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BY
SHRI AMAR NATH RAINA
(1910-1980)
Former Advocate General,
Jammu and Kashmir.

BOMBAY SECTION

CONTAINING

FULL REPORTS OF ALL REPORTABLE JUDGMENTS OF THE BOMBAY HIGH COURT REPORTED IN

(1) I. L. R. 47 BOMBAY **(2) 25 BOMBAY LAW REPORTER**

(3) 69 to 74 INDIAN CASES

WITH

MANY MORE EXTRA JUDGMENTS

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1923

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THE

ALL-INDIA REPORTER

1923

BOMBAY HIGH COURT.

1923 Bombay. 1.

SHAH, AG. C. J., CRUMP AND MARTEN, JJ.

Emperor.

v.

Narayan Krishna Gogte.

Cr. Ref. No. 23 of 1922, dated 18th October, 1922 by Dist. Magistrate, East Khandesh.

Railways Act, S. 42 (2)—Reserved accommodation for a class.

The railway is entitled to reserve accommodation for a particular class of persons without showing *undue* preference. The onus of proving undue preference is on the person who asserts it. It is a question of fact whether there has been undue preference.

(P. 4, Col. 1. P. 5, Col. 2.)

PER SHAH, AG.C J. :—A penal provision ought to be strictly construed and it is for the prosecution to make out that the compartment could be legally reserved in the manner it was reserved on the occasion. A reservation of this kind is apt to involve a transgression of the limitation laid down in S. 42 (2).

(P. 2, Col. 1.)

Binning—for the Crown.

SHAH, AG. C. J.:—This is a reference by the District Magistrate of East Khandesh recommending that the conviction and sentence should be set aside. The accused was convicted by the First-Class Magistrate of Jalgaon City, under S. 109 of the Indian Railways Act for having entered a compartment which was reserved for Europeans and Anglo-Indians in a passenger train. The accused had a third-class ticket to travel from Pachora to Bhusawal by the down-passenger train on the 17th February 1922; and he entered the compartment in question which was in fact vacant. The learned Magistrate was inclined to hold that the Railway Company had no power to reserve the compartment in that manner; but following the ruling in *Emperor* v. *Brijbasi Lal* (1) he held that the Railway Company had the inherent right to reserve compartments in that manner and convicted the accused and sentenced him to pay a fine of Rs. 5.

The accused applied to the District Magistrate who has made a reference to this Court.

The point that we have to consider is whether the compartment such as was reserved in this case could be legally reserved for a class of passengers without reference to the question whether there were any actual passengers of that class travelling or known to be intending to travel by that train. I have stated the question in this form, though in this particular case we are concerned with the reserved accommodation provided in a third-class compartment in a passenger train for Europeans and Anglo-Indians, as in my opinion that is the question underlying the reference.

It is not suggested that there is any statutory provision or any rule under S. 47 of the Indian Railways Act which authorises this kind of reservation. It appears to have been done in pursuance of "Working Instructions" issued by the Railway Company, a copy of which has been furnished to us by Mr. Binning appearing for the Company. I refer to it only for the purpose of showing that the Crown and the Company rely upon the inherent powers of the Company and not upon any statutory provision or rule.

1. (1920) 42 All. 327.

I have considered the arguments before us on behalf of the Crown, the Company, and the accused; and I have also considered the decisions of different Courts on the point, which are opposed to the view which I take of this question. In the first place I feel quite clear that the powers of the Company are subject to certain statutory limitations and must be determined in the light of the scheme of the Act so far as it bears upon the point in question. A penal provision ought to be strictly construed and it is for the prosecution to make out that the compartment could be legally reserved in the manner it was reserved on this occasion. The Company has full power to regulate its traffic within the limits allowed by Law. Section 42 (2) provides the limitation in question; (and it is for the prosecution to establish that the limitation has not been transgressed in this case. I do not feel any doubt that the section refers to all traffic, which includes passenger traffic (*See* S. 3 (11)). This point is in my opinion sufficiently dealt with in *Vishwanath Ganesh* v. *G. I. P. Ry.* (2). It is true that no suit can be instituted or proceeding taken for anything done or any omission made by the Railway administration in violation or conntravention of any provision of Chapter V. But I do not see how a Criminal Court is relieved of its obligation to consider this question so far as it is relevant in determining whether a particular offence is committed or not. In my opinion it is a question of fact to be determined in each case whether the particular accommodation reserved for a section of the travelling public to the exclusion of the rest of the public involves any undue or unreasonable preference or advantage to or in favour of any particular person or description of traffic in any respect whatever or subjects any particular person or description of taffic to any undue or unreasonable prejudice or disadvantage in any respect whatever. I readily concede that the powers of the Railway administration are very wide so long as it does not transgress the limitation which the Statute has imposed in the interests of the public. But where it exercises its powers in a manner which may appear to involve some kind of preference, it is open to the administration to have an appropriate rule under S. 47 which would remove the doubt and difficulty to a large extent. For instance if there were a rule authorising the Railway administration to reserve accommodation for Europeans and Anglo-Indians travelling in the third class within such limits as may be prescribed the onus of proving that such a rule was inconsistent with the provisions of the Act, would lie heavily upon the party asserting it. When a rule is framed under S. 47, it would imply that the Governor-General in Council is satisfied as to its need and propriety.

In the absence of such a rule, we have to consider it as a question of fact on the evidence in this case. In doing so it is necessary to bear in mind the provisions relating to "carriage of passengers" in the Act. It is provided in S. 66 that "every "person desirous of travelling on a Rail-"way shall, upon payment of his fare be "supplied with a ticket specifying the "class, the fare and the range of his "journey." Section 67 (1) provides that "fares shall be deemed to be accepted "and tickets to be issued subject to "the condition of there being room "available in the train for which the "tickets are issued", and that in case a person to whom a ticket has been issued does not get accommodation the fare is to be refunded. Thus it appears to me that a person who purchases a ticket shows beyond reasonable doubt that he is desirous of travelling by the particular train and is anxious to secure accommodation. If he finds a compartment vacant, and cannot travel by it he is put to an undue disadvantage, if the vacant room is kept apart for any person who has not shown any similar desire to travel. The trial Magistrate has remarked in his judgment with reference to third-class passengers that they "are now-a-days "getting little accommodation in crowded "trains even though these reserved com-"partments are seen mostly empty." In fact the learned Magistrate goes so far as to think that even a rule if framed would probably be considered to be inconsistent with the Act. I am not concerned with the question whether a rule, if framed would be consistent with the provisions of the Act, and I do not express any opinion as to that. It would be prema-

2. (1921) 45 Bom. 1324=23. Bom. L. R. 809.

ture and improper to suggest any opinion in anticipation about a rule which does not exist; but as regards the question of fact his observation is entirely in consonance with the evidence in the case. The relevant evidence on this point is quoted in the letter of reference by the District Magistrate and is contained in the cross-examination of the Railway Police constable and guard. It clearly establishes that the over-crowding is not a rare occurrence, while a compartment which would accommodate nearly 25 passengers remains practically vacant. What appears to me to be a probable result of this manner of reserving accommodation for one class of passengers is that a passenger outside that class would be unable to travel by a particular train for want of room on account of over-crowding whereas there would be room in the train for a person of that class who may not have expressed any desire to travel and who may not travel at all by that train. That is a result which according to the evidence is not uncommon. When a compartment is reserved in pursuance of general instructions, leading to such results, it cannot be said to be legally reserved so as to constitute an entry therein an offence punishable under S. 109. The accident that a particular train was not crowded and that there was room for the accused on that particular occasion elsewhere in the train does not seem to me to afford any answer to the real question in this case. If the evidence in this case is accepted, as it has been accepted, it shows that the exercise of this power involves the result that some passengers outside the class of passengers for whom the compartment is reserved would be left over without any accommodation in the train —whereas a passenger of that particular class at that station or any of the following stations would get accommodation and if there be no such passenger, the compartment would remain unoccupied.

It is also a matter for consideration that while the average space theoretically allowed to third-class passengers would be and should be the same for all, the space in fact allowed to passengers of a particular class, would be much greater, when a compartment is reserved for that class; for according to the evidence the average number of passengers of that class would be very small and a compartment for 25 passengers would be practically reserved for that small number. This also indirectly but effectively introduces an element of preferential treatment. I desire to make it clear that I do not put any technical or narrow meaning upon the word "passenger" as used in S. 109. I include within its meaning a class of passengers; but I do not think that it could include within its scope any persons representing a class or section of the public without the slightest reference to their desire or intention to travel by that train previously expressed or known to the Railway Company. I think that a reservation of this kind is apt to involve a transgression of the limitation laid down in S. 42 (2) and may be shown by evidence to involve that result in a particular case. That appears to me to have been shown in this case to the satisfaction of the trial Magistrate; and the District Magistrate also takes the same view.

I have carefully considered the reported cases on this point: and I am unable to agree with the view that such reservation for a class or a section of the public is necessarily legal. It may be illegal as transgressing the limits prescribed by S. 42 (2), as it has been shown in this case.

I think, therefore, that the conviction and sentence ought to be set aside. I would order accordingly. Fine, if paid, to be refunded.

CRUMP, J.:—This is a reference by the District Magistrate, East Khandesh, in the case of Narayan Krishna Gogte who was tried by the Magistrate, First-Class, Jalgaon City, for an offence punishable under S. 109 of the Indian Railways Act (Act IX of 1890) and fined Rs. 5.

In making this reference the District Magistrate has relied on the decision of this Court in *Vishwanath* v. *G. I. P. Ry.* (2). That decision proceeded on the ground that the Court had no jurisdiction by reason of S. 41 of the Indian Railways Act, and the remarks cited are therefore obiter. There is thus no decision of this Court precisely upon the point before us. There is however a decision of the Allahabad High Court, *Emperor* v. *Brijbasi Lal* (1) which on the facts is indistinguishable from the present case, and a decision of the Madras High Court, *In re*

Komaran, (3) which is also directly in point though it deals with other questions with which we are not here concerned. The first of these decisions is no doubt open to question as pointed out in the decision of this Court already cited, but in my opinion the decision of Oldfield, J., in the Madras case contains a clear and accurate exposition of the law on the point before us, and I am content to follow it.

Stated shortly the law is as follows:— The Railway Company can deal with their rolling stock as they please subject to any duties or restrictions imposed by the Legislature. We are here concerned with restrictions imposed by the Indian Railways Act, 1890 and S. 42 of that Act is the only Section which falls to be considered. The question is whether there has been "undue preference" within the meaning of that term as used in S. 42 (2). The term is familiar in England, but the English cases turn almost entirely on questions of differential treatment in the matter of rates. This much however may be said, that there is nothing illegal in showing "preference" so long as it is not "undue preference". Further that it is a question of fact in each case whether the preference shown is or is not "undue".

The accused entered this compartment knowing that it was reserved by the Railway Company for European and Anglo-Indian passengers. He did so because he objected to racial distinctions (*See* his plea and examination, dated 8—4—1922). *Prima facie* his act was an offence under S. 109 of the Indian Railways Act. It is open to him to show in his defence that the preference shown to the class of passengers indicated was undue preference, but that was not the meaning of his plea. That plea is in no way turned on the extent of accommodation reserved for this class. If however the plea of undue preference is made out by the evidence, effect may be given to it.

It is reasonable to assume that the Railway Company know their own business best, and that they will not reserve for any class accommodation beyond what is reasonable. Certainly I see no reason to suppose that Railway Companies are inclined to be over-liberal in the matter of accommodation. It would not pay them. The general instruction which the Company has issued in this case is that one compartment shall be reserved for the class of passengers in question on all long distance trains. In order to determine whether with reference to this train the preference is undue, it would be necessary to know matters on which the record is silent. I take it that there is no undue preference to A unless there is prejudice to B. To determine this question for this train generally speaking it would be convenient to know what is the total average number of passengers, what is the average number of this special class, what is the accommodation reserved for this special class and what is the accommodation available for other passengers. Here all that is known is that the compartment reserved would hold from 20 to 25 passengers. Without some such data as I have indicated it is (in my opinion) impossible to say that generally speaking there is any undue preference. As to this general aspect of the question, the evidence on the record gives little assistance. That this compartment is often empty does not go far unless it is shown that the other passengers have not sufficient accommodation. The only evidence of over-crowding is contained in the statement of the guard which is as follows:—"Except on bazar days the passenger trains are not over-crowded".

With reference to the day of the alleged offence the evidence is against the plea set up. The accused did not complain that he was in any way prejudiced. The guard says that the accused complained that the Board indicating that the reservation of the compartment was "an insult" to him. That view of the matter is quite understandable but it has nothing to do with the question of undue preference. Indeed it shows plainly enough that the accused's grievance would have been equally acute, had the accommodation reserved been adequate for one passenger only. I fully appreciate that aspect of the question but I am not concerned with it. It does not affect the legal aspect of the matter. For the rest both the guard and constable Khandu say that on this day there was ample accommodation elsewhere. This being so I fail to see

3. (1922) Mad. 35=45 Mad. 215.

how the plea of undue preference can be made out. Had it been established that owing to this reservation the class indicated find accommodation while other passengers cannot find accommodation the case might be different; but there is no evidence to that effect, nor indeed is there any evidence worth the name of overcrowding in general.

I would decline to interfere and direct the Record and Proceedings to be returned.

MARTEN, J.:—In this case I enjoy the advantage of having before me the judgments of my brothers Shah and Crump as well as those of the two learned Magistrates. I will not therefore recapitulate the facts, but will state my own conclusions.

In my judgment it is clear that by virtue of S. 109 of the Indian Railway Act 1890, the Railway Company has a general power of reserving compartments for the use of passengers. I am further of opinion that this power of reservation may be exercised either for actual passengers who have already booked their seats, or for prospective passengers who, the Company anticipate, will travel. I further hold that the Company are entitled to reserve either individual seats, or whole compartments. Thus they may reserve compartments for females travelling first or second class, or for smokers or non smokers; or for members of a theatrical Company or for a cricket or football team. I say females travelling first or second class, because S. 64 only makes it compulsory on the Company to reserve accommodation for females travelling in the lowest class of carriage in the train. So too they may in my opinion reserve compartments for a large particular traffic, expected at some particular station whether it be a terminus or an intermediate station. For instance they could reserve such accommodation for pilgrims or other passengers expected to visit a particular religious festival or fair, or again for persons attending some large political or other gathering, or a race meeting. The fact, that the particular passenger traffic thus to be catered for may consist of some particular caste or sect, *e.g.*, Hindu or Mahomedan pilgrims, is not, I think, a bar to the exercise of this general power of reservation. (*See* 45 Mad. 215).

In short the general discretion in these cases must rest with the Railway Company, for they are the statutory Managers of the Railway. As such Managers it is for them to issue the requisite orders for the reservation of passenger accommodation; and speaking generally it is for each passenger to obey those orders, believing that thereby he will best promote the general comfort of his fellow passengers, and also of the Railway staff, and incidentally of himself. If on the other hand each passenger is to be a law unto himself, chaos can be the only result. In this respect I cannot do better than quote from the judgment of Lord Halsbury in *Perth General Station Committee* v. *Ross* (4), some sentences which are I think typical of the common sense which that learned Judge always showed. He says at page 483 "But I should be sorry to throw any doubt on the absolute right of the Railway Company in the first instance to regulate their own traffic in their own way. I do not believe that any actual inconvenience to the public can result from the recognition of the right of the Railway Company to carry on their business in their own way. Their own interest is the best security that their strict legal right will not be abused."

The above then being the general powers of the Railway Company in the matter of reservation of passenger accommodation, I further hold that under S. 42 (2) they must not exercise such powers so as to give an undue preference or to cause an undue prejudice to any particular passenger traffic whether individual or collective. In this connection and with all respect to the learned Judges of the Allahabad High Court who decided 42 All. 327, I find myself in agreement with the views which Sir Norman Macleod and Sir Lallubhai Shah expressed in 23 Bom. L. R. 809 as to the effect of S. 42 (2). That being so, it is in my opinion a question of fact in each case whether the Railway Company has shown an undue preference. And in my judgment, under the ordinary rules of evidence, the onus of proof will lie on the person who alleges such undue preference. (*See* Evidence Act S. 102 Illustration (b) and S. 103.)

What then are the facts here? The accused declined to call any evidence. Con-

4. (1897) A. C. 479.

sequently all we have to go upon is the cross-examination of Khandu Vithu, the constable on duty at Jalgaon Station, and of W. P. Shaw the guard, of the train between Pachora and Jalgaon. Now the train in question is the No. 11 North-East Down Passenger, which is one of those very slow trains—happily not met with in England—which meanders through the country for hours and days at the stately average speed of about 15½ miles per hour. It leaves Bombay at 7 A.M. and reaches Pachora about 10 P.M. and Jalgaon about 11-30 P.M., Pachora being about 232 and Jalgaon about 261 miles away from Bombay. Its ultimate destination appears to be Delhi some 957 miles away from Bombay which it reaches in about 2½ days.

But as to what was the passenger traffic by this particular train on this particular day, or indeed on any other day during the 15 hours and 232 miles between Bombay and Pachora, we have no evidence whatever. Khandu Vithu the constable was only on duty at Jalgaon. Shaw the guard was obviously not on continuous duty for 16½ hours, *viz.*, between Bombay and Jalgaon. I am entitled to presume this under S. 114 of the Evidence Act; but it also so happens that I have recently had to investigate closely the running of the two sister trains, *viz.*, the No. 13 N.-E. Down Passenger and the No. 12 N.-E. Up Passenger between Bombay and Pachora. I refer to the G. I. P. murder case R. I. R. Morris and Donnison which was tried before myself and a special Jury at the Bombay Criminal Sessions last November. There the two murders were committed in train No. 13 between Deolali and Manmad and discovered at Pachora; but the two murderers escaped back from Manmad to Deolali by Train No. 12. Some of the guards had then to give evidence, and to produce the way bills. What they said in that case is not evidence in this, but the working knowledge I thus gained as to the particular portions of the line worked by the various guards of these slow trains and consequently as to the ordinary course of business of the Company in this respect, all goes to fortify the above presumption which I should draw apart from such working knowledge.

There being then no evidence as to the state of the passenger traffic between Bombay and Pachora, I hold that the accused has failed to discharge the onus of proof that there was any undue preference shown by the Railway Company in attaching this reserved compartment to the train at its start from Bombay, or in keeping it so attached. For all I know the compartment in question may have been full for many hours from Bombay of the class of passengers for whom it was intended. And for all I know it may have filled up again or once more emptied many times during the remaining forty-two hours of its journey between Jalgaon and Delhi; for there is no evidence as to what happened after Jalgaon, any more than there is of the state of affairs before Pachora.

And even the evidence as to what happened between Pachora is by no means conclusive. It is quite clear that there was ample room for the accused elsewhere in the train if he had chosen to go there. Neither in his oral nor in his written statement does he even suggest that he would have been left behind if he had not entered this reserved compartment or that he would have suffered any discomfort by over-crowding or otherwise if he had gone to an unreserved compartment. He really bases his defence—such as it is on his alleged right to enter what compartment he pleases, and on the alleged inability of the Railway Company to reserve lawfully a compartment for any particular community, no matter what the actual condition of the passenger traffic may be.

In my judgment he is wrong in both these contentions. And as regards the evidence of Khandu Vithu, it at most amounts to this, that this compartment was generally empty between Pachora and Jalgaon while other compartments were full. Shaw on the other hand says that except on bazar days this train was not over-crowded. But this is not the sort of evidence on which I can find a Railway Company guilty of undue preference for it only relates to some 1½ hours of the journey, while the total journey takes some 2½ days. Nor can one reasonably except the Railway Company to be constantly detaching or attaching particular compartments at various places on this long journey, merely because local

conditions may happen to vary either generally or on any particular day.

The conclusion then which I have arrived at is that on the evidence in this particular case, the accused was rightly convicted by the trying Magistrate. Nor do I see any reason to interfere with the fine of Rs. 5 which he has been ordered to pay. If I could have spared this middle-aged man the indignity of a conviction and a petty fine, I should have been glad to do so. But this is not the case of a passenger in an over-crowded and stifling compartment who ventures into an adjoining empty compartment which is apparently reserved for some non-existent person. In that case I can well understand the passenger feeling a natural irritation. The present case is nothing of that sort. The accused had ample time for reflection both at Pachora and Jalgaon and in the view I take he was out to give trouble, and succeeded in doing so both at Pachora and Jalgaon. In my judgment the Subordinate Railway Officials must be protected in the discharge of their duties to the general public from conduct such as this; and if the accused considers he has any grievance against their employers on the ground of undue preference, the remedy open to him under the Act is to apply to the Governor-in-Council under S. 28 to have the complaint determined by a Railway Commission appointed under S. 26. The accused's pleader did indeed inform me that that course had already been adopted by some association in Jalgaon and that the matter was still under consideration by His Excellency-in-Council. If that is so, there was all the less reason for the accused to take the law into his own hands while the matter was being investigated by the proper authorities. It must be remembered that the proper running of a Railway requires expert and detailed knowledge of its traffic and its general requirements, and that is why both in India and in England the Railway Commision consists of one Law and two Lay Commissioners. Thus in England it is the Railway Company Commissioners who determine such disputed matters as alleged undue preference in the matter of rates, etc., and normally those matters would not come before the High Court, and much less so before a Police Court. So here, it is hardly a matter for the ordinary Law Courts to determine matters of disputed railway policy, and in the present case the requisite expert evidence is wholly wanting.

In conclusion I will again quote from *Perth General Station Committee* v. *Ross* (4) and this time I will cite what Lord Watson, another great Judge, said in that case at page 489 :— "But the legislature has not committed to the ordinary tribunals of the country, the duty of determining whether the implied obligation of giving accommodation to the public has been duly fulfilled. When a member of the public having the right to use a railway or a station has reason, or without reason thinks fit, to complain that some facility which he ought to have, has been withheld from him, and that an undue preference had been shown to others in the same position, a Court of Law can give him no remedy. He must resort to the tribunal which the legislature has constituted for that purpose, the Railway Commissioners; and, until they have decided in his favour, he is not in a position, and no Court would be justified in holding, that he stands possessed of the right which he asserts."

I agree that this was a finding in a civil suit, and in the present case I have to deal with a criminal prosecution. But with reference to the argument in the case just cited that the Respondent ought to have been prosecuted before the Magistrate, Lord Watson observed at page 482 "To have this point decided by a Magistrate would have been most inconvenient." What Lord Watson held was that the proper tribunal was the Railway Commissioners; and that in fact was the decision of the House of Lords in that case.

I accordingly decline to interfere in revision in the present case and I direct the said Record and Proceedings to be returned.

Reference answered in the negative.

1923 Bombay. 8.

SHAH, AG. C. J. AND CRUMP, J.

Emperor ...
v.
Marmaduke Pickthall, Editor, Printer and Publisher of the "Bombay Chronicle" ...

Cr. Application No. 113 of 1922, dated 20th September, 1922.

Contempt of Court—Bombay High Court—Criticism in newspaper.

Where the article as a whole would leave on the mind of an ordinary reader the clear impression that injustice had been deliberately done on political grounds to some of the accused who were apparently, innocent, in other words, it attributes judicial dishonesty to the Judges, *Held*, such an article constitutes a contempt of Court. The Court has to consider the natural and probable effect of the article and not only the intention of the editor. Any unfair criticism of Courts or Judges constitutes such an interference with the administration of justice as should be punished. The tendency of such criticism is to undermine the dignity of the Court and in the end to embarrass the administration of justice.

The High Court will not act so much to protect the dignity of its Judges, as in the interest of the administration of justice. *Macleod* v. *St. Aubryn* (1899) A. C. 549 ; *Reg.* v. *Gray* (1900) 2 Q. B. 36 ; 33 Bom. 240 Foll.

(P. 10, Col. 1. P. 11, Cols. 1 & 2.)

Jinnah—for the accused.

SHAH, AG. C. J. :—This is a rule issued on the application of the Government of Bombay against Marmaduke Pickthall, the Editor, Printer and Publisher of the '*Bombay Chronicle*' to show cause why he should not be committed for contempt of Court in respect of the article headed "The Malegaon Appeals" published in the issue of the said paper of the 24th April 1922.

The article in question relates to what may be briefly stated as the Malegaon riot cases. The original trial was held by the Sessions Judge of Nasik against 113 persons ; out of whom 66 persons were convicted by him, and the rest acquitted. Sixty-four persons appealed to this Court. These appeals were heard by Marten and Crump, JJ., for several days and they delivered their judgments on the 18th April. A few of the appellants were acquitted, and in the case of the remaining appellants the convictions were confirmed. On the whole it may be said that in the main the conclusions of the trial Court were accepted. The record was exceptionally heavy and the difficulty of handling the appeals unusual. The case was undoubtedly important and difficult. The article in question was written by way of criticism shortly after the judgments were delivered.

I may note at the outset the objection raised by Mr. Jinnah to any reference being made to the interlocutory judgment of Marten, J., when the rule was granted, on the ground that it has the effect of prejudging the points which we have to decide. We have over-ruled the objection : it does not prejudge the issue in any sense, and speaking for myself it has been helpful to me in knowing the general features of the case without having to turn to the bulky record for the information. It is obvious that we have to decide the questions arising on the rule, and the interlocutory judgment does not in the slightest degree affect that position.

In this case we are concerned with a contempt of this Court and not of any Subordinate Court ; and no question of jurisdiction such as arose in *Emperor* v. *Balkrishna*, (1) arises in this case.

The publication we are concerned with refers to the proceedings which had ended, and it will not be inappropriate to refer briefly to the considerations applicable to a publication of that kind. I take them as stated in the following extracts from the judgment in *Macleod* v. *St. Aubryn* (2).

"Committals for contempt of Court are "ordinarily in cases where some contempt *ex* "*facie* of the Court has been committed or for "comments on cases pending in the Courts. "However there can be no doubt that there is a "third head of contempt of Court by the publi-"cation of scandalous matter of the Court itself. ". . . The power summarily to commit "for contempt of Court is considered necessary "for the proper administration of justice. It is "not to be used for the vindication of a Judge "as a person. . . . . Committal for "contempt of Court is a weapon to be used "sparingly and always with reference to the "administration of justice. Hence when a trial "has taken place and the case is over, the Judge "or the jury are given over to criticism. . . ". . It is a summary process and should be "used only from a sense of duty and under the "pressure of public necessity for there can be "no land marks pointing out the boundaries in "all cases".

1. (1922) Bom. 52=46 Bom. 592=24 Bom. L. R. 16.
2. (1899) A. C. 549 at 561.

I may also refer to the following passages in the judgment of Lord Russell of Killowen, C. J., in *Reg* v. *Gray* (3).

"Any act done or writing published calculated "to bring a Court or a Judge of the Court in con- "tempt, or to lower his authority, is contempt "of Court. This is one class of contempt. "Further any act done or writing published "calculated to obstruct or to interfere with the "due course of justice or the lawful process of "the Courts is a contempt of Court. The former "class belongs to the category which Lord "Hardwicke, L. C., characterised as 'scandalis- "ing a Court or a Judge.' That description of "that class of contempt is to be taken subject "to one and an important qualification. Judges "and Courts are alike open to criticism and if "reasonable argument or expostulation is offered "against any judicial act as contrary to law or "the public good, no Court could or would treat "that as contempt of Court. The law ought "not to be astute in such cases to criticise ad- "versely what under such circumstances and "with such an object is published; but it is to "be remembered that in this matter the liberty "of the press is no greater and no less than the "liberty of every subject of the Queen. * * "* * It is a jurisdiction, however, to be "exercised with scrupulous care, to be exercised "only when the case is clear and beyond "reasonable doubt."

The questions that arise for our consideration are: first, whether the case of contempt is clearly made out against the opponent; and secondly whether having regard to all the circumstances it is necessary to take action against the opponent in the interests of the administration of justice.

As regards the first point the materials that we have to consider principally are the article itself and the affidavit of the opponent. It is urged by the learned Advocate-General that the article attributes to the Judges of the High Court who decided the appeals an improper desire to uphold the convictions on evidence, which would be ordinarily considered clearly insufficient, to punish persons for their political views and activities rather than for the crimes committed by them and to give effect to the plea of exceptional times rather than to vindicate justice. It is also suggested by him that the article insinuates that the Judges were influenced by some outside agency in arriving at their conclusions. On the other hand it is urged by Mr. Jinnah that the article suggests no such outside influence and it would be wholly unreasonable to read it in that sense. He contends that the writer suggests nothing more than an error of judgment in convicting some innocent persons, that the inaccuracies in the statement of the evidence and the charges are not intentional, that the article attributes at the most an unconscious political bias to the Judges in the appreciation of the evidence and that it is a fair criticism open to his client to offer on a political case of importance. In other words he has argued in favour of the plea put forward by his client in the affidavit in these words:—

"It is not the policy of the *Bombay* "*Chronicle* to lower the dignity of this "Hon'ble Court as the Government "Pleader imagines, it has done. But I "say that after the conclusion of the trial "and appeals I felt justified in criticising "the decision and in doing so I did not "mean to show any disrespect to this "Hon'ble Court or to its dignity. The "article in question is merely a criticism "of the decision of the Judges concerned "and expresses an opinion to the effect "that the Lower and the Appeal Courts "committed an error of judgment in "attaching importance to the political "character of the trial."

We have considered the article and the affidavit in the light of the arguments urged before us. I am prepared to concede that the article does not constitute a personal abuse of the Judges such as we find for instance in *Reg* v. *Gray* (3) or *In re Narsinha Chintaman Kelkar* (4) nor does the article contain such a comprehensive condemnation of Courts including this Court and British justice as is to be found in the recent case of *In re Satyabodha* (5). I also pass over as immaterial or insignificant for our present purposes the mistakes pointed out by the Advocate-General in the statements in the articles as to the charges and the evidence in the case against the several accused. Taking the article as a whole, and making due allowance for the style, the view point and the possible political bias of a journalist, I find it difficult to avoid the conclusion that the article does attribute improper motives and political bias to the Judges in upholding the several convictions. I reject as wholly improbable under the circumstance the suggestion

3. (1900) 2 Q. B. 36 at 40.

4. (1909) 33 Bom. 240; 10 Bom. L. R. 1040.

5. (1922) Bom. 426=24 Bom. L. R. 928.

that the writer meant to imply that some extraneous influence was at work. But the article begins by a clear expression that the cause of justice was not vindicated by the Bombay High Court, and a clear implication that the vindication of justice is possible only when persons are acquitted and not if they are convicted. It clearly suggests that some innocent persons have been convicted not on account of a mere error of judgment but because of their active association with the Khilafat movement, and that they were singled out for exemplary punishment and made to pay the penalty for a cause rather than for any crime they committed. The article ends with a clear implication that the Judges were influenced by the consideration of exceptional times, not of course expressly urged by the prosecution but impliedly taken into consideration by the Court and they upheld the convictions on the evidence which according to the writer ought never to be accepted as sufficient. The article as a whole would leave on the mind of an ordinary reader the clear impression that injustice had been deliberately done on political grounds to some of the accused who were apparently innocent. In other words it attributes judicial dishonesty to the Judges. I am unable to accept the contention that such an article does not constitute a contempt of Court. We have to consider the natural and probable effect of the article and not only the avowed intention of the editor as indicated in his affidavit. I think that the publication of the article in question constitutes a contempt of Court.

The second question is more difficult. I am slow to hold that any unfair criticism of Courts of Judges constitutes such an interference with the administration of justice as should be punished. I am willing to act upon the view that the confidence of the public in Courts rests mainly upon the purity and correctness of their pronouncements and that such confidence is not lightly shaken by a mistake or unfair criticism of this kind. At the same time it is clear that the tendency of such criticism is to undermine the dignity of the Court and in the end to embarrass the administration of justice. The faith of the public in the fairness and incorruptibility of Judges is a matter of great importance. On the other hand I take into consideration the circumstance that the attitude of the opponent before us has not been unreasonable, particularly if due allowance is made for his natural partiality for the publication in question in his own paper, though the writer of it was a different person. I attach due weight to his statement, that the policy of his paper is not "to lower the dignity of this Hon'ble Court." There is no allegation in the petition to suggest anything to the contrary. I also take into account that he has expressed his "sincere regret" for the publication if it is held to constitute a contempt of this Court, as we hold it now. On the whole I think that the ends of justice will be satisfied in this case if we order that he should pay a fine of Rs. 200, (two hundred).

CRUMP, J. :—The short facts of this matter are as follows :—On April 18, 1922 a Divisional Bench of this Court delivered judgment in Criminal Appeal No. 776 of 1921 and other connected appeals. These cases dealt with what may be called the Malegaon riots which took place on April 25, 1921. The record was voluminous and the appeal was possibly the heaviest that has been heard on the criminal Appellate Side of this Court. The hearing lasted thirteen days. But shortly, the riots arose in consequence of the inflamed state of feeling among the Musalmans of Malegaon and were of a serious nature. Two Police officers were murdered, and many other persons were injured. Much damage was also done to property. These cases were thus important merely as criminal cases but further in the public eye they were held to have a political aspect.

On April 24, 1922 there appeared in a newspaper styled the *Bombay Chronicle* an article headed "The Malegaon Appeals." This article contains a criticism of the conduct of the Judges of this Court who heard the appeals. At the instance of the Government of Bombay the Government Pleader moved this Court to take proceedings for contempt. A rule was issued and arguments were heard.

The affidavit put in by the editor of the newspaper comes shortly to this. That the article is fair comment; that the liberty of the Press demands that there should be

freedom to point our errors in judgments, and to criticise judgments after they are delivered, and that there was no contempt. In the final sentence regret is expressed, "If this Hon'ble Court is of opinion that the article in question does constitute contempt."

It is not disputed that this Court has jurisdiction to take proceeding for contempt of Court; nor is it disputed that comments on a case after the hearing is completed may amount to contempt. As to the latter proposition it is sufficient to cite the case of *Reg.* v. *Gray* (3). The questions which arise are whether the language used in this article amounts to contempt and if so whether this Court should take notice of it. The principle is clear enough. The Court will not act so much to protect the dignity of it's Judges, as in the interests of the administration of justice. This Court may rightly hold itself to be above such criticism as this article contains, but if the public confidence if the impartial administration is in danger of being impaired, it may be the duty of the Court to exercise its powers.

The nature of the defence has been indicated but with reference to paras. 3 and 16 of the affidavit, the following remarks of their Lordships of the Privy Council are pertinent.

"Their Lordships regret to find that "there appeared on the one side in this "case the time-worn fallacy that some "kind of privilege attaches to the profes-"sion of the Press as distinguished from "the members of the public. The free-"dom of the journalist is an ordinary part "of the freedom of the subject, and to "whatever lengths the subject in general "may go, so also may the journalist, but, "apart from statute law, his privilege is "no other and no higher. The responsi-"bilities which attach to his power in the "dissemination of printed matter may, "and in the case of a conscientious jour-"nalist do, make him more careful; but "the range of his assertions, his criticisms, "or his comments, is as wide as, and no "wider than, that of any other subject. "No privilege attaches to his position.

"Upon the other side it would appear ". . . that this false and danger-"ous doctrine may have been hinted at, "that some privilege or protection attach-"es to the public acts of a Judge which "exempts him, in regard to those, from "free and adverse comment. He is not "above criticism, his conduct and utter-"ances may demand it. Freedom would "be seriously impaired, if the judicial tri-"bunals were outside of the range of "such comment." (*Channing Arnold* v. *King-Emperor*) (6).

Though the case in which these remarks are to be found was not one of contempt, nevertheless they furnish a valuable guide in dealing with such matters as that which is here before the Court. No one, whether he be a Judge or not, ought to take exception to fair criticism, nor should any journalist be hindered from offering such criticism. Nevertheless there is a limit which must not be passed. A journalist may say that a Judge is wrong, or ignorant of law, but if he accuses a Judge of dishonesty or corruption he transgresses the limit. And if it appears to this Court that such criticism must hinder the proper administration of justice, then it may be clear duty of this Court to exercise its powers. The article in question must be considered from this stand-point.

The first paragraph of the article deals with the case of Wolfe Tone. The substance is that the Judges "who detested the rebels" nevertheless protected Wolfe Tone; and this was "a splendid assertion of the supremacy of law." The second paragraph opens with these words, "We wish we could say of the Bombay High Court judgment that it was "a splendid assertion of the supremacy of the law." The innuendo is that the Judges of this Court did not rise above political considerations. The point is made clear in para. 10 of the affidavit where it is said that Wolfe Tone's case is cited to show that "the administration of justice should be pure and not tainted with extraneous considerations." The writer then proceeds to deal with the facts of the case. There has been some question as to the accuracy of this recital, but it is not necessary to go into this beyond remarking that the writer deliberately ignored the largest and most important part of the evidence. Then follows this passage:—

6. (1914) 41 I. A. 149=41 Cal. 1043=16 Bom. L. R. 544 (P. C.)

"In a case like the one under notice to "which the authorities apparently attach-"ed considerable political significance it "was hardly likely that the defence of "the accused, especially, 'the tallest popies "among them' would easily be accepted, "even where it was sufficiently clear and "emphatic." The plain meaning is that the learned Sessions Judge convicted against the weight of the evidence.

The writer then points out that the majority of these convictions were confirmed by this Court. The passage which follows gives the reasons which according to the writer influenced the Judges of this Court:

"Some of these may have undoubtedly "been guilty of the charges brought "against them; but of the rest it is diffi-"cult to believe the same, and impression "in the public mind is that certain pro-"minent people, because of their active "association with the Khilafat movement, "were singled out for exemplary treat-"ment; and made to pay the penalty for "a cause rather than for any crime they "have committed. We have heard it said "that Indian Judges are always out for "convictions but it can hardly be the duty "or the pleasure of the High Court to "uphold them."

The plain meaning is this. The Sessions Judge convicted though the defence was clear and emphatic. The High Court confirmed the convictions contrary to "their duty and their pleasure." It was argued that nothing more was meant than that the Judges being human were swayed by some sub-conscious political bias. But the words mean more than this. A man so influenced does not only act against "his duty and his pleasure" but he believes that that which he does is right and he is not reluctant to do it.

The article closes with the following words:

"It was an eminent English Judge—"Justice Buckland—who said that the "administering of "pure unadulterated "justice," is the only duty of the Court, "and they have no right to take into "consideration 'the plea of exceptional "times' brought forward by the execu-"tive to secure convictions against the "politically-minded."

The ingenuity of Counsel has failed to discover where and in what context "that eminent English Judge—Justice Buckland," used these words. But here and in this context the meaning is plain. "Justice was not pure and unadulterated because the High Court gave effect to the plea of exceptional times." It is unnecessary to ascribe to these words the grosser meaning suggested by the Advocate-General. They do not fairly bear the construction that outside influence was brought to bear upon the Judges. It is enough to say that no plea of "exceptional times" was ever raised on behalf of the prosecution, nor would any such plea have been tolerated by this Court.

Such is the article and it is impossible to doubt that it charges the Judges of this Court with conscious dereliction of duty. But the further question remains whether it is necessary to act. Unfortunately the effect of such writing as this cannot be ignored, and however unwilling this Court may be,—for indeed all Courts are unwilling to take proceedings in contempt unless compelled—it is impossible to permit the public to be poisoned with such calumnies as these. In a country such as this where more importance is attached to the printed word than it perhaps at times deserves, it would be difficult for the average reader to read the language used without conceiving grave doubts as to the integrity and impartiality of the Judges of this Court. Therefore in the interests of the administration of justice the Court cannot overlook this contempt.

Something has been said as to apology at the close of the affidavit that expression of regret is conditional and such as the Judges of this Court declined to consider in the case of *N. C. Kelkar* (4). The reasons assigned in that case are equally applicable here.

1923 Bombay. 12.

MACLEOD, C. J. AND COYAJEE, JJ.

D. Rubine ... (Plaintiff-Petitioner) Appellant.

v.

Balwantrai Ramnarayan Trividi ... (Defendant-Opponent) Respondent.

F. A. No. 113 of 1919, dated 13th February 1922 against the decision of Sub-Judge Ahmedabad, in Application No. 249 of 1918.

Civil P. C., S. 60—Agriculturist, meaning of.

The party alleging that he is an agriculturist must prove that he earns his livelihood wholly or principally by agriculture or that he ordinarily engages personally in agricultural labour.

K. N. Koyaji—for Appellant.

G. N. Thakor—for Respondent

JUDGMENT:—The plaintiff got a decree from the Bombay High Court against the defendant, who is described in the decree as a Merchant and Commission Agent doing business at Ahmedabad and Bombay. The defendant did not object to this description. He did not plead that he was an agriculturist, in which case this Court would have had no jurisdiction, and allowed the decree to be passed against him. When the plaintiff sought to arrest him in execution of the decree, then for the first time he claimed exemption as an agriculturist from personal arrest. He was examined, with his two witnesses, and on their evidence the Judge came to the conclusion that the defendant was an agriculturist. The Judge said "The defendant and his two witnessses Manilal and Venkatram state that the defendant's only business was agriculture. He does not follow any other business. I, therefore, hold that the defendant is an agriculturist." That is not sufficient. The defendant must prove that he earns his livelihood wholly or principally by agriculture or that he ordinarily engages personally in agricultural labour. At the most he seems to have leased 150 acres of land, some of which he let out again to tenants and some he tilled by the aid of servants. One of the witnesses said that he saw the defendant supervise the cultivation of his lands. That would not be personally engaging in agricultural labour. The defendant made no attempt to show that he derived any income from the lease he had taken. In fact he said he had not been able to pay rent to the lessor, so that not having brought himself within the description of "agriculturist" within the Act, he is not entitled to the exemption from personal arrest. Still the best course for the plaintiff to adopt was to attach the defendant's property, rather than arrest his person. The appeal must be allowed with costs and the Darkhast must continue. Costs in the Darkhast will be costs in the Court below.

1923 Bombay. 13.

MACLEOD C. J. AND SHAH, J.

Vinayak Moreshwar Natu	...	Defendant No. 3—Appellant.
v.		
Gyanoba Hariba Navale and others	...	Respondents. (Plaintiff and Defendants 1 2 and 4.)

F. A. 132 of 1919, dated 19th July 1921 against the decision of Sub-Judge, Poona, in Civil Suit No. 554 of 1917.

Specific Relief Act, S. 27—Possession is notice.

No purchaser can protect himself merely by registering his document of title against the title of a person in possession of the property, the subject-matter of his sale-deed, and if he ignores that possession and fails to make inquiry into its nature and origin, he will be affected by all the equities which the person in possession of the suit property was found to have a title to under an unregistered sale-deed which was not compulsorily registrable.

(P. 14, Col. 2.)

Coyaji with K. H. Kelkar—for the Appellant.

Gadgil with Messrs. Nijsure, S. C. Joshi and K. B. Mehendale—for Respondent No. 1.

D. S. Mandlik—for Respondent No. 3.

JUDGMENT:—This is an appeal from the decision of the First-class Subordinate Judge of Poona, in original suit No. 55 of 1917.

Certain lands in the village of Fulgaon originally belonged to one K. B. Dhavle, who on the 25th June 1910 agreed to sell them to the plaintiff and his brother defendant 4 for Rs. 8,000. Rs. 1,000 were paid as earnest money, the balance of Rs. 7,000 was to be paid after a year. A *satekhat* was executed and registered. The contract however fell through as the plaintiff was unable to pay the balance within the agreed time. Dhavle then sold the lands to defendants 1 and 2 and executed in their favour a sale-deed Ex. 72, on the 1st July 1912. Plaintiff and defendant 4 gave their consent relinquishing whatever right they may have had under their contract. The plaintiff however alleged that defendant 1 orally agreed to sell the lands to him for Rs. 8,000, out of which Rs. 1,500 were paid as part payment and the balance of Rs. 6,500 was to be paid within five

years. Plaintiff sued for specific performance of this agreement. The first defendant denied that any such agreement had been entered into but the learned Judge held the agreement proved and I see no reason for differing from him.

The terms of agreement were that (1) plaintiff was to pay the expenses of sale-deed, (2) plaintiff was to pay at once Rs. 1,500, (3) the balance of Rs. 6,500 was to be repaid within five years, (4) plaintiff was to remain in possession of the lands, (5) plaintiff was to pay assessment, (6) plaintiff was to pay interest at 9 per cent. on Rs. 6,500. For that interest he passed a rent-note Ex. 27 for a term of five years. The evidence that the plaintiff paid Rs. 1,500 was sufficient to prove that the money was paid, and the facts that plaintiff remained in possession throughout and that the sum of Rs. 585 the rent payable under the rent-note was exactly 9 per cent. on Rs. 6,500 would certainly go very far to substantiate plaintiff's case.

On the 7th November 1915 the first defendant sold the lands to the third defendant for Rs. 7,800. The sale-deed is Ex. 73. Once the Court comes to the conclusion that the agreement set up by the plaintiff for the sale of the property to him, has been proved, it must follow that the sale by the first defendant was a fraud on the plaintiff and the third defendant can only resist the plaintiff's claim to specific performance, if he can show that he was a *bona fide* purchaser for value without notice. Defendant had to admit that defendant 1 informed him that he was not in possession of the property, that plaintiff and defendant 4 were in possession as his tenants and that he (defendant 3) made no inquiry of the plaintiff or the fourth defendant regarding the circumstances in which they were in possession.

The learned Judge held that it was the duty of the defendant 3 to inquire of the plaintiff under what title he really held, and had he so inquired, he would have discovered the plaintiff's oral agreement to purchase. It was no answer to that for the third defendant to say that as the plaintiff had passed the *manyata* to defendant 1 relinquishing his rights under the original *satekhat*, he was entitled to presume that the plaintiff was in possession under the rent-note and had not entered into any later contract to purchase.

The general principle as laid down by Batty, J., in *Tajudin* v. *Govind* (1) followed by Chandavarkar, J., in *Kondiba* v. *Nana* (2) appears to be that no purchaser can protect himself merely by registering his document of title, against the tittle of a person in possession of the property, the subject-matter of his sale-deed, and if he ignores that possession and fails to make inquiry into its nature and origin, he will be affected by all the equities which the person in possession of the suit property was found to have a title to under an unregistered sale-deed which was not compulsorily registrable. In this case the plaintiff only had an oral agreement to sell which gave him no interest in the lands. But in *Daniels* v. *Davison* (3) the Lord Chancellor held that if a tenant was in possession with an agreement in his pocket to become the purchaser, those circumstances altogether gave him an equity, repelling the claim of a subsequent purchaser, who made no inquiry as to the nature of his possession. It would not therefore be going much further to say that if the third defendant had made inquiries of the plaintiff as to the nature of his possession, he would have been told that the plaintiff was paying interest on the unpaid balance of the purchase-money as evidenced by the amount due on his rent-note, being the equivalent amount of interest due on that balance, and as the third defendant made no inquiries, he must be taken to have had constructive notice of the agreement. That being so, it is not necessary to consider whether the third defendant had actual notice. The learned Judge held on the evidence that he had, but if the matter was to be decided on the appreciation of that evidence it does not seem to me to be so conclusive in favour of the plaintiff as the learned Judge thought it was.

I think that the appeal must be dismissed with costs. If the plaintiff has not paid the amount directed by the trial Court to be paid within three months from the date of the decree, it must be

1. (1902) 27 Bom. 452=5 Bom. L.R.144.
2. (1903) 27 Bom. 408=5 Bom. L. R. 269.
3. (1809) 16 Ves. 249=17 Ves. 433.

paid within three months from to-day. The plaintiff of course must pay interest until the amount is paid.

Shah, J., I agree.

1923 Bombay. 15.

MACLEOD, C. J., AND COYAJEE, J.

Tribhovandas Varjivandas... Appellants.

v.

Balmukundas Kishoridas ... Respondent.

F. A. No. 210 of 1920, dated 9th February 1922, from F. C. Sub-Judge, of Ahmedabad, in Suit No. 373 of 1919.

Specific Performance—Actual tender not necessary—Conditional sale—Agreement to re-convey.

Plaintiff sold to defendants, land on the 29th March 1916 on condition that if the vendor repaid the purchase-money within three years the land was to be re-conveyed. The vendor asked the defendants, on the 24th July 1918, to re-convey the land on receipt of the purchase amount, but did not actually tender the amount.

Held, that the vendor was entitled to specific performance even though there had been no actual tender by him of the money to the defendants.

In suits for specific performance, the strict law as to tender is not applicable. The fact that the negotiations went on for several months, the fact that the suit was filed before the three years had expired, and the fact that the defendants had been in possession of the village when they undertook to reconvey to the vendor, indicate there is no reason why justice should not be done by directing the defendants to re-convey on payment of the consideration money.

B. J. Desai—for Appellants.

G. S. Rao and Ratanlal Ranchhoddas—for Respondent.

MACLEOD, C. J.:—The plaintiff sued to recover by partition the eastern moiety of the plaint village site and agricultural land of the village of Lahna from the defendants on payment to them of the sum of Rs. 9,500, and to have a deed of conveyance relating to the said eastern moiety from the defendants. There is no dispute with regard to certain facts. On the 29th March 1916, Mahant Devpuri Sukhdevpuri who was the owner of the village, sold 1,110 bighas of the agricultural land on the western side of the village with a moiety of the village site to the defendants for Rs. 20,000 by a sale-deed Ex. 44. On the same date Devpuri conveyed to the defendants the remaining portion of the village on the eastern side with the remaining moiety of the village site for Rs. 10,000 by a deed, Ex. 45. But by this sale-deed it was agreed that the vendor Devpuri was at liberty to purchase that portion back within three years on payment of Rs. 10,000.

On the 7th June 1918, the plaintiff purchased from Devpuri his right to have the property comprised in the sale-deed, Ex. 45, re-conveyed to him.

On the 24th July 1918, the plaintiff gave notice to the defendants that he had purchased the rights of Devpuri and asked the defendants to hand over to him all the land including the village site, excepting the 1,100 bighas to the west of the said village, on receipt of Rs. 10,000.

Correspondence ensued from which it appears that disputes arose between the parties with regard to what passed by the sale-deed Ex. 44 to the defendants, and what remained to be re-conveyed to the plaintiff on payment of Rs. 10,000; and eventually before the three years had expired the plaintiff filed this suit. The only defence to the suit that could possibly avail the defendants was the contention that the plaintiff was not entitled to sue unless he had paid Rs. 10,000, and that an unconditional tender of the money was necessary to support the claim. As the Judge decreed the plaintiff's claim he directed him to pay Rs. 9,800 into Court, Rs. 200 being deducted for the value of trees cut down by the defendants. The plaintiff says that previous to the institution of the suit he called upon the defendants to re-convey to him the property comprised in the deed Ex. 45. The defendants replied to the plaintiff's notices with notices of a general character, and hence the plaintiff filed this suit. It would have been better if the plaintiff had brought the money into Court. But in a suit of this nature, which is really a suit for specific performance, we do not think that the strict law as to tenders is applicable, and considering the negotiations which went on for several months, and the fact that the suit was filed before the three years had expired, and also the fact that the defendants had been in possession of a portion of the village when they undertook to re-convey to the plaintiff, we see no reason why justice should not be done by directing the defendants to re-convey on pay-

ment of the consideration money. The decree does not limit any time within which the consideration should be paid. But the plaintiff must tender Rs. 9,800 within a month after the proceedings are returned to the lower Court. This direction should be entered in the decree. Otherwise the appeal is dismissed with costs.

Appeal dismissed.

1923 Bombay. 16 (1).

MACLEOD, C. J. AND COYAJEE, J.

Sankalchand Vithal ... (Plaintiff) Appellant.

v.

Chimanlal Maganlal Shah and others ... (Defendants) Respondents.

F. A. No. 376 of 1920, dated 17th February 1922 against the decision of Sub-Judge, Ahmedabad, in Suit No. 127 of 1917.

Accounts—Re-opening of—

Where accounts are impeached on the ground of fraud, two or three instances of particular items, which can be taken as false and fraudulent, must be brought to the notice of the Court before it can be called upon to order the accounts to be re-opened from the first. But before the defendant could ask the Court to re-open the account, he is bound to allege fraud.

G. N. Thakor—for the Appellant.

K. N. Koyajee—for the Respondents.

JUDGMENT:—The plaintiff sued to recover the balance due on a settled account. The dealings between the parties commenced in Samvat 1871, and on the 1st of Kartik Sud 1972, a *khata*, showing that Rs. 12,125-9-9 were due by them to the plaintiff, was signed by the first defendant and Vadilal, who is now dead, and who is represented by the second and third defendants. The first defendant in his written statement attacked various items in the account. But unfortunately no issue was raised at the hearing whether the defendant was entitled to re-open a settled account, with the result that the Judge dealt with the various disputed items, and disallowed some of them, passing a decree for Rs. 7,063-6-9 only in favour of the plaintiff against the first defendant and the property of the deceased Vadilal.

In *Boo Jinatboo* v. *Sha Magar Vala Kanji*, (1) it was held that "where accounts are impeached on the ground of fraud, two or three instances of particular items, which can be taken as false and fraudulent, must be brought to the notice of the Court before it can be called upon to order the accounts to be re-opened from the first."

But before the defendants could ask the Court to re-open the account they were bound to allege fraud, and they have not even done that. As far as we can judge from the proceedings, their case is that certain entries were made in the account between themselves and the plaintiff in order to defraud other persons. But it was never alleged that the defendants had not full knowledge of the facts. They admitted the items as appearing in the account. It follows, therefore, that they are not entitled to re-open the account. The plaintiff is entitled to a decree for the full amount claimed. The appeal, therefore, must be allowed with costs, and there will be a decree for the plaintiff for Rs. 12,125-9-9 with interest at 6 per cent. from the date of the *khata*, plus costs of the suit. The cross-objections are dismissed with costs.

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1. (1887) 11 Bom. 78.

1923 Bombay. 16 (2).

MACLEOD, C. J. AND COYAJEE, J.

Someshvar Jethabhai Dave ... Appellant.

v.

Someshvar Govindaram Joshi ... Respondent.

S. A. No. 494 of 1920, dated 13th February 1922 from the decision of Joint Judge, Allahabad, in A. No. 126 of 1917.

Hindu Law—Alienation by widow—Rights of alienee—Setting aside—Alienation not for necessity.

Where a sale by a Hindu widow having a limited interest has benefited the estate by the payment of debts which are binding on it, although the amount paid may not amount to the whole of the consideration money received for the property sold, the Court will when it sets aside the sale, direct payment to the alienee to the extent of the benefit received by the estate. It follows, therefore, that if the consideration-money for the sale is found intact at the death of the widow, the estate has benefited to that extent: hence if the reversioner after the widow's death wishes to have the sale by her set aside,

he can only succeed if he restores the money. It will be different if it cannot be proved that the purchase-money is still intact in the estate.

M. K. Mehta—for the Appellants.

G. N. Thakor—for Respondent No. 6.

MACLEOD, C. J.:—There is only one question which arises in these two second appeals with regard to the direction of the Court below that defendant No. 4 should receive back the total sale price of Rs. 799 which he paid for the land which Sarasvatibai sold to him without any legal necessity, as has now been proved. It has been found as a fact that the whole of this amount of Rs. 799 came to the hands of the executors of Sarasvatibai after her death.

The appellants contend that as the sale must be set aside as having been made by the widow without legal necessity, the defendant is bound to hand back the property, while they can retain the purchase price as belonging to the widow's estate. There does not seem to be any direct authority on this question, although, we think, the principles of equity provide the only answer the Court should give. If it has been proved that a sale by a widow having a limited interest, has benefited the estate by the payment of debts which were binding on it, although the amount paid may not amount to the whole of the consideration-money received for the property sold, the Court, when it sets aside the sale, will direct payment to the alienee to the extent of the benefit received by the estate, and it must follow that, if the consideration-money for the sale is found intact at the death of the widow, the estate has benefited to that extent, so that if the reversioner after the widow's death wishes to have the sale by her set aside, he can only succeed if he restores the money. It would be different if it could not be proved that the purchase-money was still intact in the estate. But in this case we are bound by the finding of fact by both the Courts below, that the purchase-money came to the hands of the executors. Therefore, it was only right that the fourth defendant, having been directed to hand back the property which he purchased, should be entitled to the price he paid for it. Both the appeals fail and must be dismissed with costs.

Appeals dismissed.

1923 Bombay. 17.

SHAH AND CRUMP, JJ.

Shivbasappa bin Lagmappa Manoli (minor) ... Plaintiff—Appellant.

v.

Nilawa Kom Satapa Manoli and others ... Defendants—Respondents.

F. A. No. 14 of 1921, dated 18th July 1922 from Sub-Judge, Belgaum, in Special S. No. 427 of 1919.

(a) *Evidence Act S. 35—Birth and death register—Value of.*

Where in influenza epidemic, there were many deaths in every family and the person who gave information about death was not examined and the entry was challenged only five days afterwards, *held*, the entry had no probative value.

(P. 19, Col. 2.)

(b) *Hindu Law—Adoption—Authority in joint family.*

After the death of the last surviving co-parcener when the estate has vested in the widows of that co-parcener the adoption effected by a widow of a predeceased co-parcener cannot have the effect of divesting that estate. On that point the decision in *Yadao* v. *Namdeo* is silent. It is difficult to accept that the effect of that decision is to overrule by implication the current of decisions on that point. It is an oft-repeated caution that a decision is an authority for what it decides, and that it is not an authority for what may seem to be a logical consequence of that decision. 44 B. 483 Foll; 48 I. A. 513 Dist.

(P. 21, Col. 1.)

Nilkant Atmaram—for the Appellant.

H. C. Coyaji with D. R. Manerikar—for the Respondents.

SHAH, J.:—This is an appeal from the decree of the First-class Subordinate Judge of Belgaum in a suit filed by the plaintiff as the adopted son of one Lagmappa. The suit is filed by the next friend and the natural father of the boy Shivabasappa. The claim is put forward on the footing that he was adopted on the 20th November 1918, and that he is entitled to the whole of the family property. The relationship of the parties is given in a tabular form at page 4 of the printed judgment of the lower Court. It appears from that pedigree that the original owner Sateppa died leaving a widow Nilawa, who is now defendant No. 1, and a son Shetyappa, who also died leaving a widow named Kashava, and two sons Baswanta and Lagmappa. Baswanta had two wives Lagmawa and Baslingawa who are defendants 2 and 3, and had a son named Satu. It appears that during

the influenza epidemic in October 1918 Kashava, the mother of Baswanta and Lagmappa, died on the 22nd October 1918. Satu the son of Baswanta also died on the 22nd October 1918, and admittedly either Baswanta or Lagmappa also died on the same day, *i.e.*, the 22nd October. But there is a dispute between the parties as to whether Baswanta died on the 22nd October and Lagmappa died afterwards, *i.e.*, on the 25th October, or whether Lagmappa died on the 22nd October and Baswanta died on the 25th October. About the dates there is no dispute except that the plaintiff alleges that Lagmappa died on the 25th October and the defendants' case is that Baswanta died on that date, Lagmappa having predeceased him on the 22nd October. Defendants 2 and 3 are the widows of Baswanta. They were pregnant at the time of Baswanta's death and each one of them gave birth to a posthumous daughter. The result was that at the date of the suit which was filed in November 1919, the plaintiff claimed as the adopted son the property of the family, whereas according to the defendants 1, 2 and 3 the property had vested in the widows of Baswanta as his heirs. Defendant No. 4 is Satyawa the widow of Lagmappa. She is said to have adopted the plaintiff on the 20th November 1918.

The parties joined issue both as to the factum and the validity of that adoption, and also as to when Lagmappa died. A plea was put forward in the lower Court that the defendant Satyava, *i.e.*, the widow of Lagmappa was unchaste and had been divorced by her husband at the date of his death. That point was found against defendants 1 to 3 and has not been pressed before us. Then issue No. 4 related to certain properties which were said by defendant No. 1 to be her own property, and not liable to be dealt with as part of the family property. There has been no finding by the trial Court on that issue. The main part of the judgment of the trial Court has been devoted to the determination of the important question of fact in the case as to whether Lagmappa died first or Baswanta. The finding of the trial Court is that Lagmappa died first, *i.e.*, on the 22nd October, and that Baswanta died three days later. The trial Court has recorded no finding as to whether the adoption is proved in fact, but has found that the adoption, even if proved, is invalid. It would have been more satisfactory in my opinion if the trial Court, after the whole evidence had been recorded, had found on all the issues of fact arising in the case. However, finding that Baswanta died last, the trial Court dismissed the suit. Apparently it was common ground in the lower Court that if it was found that Baswanta died last the plaintiff would have no claim as the adoption then would be either invalid or at least insufficient to divest the estate, which would, on that finding, be vested in the widows of Baswanta at the date of the adoption.

[The Court then dealt with the conflict of oral evidence of both sides and went on as follows]

In connection with this conflict of evidence it has been urged with insistence on behalf of the plaintiff that the Register of Births and Deaths should be given great weight, as that is sufficient to turn the scale in favour of the plaintiff, because it shows that Lagmappa died on the 25th October, whereas Baswanta died on the 22nd October. This Register, as pointed out by the Subordinate Judge, so far as the entries with which we are concerned go, appears to have been written at one time and not from day to day, and it is obvious that when the influenza epidemic was going on and when the death-rate was so high, as the facts of this case show that there were three deaths in one family on one day, it is not at all unlikely that this Register kept by the village Patil would not be kept from day to day, and it would not ordinarily be the result, and in the present case is not the result of any direct information given by the parties concerned to the Patil. But the entries are made on information conveyed by a Sanadi to the Patil. That Sanadi has not been examined in the case, nor is it stated who the Sanadi was who gave the particular information to the Patil. The appearance of the document goes to show that the entries may have been made later. It is, therefore, difficult to rely upon a document of this kind prepared at a time when the epidemic was raging. Apart from that, it appears from the evidence that by the 1st November 1918, defendants 1 to 3 had

challenged the accuracy of the entries relating to Baswanta and Lagmappa. The evidence of the pleader on this point, who has been examined, and who was given instructions to prepare an application to the Mamlatdar, in my opinion, ought to be accepted. That evidence is Ex. 69 in the case. It appears from his evidence that he prepared an application which he sent on to the Mamlatdar of Hukeri. That application is not forthcoming; but the draft, which is Ex. 158 in the case, is put in. Even if the matter rested there, it would show that so early as the 1st of November the defendants questioned the accuracy of the entries. The evidence led on behalf of the defendants in the case goes to show that actually an attempt was made by the Patil to receive some monetary consideration from defendant 1, if the entries were to be properly made. That is a story which may or may not be true, and there is this to be said that the draft petition does not contain any reference to such an allegation, nor was the pleader examined on the point. It is possible, however, that though the allegation may have been communicated to the pleader in the exercise of his discretion, he may have preferred to challenge the accuracy on somewhat different grounds. That is merely a conjecture. But the fact remains that the accuracy of the entries was challenged.

Later on in July 1919, a further application was made to the Mamlatdar challenging the accuracy of the entries and demanding an investigation. It appears that some investigation was made and the Mamlatdar came to the conclusion that there was no reason to doubt the accuracy of the entries. This decision of the Mamlatdar is Ex. 181. There was an appeal from that decision to the District Deputy Collector, and the District Deputy Collector made an order on the 24th December 1919, after the present suit was filed, which is Ex. 27 in the case. He refused to go into the question as the matter was already before a Civil Court. I refer to these facts about the Mamlatdar's decision and the District Deputy Collector's decision, as Mr. Nilkanth has placed great reliance upon the decision of the Mamlatdar being in his favour. I do not see how it is relevant at all. Even if it be relevant, in view of the fact that it was appealed from and no decision was given on the merits, I do not see how it can have any value. The nature of the inquiry conducted by the Mamlatdar is not such as could enable a Civil Court to test the merits of the conclusion reached by the Mamlatdar, and in any case as it is the duty of the Court to come to a conclusion on the evidence bearing on the question as to who died first, I do not think that the decision of the Mamlatdar indicating the result of the inquiry made by him can have any such value as the plaintiff seeks to attach to it. Giving my best consideration to the nature of the Register and the fact that the accuracy of the entries had been challenged soon after the events, I am unable to accept the contention of the plaintiff that this document ought to be relied upon as showing that Lagmappa died on the 25th October. I am unable to place any such reliance on it. On this point I am in complete agreement with the view taken by the learned Subordinate Judge.

We are, therefore, left to decide the question on the oral evidence. I have already stated my view as to the oral evidence, and I may repeat that in my opinion the learned Judge's view as to the evidence of the plaintiff not being of an assuring character is right. If it was absolutely necessary to come to any decision as to which of the two sets of witnesses is to be preferred to the other, I should lean in favour of the defendants' witnesses taken as a whole. But it is enough for the purposes of this appeal to say that the appellant has failed to show that the conclusion of the trial Court on this point is wrong. We must, therefore, deal with the case on the footing that Lagmappa died on the 22nd and Baswanta died on the 25th October 1918.

The next question of fact upon which the lower Court has recorded no finding relates to the adoption of the plaintiff. On that point it is difficult to understand how it could be said that the adoption is not proved. It may not be necessary in the view which we take of this appeal strictly to decide that question. But as it has been argued, and as it is an important question of fact in the case, I desire to record my opinion that the adoption of the plaintiff on the evidence in the case is

proved. There is the registered deed of adoption dated the 20th November 1918. There is nothing improbable about the stamp paper having been purchased at Hukeri on that day, the adoption having been effected at Sultanpur and the document prepared at Sultanpur and presented later on the same day at Hukeri for registration. It may be difficult, but the distance between Sultanpur and Hukeri, which is stated to us to be 4 or 5 miles, is not such as would render the factum of adoption impossible or inconsistent with the buying of the stamp paper at Hukeri, its preparation at Sultanpur and the presentation for registration at Hukeri on the same day. It is needless to discuss the evidence on this point in detail. But the evidence on the defendants' side on this point is necessarily of a negative character and the evidence of the plaintiff's witnesses is of an affirmative nature; and it is difficult to believe that, if defendant No. 4 and the natural father of the adopted boy were inclined to put forward this adoption, they would leave the one essential thing undone, namely the giving and taking which it would not be difficult to carry out, while they would take the trouble of having the document prepared and presented for registration on the same day. Besides the point might not have any practical importance in view of the fact that, even if the adoption did not take place, it is open, if otherwise it is competent to defendant 4 to make an adoption, to take the plaintiff in adoption even now. Therefore on the factum of adoption I do not think that it is necessary to leave the case in such a doubtful position as the lower Court has left it. I am of opinion that the factum of adoption is proved.

In the lower Court no question was raised as to the effect of the finding that Baswanta and Lagmappa were members of a joint family of whom Lagmappa died first and Baswanta afterwards. It was accepted that the result of that finding would be to negative the plaintiff's claim; and in the memorandum of appeal before us no such point as has been raised in the course of the argument has been taken. After the filing of the appeal, however, the decision in *Yadao* v. *Namdeo* (1) has rendered it possible for the appellant to raise the contention that the adoption would have the effect of divesting the estate vested in defendants 2 and 3 on the death of Baswanta. It is urged that, though according to the decisions of this Court the plaintiff would have no case, in view of the observations of their Lordships of the Privy Council in *Yadao* v. *Namdeo* (1) relating to the Full Bench ruling of this Court in *Ramji* v. *Ghamau* (2), those decisions are no longer good law, and that as a logical consequence of the observations relating to the decision in *Ramji* v. *Ghamau* (2), it follows that the adoption would be good even after the death of the last surviving co-parcener of the joint family so as to have the effect of divesting the estate vested in the widow or widows of the last co-parcener.

On behalf of the respondents it is urged that, whatever the effect of the observations in *Yadao* v. *Namdeo* (1) may be as regards the power of the widow during the continuance of the joint family, the current of decisions of this Court with regard to the inability of a widow to adopt so as to divest the estate vested in a third party is not touched in any way, and that that current of decisions cannot be treated as having been overruled by the observations which are directly made with reference to the decision in *Ramji* v. *Ghamau* (2). The current of decisions referred to begins from the year 1871 when *Rupchand Hindumal* v. *Rukhmabai* (3) was decided; then we have the decision in *Chandra* v. *Gojarabai* (4) which is strongly relied upon by the respondents. They also rely upon the observations in *Vasudev* v. *Ramchand* (5) and *Payappa* v. *Appanna* (6).

The question that arises in virtue of the observations in *Yadao* v. *Namdeo* (1) is that, if the widow of a deceased co-parcener in a joint family could adopt validly, even in the absence of any express authority from her husband, without the consent of the surviving co-parceners, whether it is necessarily implied that that adoption, even when effected after the death of the last surviving co-parcener of the joint family, and after

1. (1922) P. C. 216=49 Cal. 1=48 I. A. 513.

2. (1882) 6 Bom. 498.
3. (1871) 8 Bom. H. C. R. A. C. J. 114.
4. (1890) 14 Bom. 463.
5. (1898) 22 Bom. 551.
6. (1899) 23 Bom. 327.

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the estate has vested in the widow or widows of that last deceased co-parcener, would be valid or rather have the effect of divesting the estate so vested in the widows. It is not necessary for the purpose of this case to examine the point decided in *Ramji* v. *Ghamau* (2) along with the earlier and later decisions on that point in the light of the observations in *Yadao* v. *Namdeo* (1). It is clear, however, that for a long time in this Court the rule is accepted as stated in *Thakarama Tejrani* v. *Sarupchand* (7). "But where the circumstances are, as they are here, it seems to me quite plain that we must follow what is well understood as the ordinary law in this Presidency and apply it to the facts. The widow of a deceased co-parcener of a joint Hindu family cannot, in the absence of any specific authority, make an adoption subsequent to the death of a co-parcener who survived her husband; and more particularly when, as here, that later surviving co-parcener left widows."

That undoubtedly was the law as understood and accepted in this Presidency before the decision in *Yadao* v. *Namdeo* (1). In the present case, we are not directly concerned with the decision in *Ramji* v. *Ghamau* (2). We are concerned with another current of decisions to which I have referred, and the question is whether, after the death of the last surviving co-parcener when the estate has vested in the widows of that co-parcener, the adoption effected by a widow of a predeceased co-parcener could have the effect of divesting that estate. On that point it seems to me to be quite safe to say that the decision in *Yadao* v. *Namdeo* (1) is silent. It is difficult to accept that the effect of that decision is to overrule by implication the current of decisions on that point. It is an oft-repeated caution that a decision is an authority for what it decides, and that it is not an authority for what may seem to be a logical consequence of that decision. In the present case I am not clear at all that, because a widow of a predeceased co-parcener can adopt without the consent of the surviving co-parceners, even in the absence of any specific authority from her husband during the lifetime of the co-parcener, necessarily or logically even after the death of the last surviving co-parcener when the joint family has ceased, and the property has devolved upon the heirs of the last surviving co-parcener, she can make a valid adoption so as to divest the estate already vested in the heirs of the last male owner. Mr. Nilkanth has not been able to cite any authority in support of his argument for the appellant. But it is urged by Mr. Coyaji on behalf of the respondents that the decision in *Ramkrishna* v. *Shamrao* (8) which has been approved by their Lordships of the Privy Council in *Madana Mohana* v. *Purushothama* (9) has the effect of recognising this principle that the right of a widow to adopt may be extinguished owing to certain events or circumstances, and where that is the case it, does not matter whether she had orginally a right to make an adoption to her husband. It is urged that in the present case, when the last surviving co-parcener, *i.e.*, Baswanta died, the right of the widow of Lagmappa to adopt came to an end. The application of the principle accepted in *Ramkrishna* v. *Shamrao* (8) with reference to the facts such as we have in the present case is not to be found in any reported case so far. But it is open to the respondents to urge with force that there is no reason why that principle should not be so applied as to put an end to the power of the widow to adopt, when the estate is vested already in others. Though no decision exactly bearing on the facts of the present case has been cited to show that the principle of *Ramkrishna* v. *Shamrao* (8) can apply to facts such as we have here, it may be said that the principle has been applied under varying circumstances; for instance, it has been applied to the case of widows who inherit property under the rule laid down in *Lallubhai* v. *Mankuvarbai* (10). However that may be, I am entirely unable to give effect to the plaintiff's contention that *Yadao* v. *Namdeo* (1), must be taken as overruling the current of decisions to which I have referred, and of which the decision in *Chandra* v. *Gojirabai* (11) is a type.

I may mention with reference to this point that after the decision in *Yadao* v.

7. (1920) 44 Bom. 488.

8. (1902) 26 Bom. 526.
9. (1918) 41 Mad. 855=45 I. A. 156 at 160.
10. (1878) 2 Bom. 388.
11. (1890) 14 Bom. 463.

Namdeo (1), I had more occasions than one to refer to that case. First it was referred to in *Bhau* v. *Narasagauda* (12), to which Mr. Justice Fawcett was a party, and then in *Dattatraya* v. *Gangabai* (13). It is also referred to in *Yeknath* v. *Laxmi bai* (14). I refer to these decisions for the purpose of showing that, except as to the effect of *Yadao* v. *Namdeo* (1) on the decision in *Ramji* v. *Ghamau* (2), it has not been so far accepted as overruling the decisions of this Court which may appear somewhat inconsistent with the view taken in that case, but which bear on a distinct point that did not arise and was not in terms considered in *Yadao* v. *Namdeo* (1). I am fully alive to the force of the contention of the appellant that in view of the observations in *Yadao* v. *Namdeo*, (1) all these decisions, not only that in *Ramji* v. *Ghamau*, (2) but the others to which I have referred also should be re-considered. But in view of the settled rule on this point and of the effect which a re-consideration of it would have upon titles to property, I do not think that it ought to be departed from by this Court in the absence of a clear ruling of the Privy Council to that effect.

The facts in the present case are rather peculiar, and it may appear anomalous that, though according to the observations in *Yadao* v. *Namdeo*, (1) defendant No. 4 could have adopted after Lagmappa's death without Baswanta's consent during the three days that Baswanta survived Lagmappa, her power to adopt should have practically come to an end on Baswanta's death on the 25th October or rather it should have become ineffective for the purpose of divesting the estate vested in the widows of Baswanta. But the principle and the dividing line are clear; and for the sake of a logical application of the theory of the inherent power of a widow to adopt in this Presidency, which is probably a deviation from Hindu Law as observed by their Lordships in *Yadao* v. *Namdeo*, (1), and for which, speaking with great deference, I am unable to find any support in any text of Hindu Law, I do not think that it would be right to depart from a rule which is laid down in various decisions of this Court and which is clearly understood and uniformly followed up to now. On the contrary it would be carrying the probable deviation from Hindu Law distinctly a step further as affecting the devolution of property for which it would be difficult to find a justification in the principles governing the law of adoption.

The result is that the decree of the lower Court is confirmed and the appeal dismissed with costs.

CRUMP, J.—I concur.

12. (1921) 23 Bom. L. R. 1272.
13. (1922) 24 Bom. L. R. 69.
14. (1922) 24 Bom. L. R. 886.

1923 Bombay. 22.

MACLEOD, C. J. AND COYAJEE, J.

Emperor ...
v.
Ramchandra Bapuji Deshmukh ...

Cr. Ref. No. 59 of 1921, dated 19th January 1922 from District Magistrate, Ahmednagar.

Criminal P. C., S. 545, (1) (b)—Fine—Compensation out of fine to a third person.

The accused obtained ornaments by cheating the complainant and pledged a portion of the ornaments with one Dalichand. He was convicted for the offence and ordered to pay a fine. Out of the fine, a certain amount was ordered to be paid to Dalichand. *Held* that the order to pay a certain amount out of the fine as compensation to the pledgee was outside the scope of S. 545 as the section directs compensation to be paid to the person who has suffered by the offence.

There was no appearance on either side.

MACLEOD, C. J.:—The accused was convicted of an offence punishable under S. 420, Indian Penal Code, and sentenced by the Magistrate to four months' rigorous imprisonment and a fine of Rs. 100. The accused had dishonestly induced the complainant to part with her ornaments, and these were pledged with a person called Dalichand. The Magistrate directed that out of the fine, if recovered, Rs. 35 should be paid as compensation to Dalichand under S. 545, Criminal Procedure Code. But that section only enables the Magistrate to direct that the whole or any part of the fine, if recovered, should be applied in compensation for the injury caused by the offence committed. The offence committed was cheating, and no injury was caused to Dalichand by the cheating. We think, therefore, that the District Magistrate was right in asking this Court to revise the order passed by the trying Magistrate under S. 545,

Criminal Procedure Code, and the order must be set aside, and if any compensation has been paid to Dalichand, it must be refunded.

Order set aside.

1923 Bombay. 23 (1)

MACLEOD, C. J., AND COYAJEE, J.

Kastur Bhai Manibhai Nagarseth ... Plaintiff—Applicant.

v.

Hiralal D. Nanavati ... Defendant—Opp. Party.

P. C. A. in O. C. J. A. No. 88 of 1921, dated 27th February 1922.

Civil P. C., S. 110—Ejectment suit by landlord.

The plaintiffs sought to eject their tenant in order that they might occupy the premises themselves; while the tenant sought the protection of the Bombay Rent Act.

Held, the decree, allowing possession of the tenancy involves directly a claim or question to or respecting property over Rs. 10,000, where the monthly rent of the premises was Rs. 275 and capitalised at twenty years' purchase the value of the property will be over Rs. 10,000. The certificate to appeal to His Majesty must therefore be granted.

Thomas Strangman—for Applicant.

Jinnah—for Opp. Party.

MACLEOD, C. J.:—We think that in this case a certificate to appeal to His Majesty's Privy Council must be granted. The plaintiffs seek to eject their tenant in order that they may occupy the premises themselves; while the tenant seeks the protection of the Bombay Rent Act. The decree, therefore, allowing possession of the tenancy involves directly a claim or question to or respecting property over Rs. 10,000, as the monthly rent of the premises is Rs. 275 and capitalised at twenty years' purchase, the value of the property will be over Rs. 10,000.

Costs to be costs in the appeal.

1923 Bombay. 23 (2)

MACLEOD, C. J., AND COYAJEE, J.

Chunilal Jamnadas ... Defendant—Appellant.

v.

Mulchand Harjivandas ... Plaintiff—Respondent.

F. A. No. 97 of 1921, dated 6th February 1922 from the decision of Sub-Judge, Broach, in Darkhast No. 224 of 1915.

Execution—Right to—Partition decree—Execution taken out by plaintiff—Defendant has right to continue the proceedings if plaintiff unwilling to proceed.

In execution of a decree for partition of house and lands, at the instance of the plaintiff a Commissioner was appointed to effect a division of a house first. The Commissioner made a report, but before the report could be given effect to, the house was burnt down. The plaintiff thereupon applied to drop the execution proceedings, but the defendant insisted to carry on the same execution proceedings. *Held*, that the defendant should be allowed to continue the application for execution and need not issue a fresh darkhast.

G. N. Thakor—for the Appellant.

M. H. Mehta—for the Respondent No. 1.

MACLEOD, C. J.:—This was a partition suit in which a consent decree for partition was obtained on 8th November 1911 from the First-class Subordinate Judge, Broach. The plaintiff, on the 12th March 1915, took out a darkhast for partition of the suit property and moveables. Commissioners were appointed, who submitted a report with regard to ornaments. But with regard to a certain house Mr. Hargovandas was appointed Commisioner to effect a division of it. He made a report, but before the report could be given effect to, the house was burnt down. The plaintiff then wanted to drop the execution proceedings, but the defendant objected. The Court allowed the plaintiff to drop the execution proceedings. The result would be that those defendants who wished to continue the execution proceedings could not do so without having to issue a fresh darkhast. We see no reason why the defendants should not have been allowed to continue the darkhast in order that the suit property might be partitioned. Therefore we allow the appeal and direct the darkhast to continue at the instance of the defendant. The plaintiff to pay the appellant's cost in both Courts.

Appeal allowed.

1923 Bombay. 24.

MACLEOD, C. J., AND COYAJEE, J.

Vithaldas Gulabdas Seth ... Appellant.
v.
The Hyderabad Spinning and Weaving Co., Ltd. ... Respondents.

O. C. J. Appeal No. 120 of 1921, dated 26th January 1922, from an order of Kajiji, J.

Civil P. C., O. VIII, R. 6,—Equitable set-off —Difference between a set off and counter-claim —High Court Rules, Original Side, R. 118—Same transaction legally recoverable.

Under Art. 131 of the Companies Act directors of a company can only deduct from the dividend payable to a share-holder sums of money due from him to the company, but a claim for damages on cotton contracts is not money due. Hence a claim for damages not arising from the same transaction which is the subject-matter of the plaintiff's suit cannot be treated as equitable set-off.

Counter-claim is bad if it could not form the subject-matter of a separate suit in the same Court. *Griendtoveen* v. *Hamlyn & Co.*, (1892 8 T. L. R. 231) Dist.

A set-off can be pleaded as a defence and can only arise where the claim to be set off, one against the other whether by the plaintiff or defendant exists in the same right. A set-off can also be the subject-matter of a separate action or a counter-claim. Every set-off can be pleaded as counter-claim if the defendant so desires, but every counter-claim cannot be pleaded as a set-off. For an equitable set-off the claim for damages must arise from the same transaction which is the subject-matter of the plaintiff's suit ; and it is only when the claim for damages forms the subject-matter of a counter-claim that it makes no difference whether damages are based on a claim arising on the subject-matter of the suit or are based on some transaction which is entirely outside the plaintiff's claim.

Inverarity—for the Appellant.

Kania—for the Respondent.

MACLEOD, C. J. :—The plaintiff filed this suit against the defendant company to recover the amount payable to him by way of dividends in respect of 72nd and 73rd dividends payable on the 5th February 1920 and 19th April 1920, respectively.

In their written statement the defendants claimed that they were entitled to recover damages from the firms of Vithaldas Venkatlal and Trikamdas Purshottamdas in respect of certain cotton contracts. The joint family of Gulabdas Haridas, of which the plaintiff was the manager, was a partner in these two firms and was liable to pay these damages. Reference was then made in paragraph 7 to Arts. 13, 130 and 131 of the Articles of Association. Arts. 13 and 130 had nothing to do with plaintiff's claim ; but Art. 131, entitling the Directors to deduct from the dividend or bonus payable to any shareholder all sums of money due from him to the Company, would be in point, if certain facts were proved. The defendant company submitted that by reason of the said Articles the plaintiff was not entitled to claim the dividends referred to in paragraphs 3, 6 and 7 of the plaint, and submitted that the suit should be dismissed with costs. They, then, counter-claimed, in the event of it being held that the amounts of the damages could not be set off against the claim in respect of the dividends, that the plaintiff as the head of the joint family firm of Gulabdas Haridas & Sons might be ordered to pay to the defendant company a reasonable sum by way of damages on account of the premises mentioned in paragraph 6 of the written statement.

The plaintiff then took out a summons asking for an order that the counter-claim of the defendant company might be excluded, or that the Court should refuse permission to the defendants to avail themselves of the counter-claim, and require them (if so advised) to file a separate suit in respect thereof. On the 11th June 1921, an order was made on the summons that it should be adjourned to the hearing of the suit, and it was further ordered by the Court that the suit should be put down on the board of the learned Judge peremptorily for the trial of an issue on demurrer. Accordingly, the suit came on for hearing before Mr. Justice Kajiji on the 29th July 1921.

Now, the order that was made on the 11th June 1921, is couched in somewhat unfortunate terms. In the first place, it is not desirable to use the word "demurrer", as demurrer in English Practice has been abolished since the passing of the Judicature Act, while the term has never been recognised in India by any of the Codes of Civil Procedure. It can only be used in India by way of analogy to a bygone English form of procedure. The proper order to make, following the provisions of the Code, was to direct the

suit to be set down for settlement of issues, and when the issues had been settled, it could be seen whether any of the issues were sufficient for the decision of the case under O. XV, R. 3.

There were two questions: (1) whether the counter-claim should be struck out; (2) whether, if the counter-claim were struck out, the defendant company would be entitled to set off their claim. Those were two entirely distinct issues, depending, for their decision, upon entirely different considerations; and the confusion which arose from not raising definite issues is apparent when we come to the judgment of the learned Judge, because these two questions, which ought to be dealt with separately, are dealt with together, and the decision is that "this issue must be answered in the negative." On that finding an order was drawn up declaring not only that the defendants were entitled to plead by way of defence the facts set out in paragraphs 6, 7 and 8 of their written statement, but were also entitled to maintain the counter-claim in the written statement of defence.

I will first deal with the question whether the counter-claim should be struck off. Now it is admitted that if the defendants were to file a separate suit on the subject-matter of the counter-claim, this Court would have no jurisdiction to try such a suit. Therefore, it is quite clear that the counter-claim must be struck out.

Then, there is the question whether the defendant company can set off against the plaintiff's claim for dividends their claim for damages under the contracts referred to in paragraph 6 of the written statement. It is obvious that this question must be answered in the negative, because, under Art. 131, the Directors can only deduct from the dividend or bonus payable to a shareholder sums of money due from him to the company. The claim for damages on the contracts is not money due.

That would be sufficient to dispose of the question because in paragraph 8 of the written statement the defendant company only claim to be entitled to set off by reason of Art. 131.

But I may also deal with the question whether, apart from Art. 131 of the Articles of Association, the defendants can set-off the claim for damages. It could only be in the nature of an equitable set off, which is not permitted by O. VIII, R. 6 of the Civil Procedure Code. The learned Judge considered that the defendants could counter-claim for damages which could not form the basis of an equitable set-off under R. 118 of the High Court Rules and referred to the case of *Griendtoveen* v. *Hamlyn & Co.* (1). But that case is only an authority for the proposition that, where a claim in damages is preferred by a defendant which arises out of the same contract as the one on which the plaintiff is suing, the defendant could be allowed to counter-claim for those damages, although a separate suit could not lie for want of jurisdiction. Now, set-off and counter-claim are governed by rules of procedure, and a plaintiff can only plead by way of set-off or counter-claim that which is permitted by those rules. A set-off can be pleaded as a defence and can only arise where the claim to be set-off one against the other, whether by the plaintiff or defendant, exists in the same right. A set-off can also be the subject-matter of a separate action or a counter-claim. And hence the confusion between the terms, as though every set-off can be pleaded as a counter-claim if the defendant so desires, every counter-claim cannot be pleaded as a set-off. It would be much better if the two terms were kept distinct, and that if an equitable set-off is to be allowed, it should be provided for by rule, while R. 118 might be amended by omitting the mention of set-off. But even assuming that R. 118 of the High Court Rules, although the marginal note is "counter-claim by defendant," provides for an equitable set-off, then it is quite clear, under the decisions which lay down the principles on which an equitable set-off can be allowed, that the claim for damages must arise from the same transaction which is the subject-matter of the plaintiff's suit; and it is only when the claim for damages forms the subject-matter of a counter-claim that it makes no difference whether damages are based on a claim arising on the subject-matter of the suit, or are based on some transaction which is entirely outside the plaintiff's claim. It is, therefore, of the greatest

(1) (1892) 8 T. L. R. 281.

importance to keep separate the questions of set-off and counter-claim when the defendant seeks to claim as a set-off not money due but an unascertained sum for damages.

In any event, it is perfectly clear that in this case the counter-claim is bad, because it could not form the subject-matter of a separate suit in this Court for the reason that the defendant, who is now plaintiff, resides outside the jurisdiction, and the whole of the cause of action arose outside the jurisdiction.

It is also quite clear that the defendants' claim does not come within the definition of equitable set-off.

Therefore, the defendants clearly have no answer to the plaintiff's claim for dividends, and, as the issue, which I have raised as the real issue argued in the lower Court, must be found against the defendants, there must be a decree for the plaintiff for the amount claimed, that is to say, Rs. 10,800, the amount of the dividends, with interest at 9 per cent per annum from the 18th July 1920, when notice was given that interest would be charged, till judgment; and costs and interest on judgment at 6 per cent per annum.

Appeal allowed.

1923 Bombay. 26.

MACLEOD, C. J. AND COYAJEE, J.

Bai Karimabibi ... Plaintiff—Appellant.

v.

Abderehman Sayad Banu ... Defendant—Respondent.

F. A. No. 223 of 1921, dated 17th February 1922 from the decision of Sub. Judge of Surat in Darkhast No. 51 of 1921.

(*a*) *Civil P. C., S. 2 (3)—Decree-holder—Meaning of—Suit for specific performance.*

The plaintiff obtained a decree for specific performance of a contract to sell immoveable property for Rs. 7,200 against defendants. The money was duly deposited in Court. Subsequently, a third person obtained a decree against the defendants which entitled him to obtain possession of the property on his paying them Rs. 4,000. The plaintiff therefore took no steps to execute the decree and therefore the defendants applied to the Court to execute it.

Held, that the defendants were 'decree-holders' within S. 2 (3); and that the plaintiff should get the sale-deed which the defendants were willing to pass and should get possession and the defendants should get the money on passing the deed and giving possession.

(P. 27, Col. 1.)

(*b*) *Specific performance—Both parties can execute the decree.*

A decree for specific performance is capable of being executed by the defendants as well as by the plaintiff. If the plaintiff in a suit for specific performance after having obtained a decree, discovers or is apprehensive that the defendant cannot give him a good title his proper course is to apply to the Court that passed the decree for a review, or in the alternative he may file another suit against the defendant to set aside the previous proceedings.

(P. 27, Col. 1.)

G. N. Thakor—for the Appellant.

M. B. Dave—for the Respondent.

MACLEOD, C. J.:—The plaintiff in Suit No. 264 of 1919 in the First-Class Subordinate Judge's Court at Surat obtained a decree for specific performance of a contract to sell immoveable property. The following order was passed :—

"It is ordered that defendant No. 1 do execute to the plaintiff a sale-deed in respect of the property, the subject-matter in suit for Rs. 7,200. In default on his part, the plaintiff do apply for the execution of the same. The plaintiff do deposit in the Court Rs. 6,449 being the balance of the purchase-money due at the date of the agreement, the subject-matter of this suit. On his doing so, the plaintiff do take possession of the house, the subject-matter of this suit after the execution of the necessary sale-deed. But he is not to take possession before that. The defendant No. 2 do take Rs. 4,741-8-0 out of the said Rs. 6,449, and he do give over the balance to defendant No. 1. The documents lying in Court of defendant No. 2 (three mortgage-deeds) be given to the plaintiff. The plaintiff do also take the agreement given in writing to defendant No. 2 by the plaintiff and defendant No. 1."

The second defendant was the mortgagee from the first defendant. It also appears that the same property was the subject-matter of Civil Suit No. 217 of 1919 filed by one Ismail against the present defendants, the present plaintiff not being a party, and it appears that in that suit, after the decree in Suit No. 264 of 1919 had been passed, Ismail got a decree directing the defendants to give him possession of the suit property on Ismail's paying them Rs. 4,000.

In consequence of the decree in Suit No. 217 of 1919, the plaintiff was not anxious to get a sale-deed from the defendants. The defendants were anxious to get the money which had been deposited in Court, and were perfectly willing to give the plaintiff a sale-deed. The defend-

ants consequently took out Darkhast No. 51 of 1921. The plaintiff opposed any action being taken on the Darkhast on the ground that the defendants were not decree-holders as defined in S. 2 (3) of the Civil Procedure Code, so that they had no right to file the Darkhast. This contention was overruled by the First-Class Subordinate Judge who directed that the plaintiff should get a sale-deed which the defendants were willing to pass, and should get possession. The defendants should get the money as decreed in their favour on passing the deed and giving possession. If the plaintiff refused to take the deed and possession within a reasonable time, defendants were to be at liberty to apply to the Court for such orders as they were entitled to.

Now it seems to me on general principles, leaving aside altogether the dealings between the defendants and other parties, that the decree for specific performance was capable of being executed by the defendants as well as by the plaintiff. If this were not so, it would follow that if a plaintiff who has obtained a decree for specific performance, refuses to take the sale-deed and pay the consideration-money, the defendant is left with no remedy whatever, while, owing to the decree passed against him, he would still be debarred from dealing in any way with the suit property. We think it is clear in such a case that a defendant would be entitled to come to Court and ask for the payment to him of the consideration-money for the purchase on his tendering a sale-deed. We think the order made by the Judge in the Court below was a perfectly correct order and that the defendants came within the definition of decree-holder in S. 2 (3), Civil Procedure Code. If the plaintiff in a suit for specific performance, after having obtained a decree, discovers or is apprehensive that the defendant cannot give him a good title, then it seems to me his proper course is to apply to the Court that passed the decree for a review, or in the alternative it may be open to him to file another suit against the defendant to set aside the previous proceedings. The appeal must be dismissed with costs.

Appeal dismissed.

1923 Bombay. 27.

MACLEOD, C. J., AND SHAH, J.

Ratanbai Shivlal Lohar ... Plaintiff—Appellant.

v.

Shankar Deochand Lohar ...Defendant—Respondent.

Civ. Extraordinary Application No. 265 of 1921, dated 16th March 1922, against an order of District Judge, Khandesh, in Mis. A. No. 11 of 1920.

Civil P. C., O. XVII, Rr. 2 and 3—O. IX, R. 8, Suit—Adjournment—Default in appearance—Dismissal of suit.

The Court should proceed under O. IX, R. 8, and not under O. XVII, R. 3, when before the hearing of a suit has commenced the plaintiff fails to appear on an adjourned date.

There seems to be a direct conflict between Rr. 2 and 3, unless R. 3 applies only to defaults after hearing has commenced.

It is necessary for the Courts to exercise extreme caution when on the adjourned date the parties or any of them fail to appear. They should in the first place have recourse to O. XVII, R. 2, rather than R. 3, and even in cases where R. 3 can be considered to apply, that is to say, where the case has been part-heard and an adjournment granted, it would not be in accordance with justice to refuse a party who has failed to appear on the adjourned date at the time fixed, but appears at a later hour, the chance of having the suit restored. A party who has failed to appear at the time fixed for the hearing, if the equity of the case demands it, should certainly have an opportunity of satisfying the Court that he had sufficient cause for not appearing.

(P. 28, Col. 2; P. 29, Col. 1.)

P. B. Shingne—for the Appellant.

None for the opponent.

MACLEOD, C. J.—This suit was fixed for hearing for the 12th March 1920. Various adjournments were granted, the last of which was for the 24th July 1920. On that day when the case was called on the plaintiff was absent and the suit was dismissed. The same day the pleader appeared and presented an application for the restoration of the suit to the file. On the 23rd August, this application was dismissed. The learned Judge said:

"The applicant's pleader urges that the dismissal of the suit should be held to be under O. XVII, R. 2 and O. IX, R. 8, Civil Procedure Code, but it is clear that the Court has not dismissed the suit under the above provisions. The suit has been decided under O. XVII, R. 3, because the plaintiff to whom time was given, failed to produce the evidence, and the provisions of O. IX do not therefore apply. The plaintiff's only remedy is to appeal against the decree."

The plaintiff has obtained a rule from this Court on the 25th November 1921 calling on the defendant to show cause why the decision of the lower Court should not be reversed and a re-trial of the suit directed. The decision of the learned Judge, if it were allowed to stand, would apply to every case in which there has been an adjournment before the trial of the case has actually commenced, to enable a party to produce his evidence, and the party does not appear on the adjourned date. We are constantly having cases in which the failure to distinguish between the provisions of Rr. 2 and 3 of O. XVII has caused injustice. That Order deals generally with "adjournments." Rule 1 gives the Court power to grant adjournments from time to time, provided that, when the hearing of evidence has once begun, the hearing of the suit should continue from day to day until all the witnesses in attendance have been examined, unless the Court finds the adjournment of the hearing beyond the following day to be necessary for reasons to be recorded.

Under R. 2, where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by O. IX or make such other order as it thinks fit.

Order IX deals with "appearance of parties and the consequence of non-appearance." In all the cases which come under O. IX, the party against whom a decree or order is passed in default of his appearance, can apply to the Court to have the *ex parte* decree or order set aside on the ground that he can show sufficient cause for his non-appearance. Ordinarily, then, if a case appears on the board on an adjourned date for hearing, and there is default of appearance on the part of both or either of the parties, the Court must refer to O. IX so as to ascertain the proper procedure to be followed, and there is no necessity whatever to have any recourse to O. XVII, R. 3.

In this case the hearing of the suit had not commenced, and therefore, as it was the plaintiff who was in default, and there was no evidence to support his case, the suit should have been dismissed under O. IX, R. 8.

Rule 3 of O. XVII is certainly somewhat unfortunately worded, as it may be construed as being applicable to every case in which an adjournment has been granted to a party because he has not been ready with his evidence, whether the trial has commenced or not. It would not make much difference if there were not authorities to the effect that if the case is decided under R. 3 the only remedy of an aggrieved party is by way of appeal or review. There seems to be a direct conflict between R. 2 and R. 3, because R. 2 deals with any kind of adjournment which can be ordered under R. 1, and gives the Court power to dispose of the suit as directed by O. IX in default of appearance of the parties or any of them. If the plaintiff appears and the defendant does not appear, the Court can pass a decree *ex parte* on the merits of the case as appearing from the plaintiff's evidence. If the plaintiff is absent and the defendant appears the Court shall dismiss the suit except in so far as the plaintiff's claim is admitted.

In either case the suit is disposed of or decided, but the party in default can apply to have the *ex parte* decree or order set aside on showing cause. If then there is a default in appearance after an adjournment, ordinarily O. XVII, R. 2, will apply, and there is no necessity to have recourse to the stricter provisions of R. 3 unless the hearing of the action has already commenced. I think R. 3 was only intended to apply to such cases, as otherwise this strange result would follow. If a case is adjourned by consent without any reason being given, and the plaintiff does not appear on the adjourned date, the suit will be dismissed and he can apply to have the *ex parte* decree set aside. If, however, the adjournment is granted on the ground that the plaintiff is not ready with his evidence and the plaintiff does not appear on the adjourned date, his suit will be dismissed; but he can only appeal or ask for a review. The ground for appeal or review will be exactly the same, *viz.*, that he had sufficient cause to account for his non-appearance, and again if he succeeds the result will be the same. There will be a re-hearing. If the hearing of the action has actually commenced it is another matter, though again the result of an appeal may be that the lower Court is directed to continue the case

from the point where the plaintiff or the defendant, as the case may be, made default. It is necessary, therefore, for the Courts to exercise extreme caution when on the adjourned date the parties or any of them fail to appear. They should in the first place have recourse to O. XVII, R. 2 rather than R. 3, and even in cases where R. 3 can be considered to apply, that is to say, where the case has been part-heard and an adjournment granted, it would not be in accordance with justice to refuse a party who has failed to appear on the adjourned date at the time fixed, but appears at a later hour, the chance of having the suit restored. Generally I should like to point out that a party who has failed to appear at the time fixed for the hearing, if the equity of the case demands it, certainly should have an opportunity of satisfying the Court that he had sufficient cause for not appearing. Otherwise much delay is caused before a decision is arrived at on the merits, (See *Shrimant Sagajirao* v. *S. Smith* (1). The rule must be made absolute, and we send back the case for trial on the merits. Costs costs in the cause.

SHAH, J.—I agree.

Rule made absolute.

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1. (1895) 20 Bom. 736.

1923 Bombay. 29.

MACLEOD, C. J., AND COYAJEE, J.

Poona Chitrashala Steam Press ... Plaintiffs—Appellants.

v.

Gajanan Industrial and Trading Co. ... Defendants—Respondents.

S. A. No. 330 of 1921, dated 20th January 1922 from the decision of Sub-Judge, Satara, in A. No. 387 of 1919.

Companies Act (VI of 1882) S. 72—Promissory note signed by Secretary, Treasurer and Agent—Liability of the Company—Position of the Company's stamp.

One of the Secretaries, Treasurers and Agents signed a promissory note to pay off the price of machinery purchased by the defendant Company in his own name for Joshi, Patwardhan & Co. The promissory note was written on a form of a note-paper having the name of the Company in print and bore a rubber stamp impression of the Company. *Held*, that the promissory note was signed on behalf of the Company who purchased and used the machinery. The fact that there is no stamp of the Company below the signature makes no difference in the merits of the case. S. 47 of the Act X of 1866 discussed 4 Bom. 275 Not Foll.

Pendse, with H. G. Kulkarni—for the Appellants.

K. H. Kelkar—for the Respondents.

MACLEOD, C. J.—The plaintiffs sued to recover Rs. 2,575-1-0 the balance still due on a promissory note passed by the defendant Company. Both the lower Courts have rejected the claim on the ground that the promissory note signed by T. N. Joshi for Joshi, Patwardhan and Company, Secretaries, Treasurers and Agents, does not come within the provisions of S. 72 of the Indian Companies Act, 1882, which was the Act prevailing when the note was passed. The Appellate Court has found that T. N. Joshi had implied authority to sign the promissory note on behalf of the Company as against third parties, and there can be no doubt on the evidence that the Secretaries, Treasurers and Agents, would be the persons to sign documents of this character in accordance with the Articles of Association, and the terms of their employment; and whatever private arrangement there may have been between Joshi and the Company with regard to the machinery in respect of which this promissory note was passed, that would not affect the rights of third parties. The only question is whether it can be said that this promissory note has been drawn on behalf of the Company, and for that purpose we must look at the contents of the note, and we find there is at the top of the Note the heading, "The Gajanan Industrial and Trading Company Limited, Wai", and there is a rubber stamp, which was evidently used as the stamp of the Company in addition. There can be no doubt then that the Secretaries, Treasurers and Agents signed the promissory note on behalf of the Company, and there is no reason for dismissing the claim, because the stamp appears at the top of the paper, instead of beneath the signature. The Company undoubtedly purchased the machinery, used the machinery, and was liable to pay for the machinery. If a claim had been made for goods sold and delivered there could be no answer. It seems to us that the defence is a most dishonest one. At the most it was, as the learned Judge below pointed out, a technical defence, and consequently neither of the Courts gave the successful defendants their costs. We

think there should be a decree for the amount of the promissory note in addition to the amount of Rs. 83-6-0 with interest at $3\frac{3}{4}$ per cent from the date of the note until judgment, with costs throughout, and interest at 6 per cent on the amount of the note till payment.

Decree reversed.

1923 Bombay. 30 (1).

MACLEOD, C. J., AND COYAJEE, J.

Emperor

v.

Atmaram Shamji

Cr. Revn. No. 335 of 1921, dated 12th January 1922, from conviction and sentence by Spl. Mag. at Dholka confirmed on appeal by First-class Magistrate, Ahmedabad.

(*a*) *Bombay District Municipal Act*, 1901 *S.* 155—*Lawful order—Notice under S.* 122.

Where the accused was served with a notice under S. 122 of the Act to remove an *otla* which he had constructed and was convicted under S. 155 for having disobeyed a lawful order ; *held*, on application to the High Court that no notice need be issued under S. 122 and therefore disobedience of such a notice does not amount to disobedience of a lawful order within S. 155.

(*b*) *Bombay District Municipal Act* 1901 *S.* 122—*Powers of Municipality under—Notice under the section, whether legal.*

S. 122 gives no power to a Municipality to issue a notice to a person alleged to have erected an encroachment to remove it. Although the municipality may send such a notice, it is not a notice under the section. Such a notice may be sent as a matter of courtesy, preliminary to the Municipality taking action under the powers given them by the section to remove an encroachment themselves. Assuming a Municipality served a notice upon a person to remove an encroachment, it was not intended that if he did not do so he might be convicted under S. 155 of the Act.

G. N. Thakor—for the Applicant.

S. S. Patkar—for the Crown.

MACLEOD, C. J.—The accused was convicted by the Special Magistrate, Third Class, under S. 155 of the Bombay District Municipal Act of having disobeyed a lawful direction given by a written notice issued by the Dholka Municipality to remove an *otla*. The facts are that at least since October 1919 this *otla* was in existence. The Municipality, on the 17th December 1920, sent a notice to the accused :—

"You are informed by notice under S. 122 of the District Municipal Act that you, by making an *otla* at the side-wall of your house in the said street, have encroached on Government land. Therefore within seven days of the receipt of this notice you should remove the said *otla*. If you neglect to do so, steps will be taken according to law."

The *otla* was not removed, and so the proper step according to law which the Municipality should have taken was to remove the *otla* themselves and charge the accused with the cost of the removal. Instead of proceeding in that manner, as provided by S. 122, they charged the accused with having disobeyed a lawful order. An appeal against the conviction was rejected, but we think that the conviction was clearly wrong. S. 122 gives no power to a Municipality to issue a notice to a person alleged to have erected an encroachment to remove it, although the Municipality may send such a notice, it is not a notice under the section. Such a notice might be sent as a matter of courtesy, preliminary to the Municipality taking action under the powers given them by the section to remove the encroachment themselves. Since these special powers have been given, it seems to me that that was the proper remedy as laid down by the Legislature in cases of failure to comply with such a notice. It was not intended, assuming a Municipality served a notice upon a person to remove an encroachment, that if he did not do so he might be convicted under S. 155. I think, therefore, the conviction was wrong, and the accused must be discharged, and the fine, if paid, refunded.

Order set aside.

1923, Bombay 30 (2).

MACLEOD, C. J., AND COYAJEE, J.

Ganpati Bhatta Umamaheshwarbhatta ... Appellant.

v.

Devappa Shankarnarayan Havik ... Respondent.

S. A. No. 337 of 1921, dated 7th February 1922, from the decision of Dt. Judge, Kanara, in A. No. 119 of 1917, reversing the decree passed by Sub-Judge, Sirsi in Darkhast No. 199 of 1916.

Civil P. C., O. XXI, R. 57—*Dismissal of application—Attachment—Determination of attachment.*

A money-decree, payable by instalments, ordered that on failure to pay two instalments the

decree could be executed for the whole. It further provided that "the immoveable property of the defendant may be attached and kept." Immediately after the decree was passed, and before any default occurred, the plaintiff applied for attachment of immoveable property. The Court levied the attachment and allowed it to stand, but struck off the Darkhast. The defendant next granted the property in *mulgeni* lease to the appellants. The plaintiff, who also had purchased a portion of the property by a private sale in satisfaction of the decretal debt, applied to recover the balance of the debt by sale of the remaining property free of the *mulgeni* lease :—

***Held*, dismissing the application, that the attachment either went under the order of the Court or ceased to exist under the provisions of O. XXI, R. 57.**

It is not an easy matter to decide whether property remained under attachment when the Darkhast was struck off. Strictly speaking if the Darkhast was struck off, the attachment would go with it. It seems contrary to the ordinary meaning of words that when a Darkhast which is issued to attach property, is dismissed, still the attachment should continue.

R. A. Jahagirdar—for the Appellant.

G. P. Murdeshvar and D. R. Ugrankar—for the Respondent No. 1.

MACLEOD, C. J. :—The plaintiff in this suit got a decree so far back as 1908 for a certain sum of money which was directed to be payable by instalments. If two instalments were in arrears the decree could be executed for the whole amount. But the decree also directed that "the immoveable property of the defendant may be got attached and kept." We do not know what meaning could be attached to those words. Clearly it was *ultra vires* of the Court if it was intended that the defendant's property should be attached before default had been made in the payment of the instalments. It seems that the plaintiff immediately after the decree was passed took out a Darkhast on 14th August 1908, under which the Court ordered the lands to be attached, but struck off the Darkhast. On the 21st June 1910, the defendant granted a *mulgeni* lease to the present opponents Nos. 2 and 3. Prior to that the decree-holder had bought from the judgment-debtor a considerable portion of the property which he purported to have attached in 1908, and the terms of the sale provided that in addition to the lands sold, the defendant was to pay a small balance to the decree-holder at his convenience within a short time.

On the 25th July 1910, the decree-holder took out another Darkhast praying for the recovery of the balance by attachment and sale of the lands in dispute, the prayer being to attach and sell by auction the lands in dispute which were already attached. The property was put up for sale by the Collector, but, as there was no bid, the Darkhast was dismissed on the 20th March 1912.

Then the decree-holder transferred the decree to the present applicant who presented a Darkhast against the judgment-debtor, and that application prayed for the attachment and sale of the lands in dispute. An order for attachment was made, but as no Bhatta was paid, the Darkhast was dismissed with costs. Another Darkhast was filed in 1915 praying for the attachment of the moveable property of the judgment debtor. That was dismissed for want of prosecution. Then the present Darkhast of 1916 was filed praying that the properties now in dispute should be sold for the balance of the decree.

It is not an easy matter to decide whether property remains under attachment when the Darkhast is struck off. Strictly speaking if the Darkhast is struck off, the attachment would go with it. It seems contrary to the ordinary meaning of words that when a Darkhast, which is issued to attach property, is dismissed, still the attachment should continue. But in this case we have to consider the conduct of the judgment-creditor, and his transferee, the present applicant. We are satisfied in this case that the attachment went either under the order of the Court or ceased to exist under the provisions of O. XXI, R. 57. It does not seem to make very much difference. It certainly seems extraordinary that in 1922 we should have to decide whether a *mulgeni* lease granted in 1910 is void or not. Certainly the present applicant has only himself to thank for his own delay in not prosecuting the execution of his decree with due diligence. The appeal must be allowed and the Darkhast dismissed with all costs on the applicant.

Appeal allowed.

1923 Bombay. 32.

MACLEOD, C. J., AND SHAH, J.

Keshav Manja Bhat ... Plaintiff—Appellant.

v.

Govind Naga Bhat ... Defendant—Respondent.

S. A. No. 641 of 1921, dated 10th April 1922 from the decision of Dt. Judge, Kanara, in A. No. 146 of 1920.

Civil P. C., O. XXXIV, *R.* 6—*Form of decree —Personal covenant by mortgagor—Form in which the personal decree against the mortgagor should be passed.*

A decree in a mortgage suit, when the mortgage-deed contains a personal covenant, should direct that "if there is any deficit the mortgagee should be at liberty to apply for a personal decree for the balance against the mortgagor." A direction that on default of payment of the decretal amount the plaintiff is to be at liberty to recover the same by applying for sale of the mortgaged property and to recover the deficit, if any, from the defendants personally, is not proper.

G. P. Murdeshwar and *D. R. Ugrankar*—for the Appellant.

Y. N. Nadkarni—for the Respondents.

MACLEOD, C. J.:—The plaintiff sued to recover Rs. 542-9-0 being the balance on a mortgage bond passed by the defendants on the 22nd May 1915, together with future interest and costs by sale of the mortgaged property or against the defendants personally. The learned Subordinate Judge passed a decree in favour of the plaintiff directing that the money should be paid with interest within six months from the date of the decree. In default of payment of the decretal amount the plaintiff was to be at liberty to recover the same by applying for sale of the mortgaged property or sufficient portion thereof subject to the provisions of S. 15 B, Cl (2), of the Dekkhan Agriculturists Relief Act, and to recover the deficit, if any, from the defendants personally. That is a form of the decree which it is not desirable to pass in mortgage suits, because it cannot be known until the mortgaged property has been sold whether there will be a deficit and if there is a deficit what the amount will be. A decree in a mortgage suit when the mortgage contains a personal covenant should direct "that if there is any deficit the mortgagee should be at liberty to apply for a personal decree for the balance against the mortgagor."

In appeal the learned District Judge thought that the terms of the mortgage did not include or imply a personal covenant, and, therefore, the decree was amended by the excision of the last clause. We may mention that under O. XXXIV, R. 6, of the Civil Procedure Code, it is provided that where the net proceeds of any such sale are found to be insufficient to pay the amount due to the plaintiff, if the balance is legally recoverable from the defendant otherwise than out of the property sold, the Court may pass a decree for such amount. Therefore it is contemplated that a personal decree is passed only when it is found that the net proceeds of sale of the mortgaged property are insufficient to pay the mortgage amount. We think that the decision of the learned District Judge was wrong. The words of the mortgage-deed are as follows:—

"In case the instalments be not paid at the time fixed, but we keep the same unpaid, we will pay the amount with interest on the amount of instalments that may remain unpaid at the rate of Rs. 9-6-0 per cent. per year that may accrue up to the time of recovery, and even if two instalments be not paid at the time fixed, without putting forward the excuse of future instalments, we are liable to pay in one lump sum the amount also of all the future instalments with interest at the rate mentioned above."

It is difficult to imagine how a personal covenant could be more clearly expressed. Therefore the appeal must be allowed, but we amend the decree of the trial Court as follows: Strike out the words "and to recover the deficit, if any, out of the personal property of the defendants and the defendants personally" and in their place put the following words: "If the net proceeds of the sale are insufficient to pay the amount due to the plaintiff, then the plaintiff to be at liberty to apply for a personal decree against the defendants for the amount of the deficit." That is obviously the right order, because until the mortgaged property is sold, it is impossible to ascertain what is the amount for which a personal decree can be passed. The appellant must get his costs in this Court and in the Court below.

Appeal allowed.

1923 Bombay. 33 (1).

SHAH AND CRUMP, JJ.

Vasu Krishna Yenkavda ... Defendant—Appellant.

v.

Mahadhavrao Moreshar Bhandarker and others ... Plaintiffs—Respondents.

S. A. No. 745 of 1921, dated 30th August 1922, from Dist. Judge, Ratnagiri, in A. No. 2150 of 1920.

Bombay Khoti Act, S. 10—Transfer includes simple mortgage.

A simple mortgage is a transfer of the interest of the tenant within the meaning of the section. Even payment by Khatedar of the mortgage amount prior to suit by Khot does not destroy the right of Khot.

A. G. Desai—for the Appellant.

P. B. Shingne—for the Respondents.

JUDGMENT:—The point arising in this appeal is very simple. The facts are that the defendant effected a simple mortgage of his 1/3rd share in the Khata. The mortgage is said to have been paid off on the 5th of November 1917, and the Khot filed the present suit in 1918 to claim the right which accrued to him under S. 10 of the Khoti Act, as amended by the Acts of 1912 and 1913. In virtue of the provisions of S. 9, as amended, the interest of the occupancy tenant is heritable but not transferable without the consent of the Khot. The exception laid down in that section does not apply to the facts of the present case, and under S. 10 "if the occupant does any act purporting to transfer his land or any portion thereof or any interest therein, without the consent of the Khot, his land shall be at the disposal of the Khot as Khoti land free of all incumbrances, other than the liens or charges created or existing in favour of Government." That is the provision which the plaintiff seeks to enforce in his favour, and both the lower Courts have awarded his claim.

In the present appeal before us by the occupant, the original defendant 2, it has been urged that simple mortgage is not a transfer of the interest of the occupant in the land within the meaning of S. 10. But it is difficult to hold that a simple mortgage is not a transfer of the interest of the mortgagor within the meaning of that section. There is no decision on the point and on the plain meaning of the word "transfer" it is difficult to exclude such a transfer as we have in the present case from the scope of that section.

It is also urged that as the defendant paid off the mortgage before the suit was filed, it must be treated as not having been made at all; and that at the date of the suit there was no cause of action. The words of the section are clear that if the occupant does any act purporting to transfer any portion or any interest in the land without consent of the Khot, his land shall be at the disposal of the Khot. It is the defendant's act by way of effecting a simple mortgage that gives the Khot a right which he claims to enforce in the present suit; and the satisfaction of the mortgage before suit cannot afford any answer to the claim made by the plaintiff. It is apparently a hard case; but we have to give effect to the provisions of the section as enacted by the Legislature, and defendant 2 has not been able to show that the present transfer is outside the scope of the section. We, therefore, dismiss the appeal with costs.

1923 Bombay. 33 (2).

MACLEOD, C. J., AND SHAH, J.

Sidhraj Bhojraj ... Plaintiff—Appellant

v.

Ali Haji ... Defendant—Respondent.

S. C. C. Ref. in Suit No. 1289-1380 of 1921, dated 10th April 1922 from the decision of Third Judge of Presidency Court of Small Causes at Bombay.

(a) *Limitation Act* (IX of 1908) S. 15—*Presidency Towns Insolvency Act* (*III of* 1909) *S. 17—Injunction or order.*

It cannot be said that when an adjudication order is made, there is any injunction or order against the institution of a suit by a creditor. Before a creditor can institute a suit he must comply with the formality prescribed by the section, and it is only when leave is refused that it can be said that there is an injunction or order staying the institution of the suit.

(P. 34, Col. 2.)

(b) *Presidency Towns Insolvency Act, S. 17; Lim. Act, S. 15—Effect of—Creditor's right to sue.*

Section 17 does not present an absolute bar to the creditor's right to institute a suit. The creditor cannot, therefore, claim a deduction of the time during which the insolvency was pending, in computing the period of limitation in any suit brought by the creditor after the insolvency proceedings are quashed.

(P. 35, Col. 1.)

No appearance on either side.

MACLEOD, C. J. :—This is a reference by the Third Judge of the Court of Small Causes.

The following questions have been referred :—

(1) Where after a debt has become due and payable and time has begun to run against the creditor, the debtor is adjudicated insolvent and his petition is subsequently dismissed and the adjudication order cancelled if the creditor institutes a suit thereafter against the debtor to recover the debt, is the time during which insolvency proceedings were pending to be deducted in computing the period of limitation ?

(2) Is S. 17 of the Presidency Towns Insolvency Act a bar absolute to the creditor's right to institute a suit so as to enable the creditor to claim a deduction of the time during which the insolvency was pending, in computing the period of limitation in any suit brought by the creditor after the insolvency proceedings are quashed ?

Judgment in the case was delivered by the Third Judge contingent on the opinion of the High Court under S. 69 (2) of the Presidency Small Cause Courts Act. But in spite of that the defendant applied to the Full Court. This would seem to be irregular as there was no decree or order against which an appeal would lie. Though the appeal was heard by the Full Court and both Judges were of opinion that a case should be stated, still the reference comes before us as on a case stated by the Third Judge alone.

We have not had the advantage of hearing the parties or their advocates.

We think both the questions should be answered in the negative.

When once time has begun to run against a plaintiff for the institution of a suit which he is competent to file, it will continue to run unless stopped by some provision of the Limitation Act. In this case the plaint was presented on the 11th July 1921. The suit was to recover the balance due on account of sugar sold and delivered to the defendant from the 16th March 1916 to the 31st October 1917. To save the bar of limitation the plaintiff relied upon the fact that the defendant was adjudicated insolvent on the 7th January 1919 by an order of the High Court which was annulled on the 5th October 1920.

The plaintiff contends that the period during which the adjudication order was in force should be excluded under S. 15 of the Indian Limitation Act. That section says that where the institution of a suit has been stayed by an injunction or order, the time of continuance of the injunction or order, the day on which it was issued or made and the day on which it was withdrawn shall be excluded in computing the period of limitation prescribed for the suit. The plaintiff would then have to show that the institution of his suit was stayed by an injunction or order, or that it could be said that the institution of his suit was stayed by virtue of the provisions of S. 17 of the Presidency Towns Insolvency Act. That section says that on the making of an order of adjudication no creditor to whom the insolvent is indebted in respect of any debt provable in insolvency shall during the pendency of the insolvency proceedings have any remedy against the property of the insolvent in respect of the debt or shall commence any suit or other legal proceeding except with the leave of the Court or on such terms as the Court may impose. It cannot, therefore, be said that when an adjudication order is made there is any injunction or order against the institution of a suit by a creditor. Before a creditor can institute a suit he must comply with the formality prescribed by the section, and it is only when leave is refused that it can be said that there is an injunction or order staying the institution of the suit. In *Ramaswami Pillai* v. *Govindaswami Naicker* (1) the same question arose and it was decided that the period during which insolvency proceedings were pending could not be excluded. I think a certain amount of confusion of thought is due to the fact that with regard to the proof of debts in insolvency the date of the adjudication order determines a creditor's right to prove (S. 46 of the Presidency Towns Insolvency Act), but a creditor has always to face the risk that the order may be annulled when made on a creditor's petition on the ground that no act of insolvency has been committed and for want of prosecution when made on the debtor's petition. The creditor, therefore, should see that his debt is acknowledged in the schedule, for even if his proof is admitted by the Official Assignee his claim may be barred if the adjudication order is

(1) (1918) 42 Mad. 319 ; 31 M. L. J. 104.

annulled. Cases of real hardship must be very rare, for if a cerditor allows the greater part of the time prescribed for instituting his suit to pass by, he has only himself to thank if the time expires pending insolvency proceedings. In this case it would appear that from the 7th January 1919 until the 5th October 1920 the plaintiff did nothing to protect himself either by getting an acknowledgment of his claim from the debtor or by asking for leave to put a suit on the file. The only excuse he may have had was that there had been previous decisions of the Small Cause Court to the effect that the period during which insolvency proceedings were pending could be excluded from the period of limitation.

SHAH, J.—We have not been assisted with any argument in this case: and the questions referred to us are not altogether free from difficulty.

On the whole I do not think that there is sufficient ground for not accepting the view taken by the Madras High Court in *Ramaswami Pillai* v. *Govindasami Naicker*. (1) It may work hardship in some cases. But in the absence of any order of the Insolvency Court refusing leave to commence the suit, it is difficult to hold that the provisions of the S. 15 of the Indian Limitation Act can apply. The mere fact of an adjudication order having been made does not necessarily mean that there is an injunction or order staying the institution of a suit within the meaning of S. 15 of the Indian Limitation Act, though the effect of the order of adjudication read with S. 17 of the Presidency Towns Insolvency Act is to prevent a creditor from commencing any suit against his debtor without the leave of the Court.

I do not consider it necessary to refer to the English decisions bearing on this point, as I do not think that the difficulty of interpreting the provisions in the Indian Acts on the point is removed thereby. In spite of the possible hardship in some cases, I think that on the whole the view of the Madras High Court is right.

I, therefore, agree that the questions should be answered as proposed by my Lord the Chief Justice.

Answers accordingly.

1923 Bombay. 35.

MACLEOD, C. J., AND SHAH, J.

Emperor.

v.

Kalyanchand Gopalchand Gujrati.

Cr. Revn. No. 91 of 1922, dated 4th April 1922 against the decision of the Magistrate of Yeola.

Arms Act (XI of 1878), Ss. 19 and 13—Public assemblage—Marriage Procession.

The accused, who was not a licensee, borrowed a gun from his cousin who held a license, and fired some shots while proceeding in a marriage procession through streets. The license forbade the taking of a gun to a public assemblage. *Held*, that the accused in handling and firing the gun had committed the offence under S. 19, since the marriage procession became a public assemblage as soon as it emerged into a public road.

A. G. Desai—for the Applicant.

MACLEOD, C. J.,—This is an application in revision made by the petitioner who was convicted by the First-class Magistrate of Yeola under S. 19 of the Indian Arms Act which provides a penalty for the offence of going armed in contravention of the provisions of S. 13. S. 13 directs that no person shall go armed with any arms except under a license and to the extent and in the manner permitted thereby.

The accused is not a licensee, but his cousin handed over the gun for which he held a license to the accused while proceeding in a marriage procession. The accused fired some shots during the procession, with the result that some persons were accidentally injured. It is contended that the license permitted the licensee to go armed in the marriage procession. Clause 4 of the license reads as follows :—

"The licensee or any retainer acting under this license shall not go armed with any arms covered thereby otherwise than in good faith for the purpose of sport, protection or display, and, save where he is specially authorized in this behalf in any presidency town or Rangoon, by the Commissioner of Police or in any other place, by the District Magistrate or Sub-Divisional Magistrate specially empowered by the Local Government to grant licenses, he shall not take any such arms to a fair, religious procession or other public assemblage."

The argument is that a marriage procession is not a public assemblage, but it is clear from the terms of the clause that a religious procession is considered a public assemblage, and therefore, the suggestion

that because a procession only consists of persons of a particular persuasion, or of persons invited to a particular ceremony, it is not a public assemblage, cannot be accepted. When a marriage procession emerges from private premises and goes down the public street, then it is open to the public to join the procession, and the marriage procession becomes a public assemblage. It seems to me, therefore, that the Magistrate was right in convicting the petitioner under S. 19 of the Indian Arms Act. The application is rejected.

SHAH, J.:—I agree. It may be that on this particular occasion the gun was taken by the applicant merely for the purpose of display; but even then I think that under the terms of the license, unless he is specially authorized, he is prevented from using it even for that purpose in a public assemblage. It may be that this was quite innocently done for mere display as it is sometimes done: but whether that is in accordance with the terms of a particular license or not, must be decided when the point is raised. It is clear on the terms of this license that he could not do it in a marriage procession, which was in the nature of a public assemblage, without contravening the terms of the license.

Application rejected.

1923 Bombay. 36.

SHAH, AG. C. J., AND CRUMP, J.

Mulji Prushottam Thakkar ... Appellant.

v.

Goverdhandas Tribhuvandas ... Respondent.

S. A. No. 635 of 1921, dated 30th August 1922 against the decision of the Dist. Judge of Thana, No. 193 of 1920.

Civil P. C., S. 11—Applicability—Execution proceedings.

Where the point as to whether the defendant was or was not an agriculturist was necessarily involved in the suit, though there was no express decision, as the point was not in dispute between the parties, it must be taken to have been decided by necessary implication.

The provisions of S. 11 of the C. P. C. would not have any application to such proceedings: but the principle underlying that section would necessarily govern execution-proceedings and it is obvious that any fact which is decided in the suit expressly or by necessary implication cannot be challenged in execution proceedings.

Jurisdiction—Execution—Deccan Agril. Rel. Act S. 3 (w) and 20.

The executing Court has jurisdiction to entertain an application under S. 20 by deft. residing within its jurisdiction and outside the jurisdiction of the High Court which passed the decree.

D. G. Dalvi—for Appellant.

W. B. Pradhan—for Respondent.

JUDGMENT:—This appeal arises out of execution-proceedings. A decree was passed in favour of the plaintiff on the Original Side of the High Court. It was an *ex parte* decree. The defendant was described in those proceedings as a cloth merchant. Though the summons of the suit was served upon the defendant, he did not appear to contest the suit. The decree was subsequently transferred to the Court of the Second-class Subordinate Judge at Bhivandi for execution. In the execution-proceedings the judgment-debtor made an application under S. 20 of the Deccan Agriculturists Relief Act for instalments contending that he was an agriculturist. The application was first rejected on the ground that that Court had no jurisdiction to entertain such an application, and that the application should have been made to the High Court which passed the decree. That view, however, was not accepted in appeal by the District Judge, and for the purposes of the present proceedings, it must be taken that it was competent to the Court at Bhivandi to entertain the application. The question that arose on the merits of the application was whether it was open to the judgment-debtor at that stage to prove that he was an agriculturist, he having failed to challenge the allegation made in the suit that he was not an agriculturist. The Court of first instance decided in favour of the decree-holder and directed the darkhast to proceed. The defendant appealed to the District Court and the learned District Judge has come to the same conclusion.

In the appeal before us, the correctness of the view taken by the lower Courts has been challenged. It is contended that, as in fact there was no decision in the suit before the decree was passed as to whether the defendant was an agriculturist or not, it was open to him to show now that at that date he was an agriculturist, and that he was entitled to the benefit of the provisions of S. 20 of the Deccan Act. On the other hand, it is contended that in virtue of the provisions of S. 11 of the

Deccan Act, the High Court on the Original Side would have no jurisdiction to entertain the suit, if in fact the defendant was an agriculturist, the nature of the suit being such as would fall within S. 3, Cl. (w) of that Act. That section provides that every suit of the description mentioned in Cl. (w) of S. 3 may be tried where the defendant resides and *not elsewhere*. It was essential for the plaintiff to establish that the defendant, who did not reside within the limits of the original jurisdiction of the High Court, was not an agriculturist. He asserted that the defendant was not an agriculturist, and in the suit this statement was not challenged.

It is clear that the point as to whether the defendant was or was not an agriculturist was necessarily involved in the suit and though there is no express decision, as the point was not in dispute between the parties, it must be taken to have been decided by necessary implication. If we treat it as having been decided, as we think, under the circumstances, we must so treat it, it follows that the defendant was not an agriculturist at the date of the decree. If he was not an agriculturist at the date of the decree, he cannot in execution-proceedings, which are proceedings in the suit, raise the question that he was an agriculturist at the date of the decree. It is also clear in view of the decision in *Balchand* v. *Chunilal* (1) that if he was not an agriculturist at the date of the decree, he cannot claim the benefit of S. 20 of the Deccan Act, if he becomes an agriculturist subsequently.

In the present case it is not suggested by the defendant that there has been any change in his status, and as pointed out in Balchand's case, any subsequent change in the status would not avail him. His point really is that he was an agriculturist at the date of the decree. It seems to us that when the decree was passed it must be taken to have been decided that he was not an agriculturist. Whether such a decision is reached as a result of the contest between the parties, when the allegation is challenged, or whether the allegation of the plaintiff is accepted without any contest, because the defendant does not choose to challenge it, the result is exactly the same so far as the subsequent proceedings are concerned.

There has been some argument before us on the question as to whether the provisions of S. 11 of the Civil Procedure Code would apply to these proceedings. We do not think the provisions of S. 11 of the Civil Procedure Code would have any application to these proceedings; but the principle underlying that section would necessarily govern execution-proceedings and it is obvious that any fact which is decided in the suit expressly or by necessary implication cannot be challenged in execution-proceedings. We, therefore, dismiss the appeal with costs.

1. (1913) 37 Bom. 486=15 Bom. L. R. 887.

1923 Bombay. 37.

MARTEN AND PRATT, JJ.

Shridhar Laxman Dhekne and others ...Appellants.

v.

Janardhan Bapuji Kurawde... Plaintiff—Respondent.

S. A. No. 704 of 1920, dated 28th September 1922, against the Addl. Judge at Poona, in A. No. 16 of 1919.

(a) *Registration Act, S. 32—Authority to sign.*

Where it was urged that the father had no authority to sign on behalf of the son but the want of authority did not appear on the endorsement of the Sub-Registrar.

Held, whether a man signs expressly as agent or whether he is expressed to sign on some other person's behalf, that makes no substantial difference. In each case he signs *prima facie* as agent.

(P. 38, Col. 2; P. 39 Col. 2.)

(b) *Civil P. C., S. 100—Point involving evidence.*

The appellant cannot in second appeal take a point of law which involves the taking of additional evidence.

(P. 39, Col. 2.)

Nilkant Atmaram—for the Appellants.

B. V. Virkar for *D. C. Virkar*—for the Respondents.

MARTEN, J.:—We are hearing this case in Second Appeal, and two points have been argued before us. The first is as to the effect of the conveyance by Krishnaji to the plaintiff of 23rd September 1915. (Ex. 71). Counsel for the defendants 2 to 4, who are the appellants, contends that on the true construction of the document, merely one-third of Ramachandra's one-quarter share passed, and not the whole of that one-quarter share. We have carefully considered this document, and we are of opinion that the decision in the

Court below as to the effect of this document is correct, namely, that the entirety of that one-quarter passed to the plaintiff.

Originally undoubtedly Ramachandra has conveyed this quarter to Kashinath in 1883 by Ex. 66. Kashinath had conveyed it by Ex. 83 to Krishnaji in 1896. But by a document of 1904 (Ex. 72) one Govind as survivor of himself and Gopal had purported to convey a two-third share in this quarter to the plaintiff on the hypothesis that Krishnaji acquired this quarter share for the benefit of himself and his joint brothers, Govind and Gopal. Turning next to Ex. 71 under which the plaintiff also claims, this document refers to the conveyance by Govind (Ex. 72,) and in the view I take it really confirms it. The effect of Ex. 71, is, in my opinion, that there is an absolute conveyance of one-third of one-fourth, and a confirmation and conveyance of the remaining two-thirds which had previously been conveyed by Ex. 72 by Govind to the plaintiff. I am quite satisfied that the intention of the parties was that the entirety of the quarter should vest in the plaintiff. That in my opinion is the effect of this document, and accordingly this point will be decided in favour of the respondent.

Then the next point is this that the defendants contend that the conveyance of 1896 by Kashinath to Krishnaji (Ex. 83) was not duly registered in accordance with the requirements of the Registration Act. From the endorsement it appears that this document was presented at the office of the Sub-Registrar on the 3rd September 1896, and it is signed as "Krishnaji Ramchandra on his behalf Ramchandra Vithal." In other words, Ramachandra, the father of Krishnaji, presented the document for registration. Now no doubt, the Indian Law is very strict, and rightly so, having regard to the danger of forgery, in seeing that the requirements of the Indian Registration Act are strictly complied with and nothing in what I am going to say is intended in any way to depart from the well-established authorities on these points. Counsel for the appellants conceded, and I think rightly so, that if the document had been signed by Ramchandra as agent for his son Krishnaji, then the Act would *prima facie* have been complied with and it would then be for the defendants to establish if they could, that the requirements of the Act were not in fact complied with. But in my opinion, there is no substance in that point. Whether a man signs expressly as agent or whether he is expressed to sign on some other person's behalf, that in my opinion, makes no substantial difference. In each case he signs *prima facie* as agent. Accordingly, in the view I take, *prima facie* the document complied with the requirements of the Indian Registration Act, and therefore, it was rightly admitted in evidence. It appears that in fact no objection whatever was taken to this document until after the evidence was closed and indeed until after counsel's arguments were finished. The result was that no evidence was led by the defendants to negative the *prima facie* conclusion as to the validity of registration. Under these circumstances, I agree with the learned Judges in the Courts below that this document was duly registered and that it was rightly relied on in the lower Courts. This disposes of the two points raised by the defendants in Second Appeal No. 704 of 1920.

Then there is a cross appeal, Letters Patent Appeal No. 13 of 1921. This raised two small points. The one is for mesne profits for the plaintiff for three years before suit and for three years after suit. The other is that the defendants were wrongly allowed to go into the matter of certain improvements which they effected during the suit and to have inquiries made for that purpose. *Prima facie* it sounds plausible that if a person is kept out of possession he should be allowed mesne profits for some time before suit, or at any rate, from the institution of the suit. But the facts here are peculiar. The defendants were admittedly rightfully in possession of ¾th of the house in their own right. The house was also, on the evidence before us, in a very dilapidated condition. On the facts then of this case, it seems to me extremely difficult to establish, within the meaning of O. XX, R. 12, and S. 2, Sub-S. 12 of the Civil Procedure Code, that the defendants actually received any profits of the remaining one-quarter, or might, with ordinary diligence, have received such profits. There was no evidence that they actually received any, and on the facts stated I can-

not disagree with the view taken in the Court below that there was no proof that they would, with ordinary diligence, have received such profits. Nor can I see that the position after suit was any different to what it was before. We are not concerned with the future because we are told by Counsel that the house was acquired by the Municipality last year for Rs. 8,000. Under these circumstances I think that the appeal as to mesne profits fails.

Similarly defendants have not, I think, been damnified as regards the repairs. That will be a matter to be gone into on the inquiry in the suit as directed by the trial Judge. If the defendants can show by proper evidence that they ought fairly to be compensated for certain improvements which they can prove they have effected to the property, then they can be allowed those expenses in working out the partition although they have not yet proved them in this case. If on the other hand the inquiry results in favour of the plaintiff, he will not have to contribute to these alleged improvements, and so will not be prejudiced.

In the result therefore I am of opinion that the lower Courts have arrived at the correct result and both the appeals will be dismissed with costs.

It is suggested that we ought to interfere with the order for costs in the Courts below, and in particular in the Court of first instance. It is a hardship, it is said, on the plaintiff that he should be ordered to bear his own costs. But I cannot see that the learned Judge proceeded on any wrong principle. He gave his reasons for ordering each side to bear its own costs. Whether I personally should have arrived at the same decision is really immaterial. The discretion was his. I see nothing unreasonable in his exercise of that discretion, and in my judgment we ought not to interfere with it. The result is that the orders as to costs in the Courts below will stand.

PRATT, J.:—I agree. I only desire to add one word on the point of registration. The deed of sale (Exhibit 83) was presented for registration by Ramchandra on behalf of Krishnaji and the endorsement of presentation was signed by Ramchandra under S. 52 of the Indian Registration Act. The objection raised by the defendants is that Ramchandra had no authority to present the deed on behalf of his son because he did not hold a power-of-attorney recognizable under S. 32 of the Act. But this want of authority does not appear on the Sub-Registrar's endorsements. So far as they go, the deed had been properly registered. If, as a matter of fact, Ramchandra had not authority to present the deed for registration, that was a fact which ought to have been established by evidence in the lower Court. The appellant cannot in second appeal take a point of law which involves the taking of additional evidence. See *Gavadappa* v. *Girimallappa*. (1)

1. (1895) 19 Bom. 331.

1923 Bombay. 39.

SHAH AND CRUMP, JJ.

Shriniwas Laxmipatirao and others ... Defendants—Appellants.

v.

Hanmant Shriniwas Deshpande and another ... Plaintiffs—Respondents.

P. C. Application No. 915 of 1919, dated 10th July 1922 against the decision of the Court in F. A No. 41 of 1917.

Civil P. C., S. 109 (a)—*Interlocutory order.*

The substantial portion of the order which the applicants complained of in their petition for leave to appeal to His Majesty in Council was really passed on the Civil Extraordinary application, but it did not finally dispose of the rights of the parties and the suit was left at practically the stage at which it was when filed.

Held, it cannot be said that this is a final order within the meaning of S. 109 (*a*) or that it is a final judgment within the meaning of Cl. 39 of the Letters Patent.

K. H. Kelker—for the Applicant.

No appearance for the Respondent.

JUDGMENT :—It is unfortunate that the hearing of this Rule has been delayed so long as the notice could not be served. The order of this Court was passed on the 12th August 1919 on appeal No. 41 of 1917 and Civil Extraordinary application No. 333 of 1917. The circumstances under which the decree of the trial Court was set aside and the case sent back to the trial Court for passing a fresh decree are stated in the judgment of this Court. Apart from the difficulty in the way of the applicants in getting a certificate under

S. 110, arising out of the terms of S. 109 (*a*), we do not think that under the special circumstances of this case it would be right to grant the certificate applied for. But the difficulty which we have referred to seems to be insuperable. The order of this Court cannot be said to be a final order passed on appeal. The substantial portion of the order which the applicants complain of in their petition for leave to appeal to His Majesty in Council was really passed on the Civil Extraordinary application which we have already mentioned. Further it cannot be said that this is, a 'final order' within the meaning of S. 109 (*a*) or that it is a final judgment within the meaning of S. 39 of the Letters Patent, as it does not finally dispose of the rights of the parties. The matter has been delayed beyond all reasonable limits already; and the suit of 1911 is still practically at the stage where it was when it was filed. In view of these facts and of the nature of the order, we discharge this Rule. While doing so, we express a hope that the parties and the Court will see to it that the suit is heard and finished without any further appreciable delay.

1923 Bombay. 40.

SHAH AND CRUMP, JJ.

Kariyappa Fakirappa ... Applicant—Appellant.

v.

Tantappabin Kariyappa Kasawal and others ... Opponents—Respondents.

F. A. No. 74 of 1921, dated 21st August 1922 against the decree of the Dist. Judge, Dharwar, in application No. 48 of 1921.

Civil P. C., O. XX, R. 4—S. 151—Minor—Mistake as to amendment.

Where an application to be brought on record on behalf of a minor was made within 6 months through a *bona fide* mistake as to the period of limitation to bring on record a representative, which had been reduced to 3 months by the Act XXVI of 1920, the order rejecting the application was set aside.

R. A. Jahagirdar—for the Appellant.

S. Y. Abhyanker—for the Respondent.

JUDGMENT :—In this case the appellant before the District Court of Dharwar died on the 12th December 1920. He was original defendant No. 4. An application was made on behalf of his minor son and heir by his cousin Govidappa on the 13th June 1921 to bring the minor heir on the record. That application would be in time according to the Limitation Act of 1908 as it stood prior to the amendment, as it was made in six months. That was, however, rejected because the period was reduced by the amending Act XXVI of 1920 to three months. Then he made an application on the 22nd July 1921 to set aside the abatement and to allow the minor son as represented by his cousin to continue the appeal. In support of that application, he apparently relied upon S. 6 of the Limitation Act; but the learned Judge held the section to be inapplicable and accordingly rejected the application. The order, however, refusing to set aside the abatement is appealable under O. 43, Cl. (*k*).

In the appeal before us it is contended that in view of the ignorance of the party as to the change in the period of limitation, and of the fact that the heir is a minor, it will be really a matter of injustice and hardship if he is not allowed to continue the appeal. It is unfortunate that a proceeding of this nature which deserves to be carefully attended to by the party or the pleader concerned has not been attended to in that manner with the result that the application was not properly drawn up and no proper affidavit was put in to show that there was sufficient reason to allow the application even though it was in law beyond time. Naturally the respondent's pleader here has relied upon the absence of materials on this point to show that the order made by the learned District Judge should not be disturbed. Having regard to the change in the law and to the fact that the application was made on behalf of the minor heir, I do not think it would be just to allow the order appealed from to stand. It is evident from the application which was first made on the 13th June, that the guardian of the minor was clearly under a mistaken impression as to the law on the point. I think it would be fair to allow this appeal, though the ground put forward before the District Judge in support of the application is not tenable. I would allow the appeal, set aside the abatement and allow the application of Govindappa to continue the appeal on behalf of the minor heir in the District Court. No order as to costs.

1923 Bombay. 41. (1)

SHAH AND CRUMP, JJ.

Achut Sitaram Patwardhan and others ... Plaintiffs—Appellants.

v.

Tarachand Chimniramshet Marwari ... Defendant—Respondent.

F.A. No. 142 of 1921, dated 24th August 1922 against the decision of Sub-Judge, Poona, in Darkhast No. 645 of 1919.

Civil P. C., O. III, R. 2 (1)—Bombay High Rules.

O. III, Rule 2, Cl. (a) as altered by the rule made by Bombay High Court enables a person holding a general power-of-attorney from a party not resident within the local limits of the jurisdiction of the Court within which limits the appearance is made, authorizing him to appear and act on behalf of the party, to so appear and act.

D. R. Patwardhan—for the Appellant.

S. R. Gokhale—for the Respondent.

JUDGMENT :—This appeal is not resisted by the Respondents. It appears that the power-of-attorney has been given by the guardian of the minor Achut Sitaram Patwardhan The guardian resides at Nagar and there is no objection as to the validity of the power-of-attorney. Order III, R. 2, C. (a), as altered by the rule made by this Court, enables a person holding a general power-of-attorney from a party not resident within the local limits of the jurisdiction of the Court within which limits the appearance is made, authorizing him to appear and act on behalf of the party, to so appear and act. We think that the order made by the learned Judge rejecting the darkhast is wrong. We, therefore, set that aside and remit the darkhast for disposal according to law.

We are informed by the pleaders here that the parties have arrived at some compromise. That, however, is a matter which will be dealt with by the learned Judge below if it is put before him. He will have to consider the question whether the proposed compromise is for the benefit of the minor. Costs to be costs in the darkhast.

1923 Bombay. 41. (2)

SHAH AND CRUMP, JJ.

Gandhi Vadilal Chhaganlal...Applicant—Appellant.

v.

Gandhi Manaklal Chhaganlal Opponent—Respondent.

F. A. No. 179 of 1921, dated 21st August 1922 against the decision of Sub-Judge, Nadiad, in Darkhast No. 239 of 1920.

Execution—Decree on award—Court-fees.

Where a proper complete decree had been drawn up on the award and the execution Court dismissed the application for execution on the ground that there was no decree as no necessary Court-fees had been paid, *held*, the order dismissing the application for execution was wrong.

M. H. Metha—for the Appellant.

D. G. Dalvi—for the Respondent.

JUDGMENT :—This appeal arises out of execution-proceedings. Defendant 2 filed a Darkhast in the Court of the First-class Sub-Judge at Nadiad to recover Rs. 1,157-14-0 payable to him under the decree in Suit No. 753 of 1915. The learned First-class Subordinate Judge has dismissed the application for execution on the ground that there is no decree, apparently because the necessary Court-fees had not been paid. It does not appear from the order made by the learned Judge as to how the payment of the Court-fees under the circumstances of this case was necessary, nor does it appear why this decree, which in form is a complete decree, should not be treated as a decree capable of execution. Apparently there is no provision with regard to the payment of Court-fees in respect of the sum in question in the decree : and on the facts, so far as they have been elicited in the case and the arguments, it is by no means made clear to us as to whether any Court-fees would be payable at all in respect of this sum. In the absence of further information as to the circumstances under which the decree on the award came to be passed, we do not desire to express any opinion as to whether at the time when the decree was passed an order could have been made for the payment of Court-fees before execution could be taken out by defendant 2. The decree has been drawn up, and we see no reason whatever to hold that it is not a proper decree. It seems to us that defendant 2 is admitted to the execution thereof. We do not think

that for such a plain position any authority is needed, but we may refer to the decision in *Nawab Mir Sadrudin* v. *Nawab Nurudin* (1) which puts the question beyond doubt. We allow the appeal, set aside the order made by the lower Court and remit the darkhast to that Court in order that the decree may be executed in accordance with law. The appellant is entitled to the costs of this appeal. The costs in the lower Court will be costs in the darkhast.

1. (1905) 29 Bom. 79.

1923 Bombay. 42. (1)

MACLEOD, J.

Nanchi Kom Khatal Md. Ghori Saudagaor ... Plaintiff—Appellant.

Shititi Kulsambi Kom Sayad and others ... Defendants—Respondents.

S.A. No. 231 of 1921, dated 16th January 1922 against the decision of the Dist. Judge, Belgaum, in A. No. 162 of 1920.

T. P. Act, S. 63—Redemption—Substitution through mistake.

The mortgagee had been in possession of extra land not as if it were an accretion to the property in the original mortgage but as a substitution through mistake.

Held, obviously the mortgagor in a suit for possession would be entitled to recover that property.

J. G. Rale—for the Appellant.

S. G. Desai—for the Respondent.

JUDGMEMT :—Strictly speaking, the finding of the lower Court that the plaintiff was only entitled to redeem 2 acres and 34 gunthas area out of Survey No. 1075 as mentioned in the mortgage of 1901 to the defendant was correct. But it cannot be denied that the plaintiff was entitled on a partition between himself and the other sharers to 4 acres and 7 gunthas out of Survey No. 1075, and in 1910 she seems to have put the defendants into possession as mortgagees of more than was specifically mortgaged by the deed of 1901, with the result that the defendants had been in possession of that extra land not as if it were an accretion to the property in the original mortgage but as a substitution through mistake: obviously the plaintiff in a suit for possession would be entitled to recover that property. There is no reason why in second appeal we should not do justice by directing that, on the plaintiff's paying the decretal amount within six months from the date the record goes back to the lower Court, defendant No. 1, should give back possession not only of 2-34 acres but also the remaining portion of the land making a total of 4-7 acres to which the plaintiff became entitled on partition.

The appellant to pay costs of the Respondents throughout.

1923 Bombay. 42. (2)

SHAH AND CRUMP, JJ.

Sheikh Hasansab Walad Ladasaheb and others ... Plaintiffs—Appellants.

v.

Mohidinsab Walad Ummarsab and another ... Defendants—Respondents.

S. A. No. 528 of 1921 against the decision of the District Judge, Dharwar, in A. No. 148 of 1920.

Mahommadan Law—Mosque, private or public — Evidence.

The question whether a particular building is a public mosque or not is a question of fact, and while the existence of a *mihrab* and *mimbar* may be evidence to be considered along with the other facts in the case, in deciding that question of fact it is not possible to lay down that as a matter of law the Judge is bound to accept the existence of such structures as practically conclusive proof of the fact that the building in question was a mosque, *i.e.*, a public mosque. (P. 43, Col. 2; P. 44, Col. 1.)

Tyabji with R. A. Jahagirdar—for the Appellants.

Coyajee with A. G. Desai—for the Respondents.

JUDGMENT :— This appeal arises out of a suit brought by the plaintiffs, who were some of the Mahomedan residents of Ron, to establish their right to perform religious ceremonies in the mosque in suit and to the land surrounding the mosque. The defendants claimed to be the owners of the building and the land, and to have been in possession of the property from time immemorial. Issue 1 raised in the trial Court was whether the plaint Masjid and the open site in suit belonged to the public as alleged by the plaintiffs. The finding was that the allegation was not proved. But relying upon the circumstance that certain structures called *mihrab* and *mimbar* were to be found in this parti-

cular building, that Court held that it was a mosque in the proper sense of the term, *i.e.*, a mosque dedicated to the use of the public. On that footing the trial Court declared that the plaintiffs were entitled as a matter of right to offer prayers in the mosque in dispute without prejudice to the duties of defendants as Mullas, and the defendants were restrained by an injunction from interfering with this right of the plaintiffs. The rest of their claim was dismissed.

The plaintiffs appealed in respect of that part of the claim, and the defendants filed cross-objections. The Court of appeal came to the conclusion that as regards the land, the plaintiffs had not been able to establish anything more than the right to attend the *urs* ceremony when it was performed and to use the land for the performance of certain ceremonies in connection with the Mohoram. The learned District Judge was of opinion that the existence of *mihrab* and *mimbar* by itself was not sufficient to make the mosque a public mosque; or if, as Mr. Tyabji contends, the word "mosque" cannot be appropriately used, with reference to a building which is not dedicated to the public as a mosque, his conclusion was that the building in question could not be held to be a mosque in the proper sense merely on account of the existence of *mihrab* and *mimbar* in that building.

The test that the District Judge applied in order to determine whether the building in question was shown to be a public mosque was whether the plaintiffs had proved that public prayers had been offered in the mosque in question. An issue was sent down to the trial Court with a view to give the plaintiffs an opportunity of establishing that point. But the plaintiffs failed to appear in the trial Court, and to adduce any evidence on the point. The result was that on that point the finding was against the plaintiffs. That finding was accepted by the District Judge and a decree was passed declaring that the plaintiffs were only entitled to attend the Mohoram and *urs* ceremonies, and not to offer prayers in the mosque.

From this decree the present appeal has been preferred by the plaintiffs to this Court; and it has been urged on behalf of the appellants that the building in question is a mosque, and that properly speaking there could be no mosque in which the public have not a right to offer prayers. Whatever the exact connotation of the word "Masjid" may be, and whether it could be appropriately used, as it has been used in some of the books on Mahomedan Law to indicate what may be in fact a private mosque that is a private place used by the owner and his people for offering prayers or not, it is clear that it is essentially a question of fact whether a particular building is a mosque or not. In the present case the one test which has been applied is as to whether any public prayers have been offered in this building. The plaintiffs have failed to establish the fact, and so far as the application of that test is concerned, the plaintiffs' claim to use the building as a mosque must fail.

So far the position is not contested and cannot be contested. But it is urged that as a matter of law the existence of structures called *mihrab* and *mimbar* must lead to the presumption that the building in question is a mosque dedicated to the public. It is enough to point out that no such proposition is shown to have been laid down in any of the recognized books on Mahomedan Law which are available to us. It is not so stated, for instance, in Baillie's Digest of Mahomedan Law, (pp. 604 and 605) where while dealing with the question as to how a Masjid is constituted, reference is made to the question whether any public prayers have been offered in that building.

The passages cited from Ameer Ali's Mahomedan Law, Vol. I, 4th Edition at pp. 394 and 395, also go to show that there may be a private mosque, and that unless a permission has been once granted to outsiders to come and pray, a building which may be used for the purposes of prayers by the owner cannot become a public mosque. It is pointed out there that where prayers have been once offered it is not necessary to prove an express dedication, and importance is attached to the proof of prayers having been offered in the building.

It seems to me that after all the question whether a particular building is a public mosque or not is a question of fact, and while the existence of a *mihrab* and *mimbar* may be evidence to be considered along with the other facts in the

case, in deciding that question of fact it is not possible to lay down that as a matter of law, the District Judge was bound to accept the existence of such structures as practically conclusive proof of the fact that the building in question was a mosque, by which we mean a public mosque.

It might be open to the District Judge to base that inference upon the circumstance that there were such structures, but it was also open to him in appreciating the evidence not to draw that inference from that circumstance. We think, therefore, in spite of the argument which we have heard on the question of law as to what would constitute a valid dedication of a building as a mosque, that the finding of the District Judge should be accepted in second appeal. That finding is that this particular building is not shown to be a mosque, using the term in the strict sense as contended for by the appellants before us, or to use a popular phrase it is not shown to be a public mosque. We, therefore, dismiss the appeal with costs.

1923 Bombay. 44 (1)

SHAH AND CRUMP, JJ.

Ganpati Nana Powar and another ... Defendants—Appellants.

v.

Jiwanabai Kom Subanna ... Plaintiff—Respondent.

S. A. No. 705 of 1921, dated 8th September 1922 against the decision of the Asst. Judge, Sholapur, in A. No. 5 of 1921.

Civil P. C., O. III R. 2 (c) and S. 99—Bombay High Court rules—Power-of-attorney.

Where the power-of-attorney on the strength of which the suit was filed was a special power of attorney within the meaning of the rule as framed by High Court for appearances within its jurisdiction.

Held, as it is an error, defect or irregularity in the proceedings in the suit not affecting the merits of the case or the jurisdiction of the Court, there is no reason for disturbing the decree appealed from on that ground.

G. P. Murdeshwar—for the Appellants.

G. S. Mulgaonker—for the Respondent.

JUDGMENT:—The only point urged in support of this appeal is that the power-of-attorney, on the strength of which the suit is filed is a special power-of-attorney and not a general power-of-attorney within the meaning of the rule as framed by this Court, which is as follows:—"The recognized agents of parties by whom such appearances, applications and acts may be made or done are persons holding general powers-of-attorney from parties not resident within the local limits of the jurisdiction of the Court, within which limits the appearance, application or act is made or done, authorizing them to make and do such appearances, applications and acts on behalf of such parties."

We are by no means clear in this case that the words used in this power-of-attorney are not sufficient to constitute it a valid general power-of-attorney. But assuming in favour of the appellants that the words are not sufficient to constitute it a general power-of-attorney, the objection is covered by S. 99 of the Civil Procedure Code and as it is an error, defect or irregularity in the proceedings in the suit not affecting the merits of the case or the jurisdiction of this Court, we do not think that we would be justified in disturbing the decree appealed from on that ground. The decision of this Court in *Charles Palmer* v. *Sorabji Jamshedji* (1), which related to S. 578 in the Code of 1882, corresponding to S. 99 of the present Code, supports this view. We, therefore, dismiss the appeal with costs.

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1. (1886) P. J., 63.

1923 Bombay. 44 (2).

MACLEOD, C. J., AND SHAH, J.

Emperor ...

v.

Amiruddin Salebhoy Tyabjee.

Cr. A. No. 856 of 1921, dated 13th April 1922, by the Government of Bombay from the Acting Chief Presidency Magistrate of Bombay.

(a) *Penal Code Ss. 161 and 116—Instigation to the public servant to do something—Elements of the offence.*

The accused, successfully interceded with the Municipal Commissioner of City of Bombay on behalf of a cousin of his and got some of the building regulation relaxed in his favour, he then waited upon the Commissioner to thank him for the concession. After some conversation about tenders, the Commissioner was expecting the accused to leave. He therefore asked if the accused had anything further to say: On this the accused stated

".my cousin wished to give you five thousand rupees." The conversation ended there: the Commissioner called up his Deputy and complained to him that the accused had offered him a bribe. The accused offered profuse apologies but was asked to leave. On these facts the accused was prosecuted for an offence under Ss. 116, and 161 of the Indian Penal Code. The accused explained at the trial that he did not offer any bribe at all; but that he merely repeated, as he thought, his cousin's desire to contribute a sum of Rs 5,000 to any of the charities, in which the Commissioner may be interested, as a thanks-offering :—

Held, that there was no offer of a bribe.

(*b*) *Penal Code*, S. 116, *Illus.* (*a*)—*Substantive offence not committed.*

PER MACLEOD, C.J.:—"To bribe or to attempt to bribe a public servant is only punishable under the Indian Penal Code as an abetment of the substantive offence of a public servant accepting or attempting to obtain an illegal gratification."

"Illustration (*a*) to S. 116 is only an example of abetment of an offence under S. 161; there are many other ways of instigating a public servant to commit an offence under S. 161 besides by means of a direct offer of a bribe."

It would be establishing a very dangerous precedent to hold that an officer is protected if he agrees to allow his official acts to be swayed by the motive of accepting a gratification to be used not for his own personal benefit but for some public object."

PER SHAH, J.—Where the conversation does not amount to an offer of a bribe, the Court should be slow to infer a sinister purpose from words which do not naturally bear that interpretation

(*c*) *Criminal trial—Evidence, equivocal.*

Where the inference suggested by what happened at the interview is equivocal and where the explanation put forward by the accused is reasonably possible, the theory of innocence cannot be said to have been sufficiently negatived by the prosecution.

(P. 51; Col. 1.)

MACLEOD, C. J.:—The accused was charged before the Acting Chief Presidency Magistrate that he on or about the 14th day of October 1921 at Bombay abetted the commission by H. P. Clayton, Esquire, Municipal Commissioner of Bombay, a public servant, of an offence of taking gratification as the said public servant other than legal remuneration as a motive for doing a future official act, *viz.*, giving contracts, punishable with imprisonment under S. 161 of the Indian Penal Code, which said offence was not committed in consequence of the said abetment and thereby committed an offence punishable under Ss. 116 and 161 of the Indian Penal Code.

The accused was acquitted and Government have appealed.

The facts are shortly as follows:—A cousin of the accused, one Ebrahim Mahomedally, had submitted plans to the Municipality, for a building on the Queen's Road, to which objections were raised. On the 21st September, accused called on Mr. Clayton and handed him a memorandum in respect of the objections. The Commissioner sent the memo. to the Executive Engineer for report and on his report the objections were eventually withdrawn. On the 21st September, the accused had spoken to the Commissioner about a tender he had made for the supply of sleepers in reply to an advertisement of the Municipality, and asked the Commissioner whether the result of the tenders was known. As a matter of fact a tender was sent by the accused's firm over his signature on the 22nd September. On the 8th October, a notice was sent to Ebrahim that the objections B and C to the construction of his building had been waived by the Commissioner and he was asked to inform the accused of that fact. On the 12th October, the accused wrote to the Commissioner thanking him for waiving the objections and asking him to dine at the Willingdon Sports Club on any day that might suit him. On the 14th October, before the reply which was endorsed on the letter of invitation could be sent the accused came to see the Commissioner. I give the Commissioner's account of the conversation which then took place:

"The accused thanked me for the concession I had made in respect of his cousin's building. He then referred to the tender he had put in for the sleepers. I told him that the contract was not disposed of and that I had not seen the papers. He then said, 'I think that the Municipality is asking for tender for 5,000 tons cement' or words to that effect. He asked me whether it was any good to put in a tender for the same. I told him that I would be glad if he would put in a tender because I wanted to have as many tenders as possible and he remarked that it was no good putting in a tender unless he had influence. I remember the word 'influence', but I am not certain whether he said 'unless one had influence' or 'unless I had influence.' I told him that the tenderer who put in a tender for cement as per British specification and at the cheapest price would probably get the contract. I expected the accused to leave me at this stage and I asked whether he had anything else to say and the accused said 'when shall I see you again'. I told him there was no necessity for him to see me again. He said 'shall I see you here or elsewhere.' I said 'what about'. He said 'about that Rs. 5,000'. I said 'what Rs. 5,000'. He replied 'my cousin wishes to give you Rs. 5,000'. I began to get suspicious about the accused's intention since he had mentioned the word 'influence'."

The Commissioner then called in Mr. Kirpalani who was sitting in a screened off portion in the same room and said:

"'This gentleman has just offered me a bribe of Rs. 5,000.'...The accused in the presence of Mr. Kirpalani admitted that he had offered me a sum of money on behalf not of himself but of his cousin. I then requested the accused to leave my office at once and never to come back again. The accused was very reluctant to do so. He was profuse in his apologies."

In his statement to the Court the accused was asked :—

Q.—Did you in your conversation with Mr. Clayton mention Rs. 5,000.

A.—Yes.

Q.—Did you offer that sum as a bribe.

A.—No.

Q.—Do you wish to say in what connection you made mention of that sum.

A.—That offer was made on behalf of my cousin towards one of the funds.

Q.—Do you wish to say to what funds.

A.—I do not know in what funds the Commissioner was interested, but I thought the suggestion would come from the side of the Commissioner.

In the written statement, which was put in, the accused said that his cousin saw him and expressed his gratification at the result of the appeal to the Commissioner. Accused understood from him that he was contributing through Mr. Clayton a sum of Rs. 5,000 or so to some fund in which Mr. Clayton might be interested.

Para. 7 runs as follows :—

"I do not remember the exact words in which I replied (to the question 'what about') but I intended to convey to him that it was about that sum of Rs. 5,000 which my cousin was contributing through him to some fund and about which I believed that my cousin had spoken to or arranged with Mr. Clayton."

Now to bribe or to attempt to bribe a public servant is only punishable under the Indian Penal Code as an abetment of the substantive offence of a puplic servant accepting or attempting to obtain an illegal gratification.

Under S. 161 of the Indian Penal Code, "whoever, being a public servant, accepts or obtains, or agrees to accept, or attempts to obtain from any person, for himself or for any other person, any gratification whatever, other than legal remuneration, as a motive or reward for doing or forbearing to do any official act, etc. etc., shall be punished with imprisonment or with fine or with both." S. 116 deals with the abetment of an offence punishable with imprisonment if that offence be not committed in consequence of that abetment.

Under S. 107 a person abets the doing of a thing who instigates any person to do that thing.

The question, therefore, in this case is whether the accused instigated the Commissioner to attempt to obtain an illegal gratification.

It was argued by the Advocate-General that what the accused said amounted to an offer of money as a bribe.

The learned Magistrate also in his judgment appeared to think that the only question was whether an offer was made, or whether the accused was merely making preparations to make the offer.

I think the real aspect of the case has been obscured by the failure to observe that illustration (*a*) to S. 116 is only an example of abetment of an offence under S. 161. There are many other ways of instigating a public servant to commit an offence under S. 161 besides by means of a direct offer of a bribe.

The words "my cousin wishes to give you rupees five thousand" do not legally amount to an offer. But they do indicate a state of mind on the part of the cousin that if asked he might give Rs. 5,000. The distinction between an offer and an invitation for offers to be made is well recognized in the Law of Contract, and there is no reason why in a criminal case the same distinction should not be observed, if the sole question is whether an offer has been made or not.

Now a person is said to instigate another to an act when he actively suggests or stimulates him to the act by any means or language direct or indirect, whether it takes the form of express solicitation or of hints, insinuation or encouragement: Russell on Crimes, p. 164. Taken in connection with what had previously occurred, the conversation on the 21st September about the tenders for the sleepers, the tender actually made by the accused on 22nd September, the conversation with regard to the tender for cement on 14th October, it cannot be denied that the words 'my cousin wishes to give you Rs. 5,000' can perfectly fairly be considered as an instigation to the Commissioner to attempt to get the Rs. 5,000.

But the defence is that the Commissioner did not allow the accused to finish the sentence, he wanted to add the words "for one of your funds." That when Mr. Kirpalani was called in and told by the

Commissioner that accused had offered a bribe, accused was pushed out of the office and was given no chance of explaining what he meant or of clearing up the misunderstanding, which arose in the mind of the Commissioner, because the accused wrongly assumed that his cousin must have spoken to the Commissioner about the sum the accused thought his cousin was contributing.

This story is not borne out by the evidence of the Commissioner and Mr. Kirpalani. The Commissioner said he asked the accused to repeat his offer in the presence of Mr. Kirpalani and accused said he offered the money not on behalf of himself but on behalf of his cousin. He was reluctant to leave the office and was profuse in his apologies. He was not asked in cross-examination whether he pushed the accused out of his office without giving him any chance of explaining what he had said. The Commissioner is corroborated by Mr. Kirpalani. It is clear, therefore, that the accused had sufficient opportunity to explain, if he had wished to do so, that the money his cousin was willing to give was for one of the funds in which the Commissioner was interested, and nothing would have been simpler than for him to say, if as a matter of fact he was under the impression that his cousin had already spoken to the Commissioner about contributing Rs. 5,000 to some fund: "I was not suggesting that my cousin should give you Rs. 5,000 but that he should contribute Rs. 5,000 to one of your funds." I have not the slightest doubt in my own mind that at that time the accused had had no talk with his cousin about any contribution to some fund, and that he was not under the impression that his cousin had mentioned the matter to the Commissioner. His cousin had succeeded in getting the objections to his building removed, and unless he went into the witness-box to say that he intended as a thanks-offering to contribute Rs. 5,000 to one of the Commissioner's funds there is not the slightest reason why we should infer that he was prepared to add another Rs. 5,000 to the cost of the building without any necessity therefor.

On the evidence for the prosecution there is a clear case of instigation. The Commissioner was stimulated towards making an attempt to get Rs. 5,000, and if he succeeded the accused might hope that his tenders would be considered more favourably in competition with others.

It was open to the accused to satisfy, the Court by his own statement either, alone, or supported by evidence, that the view of the prosecution evidence was not the right one. In my opinion he has failed to do so. He has relied solely on his own statement which is entirely opposed to the evidence and the probabilities of the case. But even if I assume that the accused was merely instigating the Commissioner to make an attempt to get Rs. 5,000 for one of his funds, I do not see how that could do more than mitigate the offence since under S. 161, gratification is not restricted to pecuniary gratification or to gratification estimable in money.

If, during the period prescribed for the making of tenders in answer to his invitation, the Commissioner was to accept or to attempt to obtain from the tenderers or their relations sums of money not for himself but for one of the funds in which he was interested, there can be no doubt he would be liable to be prosecuted under S. 161, and any tenderer who paid him money or offered to pay him money in these circumstances, the obvious object being to induce the Commissioner to look favourably on his tender, would be guilty of abetment.

Mr. Inverarity contended that if offering monies for a charity amounted to offering a bribe, a good many persons would be in jail, as many Indian Princes and others contributed large sums towards charities in which the Viceroy or the Governor of a Province was interested. They did so not because they cared for the charities but because they wanted to ingratiate themselves with the Viceroy or the Governor. I trust that persons of wealth take a higher view of their duties to humanity, but I am only concerned with the case before us, and I should be establishing a very dangerous precedent if I were to hold that an officer is protected if he agrees to allow his official acts to be swayed by the motive of accepting a gratification to be used not for his own personal benefit but for some public object such as charity, science or religion. The object of the abetter remains the same, to influence the public servant in his favour. In *Imp.* v. *Appaji Yadavrao* (1) Jardine, J. held that the plain words of S. 161 of

1. (1896) 21 Bom. 517, 520.

the Indian Penal Code excluded such a defence.

But having stated what I consider to be the law in the case, and what I consider to be the proper inferences to be drawn from the evidence, it remains to be considered whether the appeal should be allowed and the accused convicted. If I had been the trying Magistrate I should not have taken a very serious view of the conduct of the accused considering all the circumstances of the case. If I had convicted I should not have imposed a heavy penalty, and if it had been in my power I would have discharged the accused with a caution. Sitting to hear an appeal by Government from the order of acquittal, considering that my brother Shah is not in favour of a conviction, I am content to refrain from expressing an opinion which would necessitate another hearing. I feel quite sure that the accused must have realized by this time that at the best he acted very foolishly in using words which might be construed as an attempt to influence the Commissioner in his favour by suggesting that the Commissioner might be able to secure for himself or for some charity a monetary advantage. If he had only been wiser he should have known that nothing could be more likely to damage his case.

SHAH J.:—In this case Mr. Clayton the Municipal Commissioner of Bombay, is the complainant. His complaint was that the accused offered him a bribe of Rs. 5,000 on the 14th October 1921 in his office, that the fact was admitted in the presence of his Deputy, Mr. Kirpalani, and that the accused was guilty of abetment of an offence under S. 161, punishable under Ss. 161 and 116, Indian Penal Code. The complainant and his Deputy were examined as witnesses and a charge was framed against the accused to the effect that he abetted the commission of an offence by a public servant of taking gratification in that capacity other than legal remuneration as a motive for doing a future official act, *viz.*, giving contracts, and that as the offence was not committed in consequence of the said abetment his act was punishable under Ss. 161 and 116, Indian Penal Code. The learned Chief Presidency Magistrate came to the conclusion that the abetment was not proved as the matter had not reached the stage of offer, that there was *locus penitentiæ*, that it was not clear beyond doubt that the alleged offer to the public servant was really as a motive or reward for any official favour, and accordingly acquitted the accused.

The present appeal is preferred by the Local Government against the order of acquittal.

It is urged on behalf of the Crown that what the accused said to the complainant at the interview amounted to an offer of Rs. 5,000 as a bribe, that, whether it was an offer or not, it amounted to instigating the public servant to agree to accept or to attempt to obtain a bribe or rather to do something which, if done would amount to an offence punishable under S. 161, Indian Penal Code. It is urged that in view of the proved conduct of the accused there was no *locus penitentiæ* and that the instigation, however feeble and ineffective, was complete, so as to bring the case within the scope of S. 107 (*a*) read with S. 161.

On behalf of the accused it is urged that there was no offer of the bribe, that the statement that his cousin wanted to give Rs. 5,000 had really no reference to any future official act, that, according to his then knowledge, he thought he intended to give it as a thanks-offering to one of the public charitable funds in which the complainant was interested, that an innocent act of his was misinterpreted by the complainant without sufficient ground, and that owing to the somewhat unexpected and embarrassing position in which the accused found himself when Mr. Kirpalani was suddenly called in by the complainant, he got confused and could not explain what he could have explained, if left to himself. The real nature of his statement, it is suggested, was misunderstood much too readily.

I may add that it is urged on bahalf of the Crown that the accused has adduced no evidence in support of his statement made at the trial that his cousin intended to give the sum for the benefit of one of the funds, and that he has not examined his cousin. On the other hand, it is pointed out that it was not thought necessary to do so, that, apart from the evidence of the cousin, there was no reason to distrust the explanation offered by the accused, and that his cousin can be examined even now, if his evidence is thought to be material by the Court.

There is really no dispute as to what happened in fact at the interview between the accused and the complainant. The real dispute is as to its effect and as to the intention of the accused. I do not consider it necessary to recapitulate the facts preceding the interview, which have been fully stated in the judgment of the lower Court nor do I consider it necessary to quote here the passage from the complainant's evidence as to the account of the interview. It is contained in the passage in the latter part of his examination in-chief commencing from his statement that, on the 14th October, the accused called on him in his office. I adopt that in its entirety as representing what happened then. This too has been stated with sufficient fulness in the judgment of the trial Court. Mr. Kirpalani's evidence supports this account of the interview so far as it took place in his presence after he was called in. Both the witnesses are agreed that the accused was not in the room for more than two minutes after Mr. Kirpalani was called in. As regards the public funds the complainant's statement is as follows:—

"I am interested in getting contributions from persons of wealth for certain funds. The fund I am particularly responsible for is the Acworth Leper Asylum and I am the President of the Board of Management I am interested in collecting subscriptions for a great many deserving objects. On certain occasions, I have requested some of the leading men in Bombay to subscribe to a particular fund."

The evidence has been fully discussed before us; and after a careful consideration of the arguments and the evidence, I am unable to hold that the acquittal is wrong or that the accused has been shown to be guilty of having instigated the complainant to do something which, if done, would be punishable under S. 161.

I shall briefly deal with the arguments in the light of the evidence.

It is urged that there was an offer of a sum of Rs. 5,000 by the accused. This position is taken up with reference to illustration (*a*) to S. 116, Indian Penal Code. The illustration assumes the fact of an offer for an improper purpose as stated in S. 161. It is in dispute here. All that the accused asked was as to when he could see the complainant again and explained that it was with reference to a sum of Rs. 5,000 which his cousin wanted to give. I do not think that the conversation amounted to an offer. I do not desire to elaborate this point as the lower Court has taken this view and as the learned Chief Justice also takes the same view.

It is urged, however, that whether it was an offer or not, it really amounted to an instigation to do a thing punishable under S. 161, Indian Penal Code, and that the accused is guilty of abetment. This argument requires a closer examination. A careful perusal of the evidence as to the interview shows that the accused inquired of the complainant as to when he could be seen again in connection with "that sum of Rs 5 000," which the cousin of the accused wanted to give him. In order to bring the case within the ambit of the Penal Code, the prosecution must show that this was an instigation and further it was an instigation to a public servant to agree to accept or to attempt to obtain from the accused or his cousin for himself or for any other person a gratification other than legal remuneration as a motive or reward for doing some official act or for showing any favour in the exercise of his official functions. In my opinion it is far from clear that this conversation was really an instigation. It is not easy to define the word: and really it must be decided with reference to the facts of each case whether the words used have the natural effect—not necessarily effect in fact—of instigating a person to do that thing. I do not think that without straining the meaning of the language used, it could be said that the accused instigated the complainant to do anything. Particularly where the conversation does not amount to an offer, the Court should be slow to infer a sinister purpose from words, which do not naturally bear that interpretation.

Assuming, however, that it was instigation within the meaning of S. 107 (*a*), the question is whether it was for doing something, which, if done, would be punishable under S. 161. That is really the most important question and in my opinion more difficult than the question whether the conversation does amount to instigation; and it may be said at once that, if the sinister purpose of the accused was clear, it might induce the Court to hold that there was instigation on his part from his conduct and words, which

might not otherwise bear that interpretation.

In order to appreciate this part of the case it must be remembered that the cousin of the accused was building a house on the Queen's Road; and that there were certain conditions imposed by the Municipal authorities, which were of a restrictive nature. On a representation made on his behalf these conditions were dispensed with by the complainant after reference to and on the recommendation of the Executive Engineer. These conditions were of a technical nature from the Municipal point of view as stated by the authorities, but involved restrictions of a substantial character so far as the builder was concerned. The removal of these restrictions would naturally please the builder and the accused so far as he was interceding on his behalf. At the date of the interview this concession was an accomplished fact. Further, at that time the accused had put in a tender and was likely to put in another tender for certain contracts: and he might expect official favour in respect thereof. The charge refers to a future act and not to the act already done by the complainant. Though this limitation in the charge was not realized in the course of the argument it is as well to bear it in mind in determining the intention of the accused. The words used indicate an inquiry by the accused of the complainant as to that sum of Rs. 5,000 which his cousin wanted to give. That might refer and would refer to the favour already shown to him, if it has any reference to any favour. It does not refer to the favour which the accused might expect in respect of his tenders. If the case made in the charge is to be considered, and if the future act is to be looked to, as stated in the charge, I do not think that the conversation justifies such an inference. Of course it is possible that the accused may have the prospect of such a favour in view. But the complainant did not make any further inquiry of the accused as to the reason why the cousin of the accused wanted to give Rs. 5,000, and in the absence of any indication to connect it with the future act, I do not think that any inference against the accused could be reasonably drawn. The fact that he had expressed his opinion that without influence his (or one's) chance in respect of the tenders would not be worth considering is not sufficient, in my opinion, to alter the character of his statement. It is not suggested that his cousin had anything to do with the tenders and it is clear that his cousin was the person benefited by the restrictive conditions as to his building having been removed. On the statements made by the accused at the interview, the theory that his cousin may have thought of giving Rs. 5,000 is perfectly possible and unless by implication or in terms that suggestion can be said to be excluded by the evidence in the case, I do not see how it could be said that the sum mentioned at the interview had any reference to any future act in respect of which the charge is framed.

There is a further difficulty in the way of the prosecution. It is not a necessary inference from the conversation between the accused and the complainant that the cousin proposed to give the sum for an improper purpose, that is, as a motive or reward for any favour having been shown to him by the complainant in the exercise of his public functions. The benefit, which he got from the removal of the restrictions on his building, was substantial, and there is nothing unlikely in his entertaining or at any rate it is well within the range of reasonable possibility that he may entertain a desire to please the Commissioner without meaning to offer it as a motive or reward for his official acts. If the complainant had pursued the inquiry a little further and ascertained or elicited some further facts to enable him to ascertain that it was really offered as a motive or reward for showing some official favour and not for any innocent purpose, the case would have been different. But as he says he began to get suspicious about the accused's intention since he had mentioned the word 'influence.' He at once called Mr. Kirpalani, and when he came in instead of allowing the accused to state what he liked, he stated to Mr. Kirpalani that the accused had offered him a bribe and asked the accused to repeat what he had stated to him already. The interview ended in a very short time. The accused was very profuse in his apologies and admitted what he had stated to the complainant before Mr. Kirpalani came in. I am unable to draw any inference against the accused from his omission to mention during that

short interval that the sum was really intended by his cousin for a contribution to some fund and for an innocent purpose. The accused saw that the complainant had already put a definite interpretation upon his conduct, and in the confusion of the moment, he might omit to mention what might be true from his point of view. Some persons in such a condition may act with coolness and composure and some may not: but I do not think that in a criminal case it could be fairly treated as giving him an opportunity of explaining his position. He was at once told to go out: and though his reluctance to move out promptly has been referred to by the learned Advocate-General as telling against him I do not think that the circumstance can be treated as having any such significance. Thus the accused had really his first opportunity at the trial to explain his position. The accused has explained in his statement that his cousin wanted to contribute to one of the funds in which the complainant was interested, and that his information about it was incomplete and that he was under the impression that his cousin had spoken to the complainant about it. In short his defence is that his statement as to the sum of Rs. 5,000 had nothing to do with a future act of the complainant and that his inquiry about it was merely casual and on behalf of his cousin without the slightest intention of offering it as a motive or reward for any official act of the complainant. This explanation is undoubtedly open to the criticism that it may be—and it is contended by the Crown that it is—an after-thought and not true. Indeed if the case for the defence on this point rested on its being made out that it was true, it might fail for want of evidence. But where the inference suggested by what happened at the interview is equivocal and where the explanation put forward by the accused is reasonably possible, the theory of innocence cannot be said to have been sufficiently negatived by the prosecution. The absence of the cousin from the witness-box does not matter under the circumstances. It would matter if the accused had to establish affirmatively the truth of his allegation. In view of the fact that the complainant was interested in the collection of several funds, it was particularly desirable for him to put it beyond question by further inquiry that the proposed donation was not meant for any such innocent purpose.

Taking a general view of all the facts and circumstances of the case, I think the complainant was justified in feeling suspicious about the accused's intention; but he was not justified in inferring, as he did by the time Mr. Kirpalani arrived on the scene, that the accused had offered him a bribe of Rs. 5,000. The case for the prosecution is not free from doubt and difficulty. On the whole I am not satisfied that there was any offer of a bribe nor am I satisfied that there was any instigation to the complainant to do something which is prohibited by S. 161, Indian Penal Code. It is not clear that the instigation, if any, was to make the complainant agree to accept or attempt to obtain the sum as a motive or reward for any official act.

For these reasons I am of opinion that the appeal fails and must be dismissed.

I desire to make it clear that I do not wish to be understood as approving of the conduct of the accused in any sense even taking it in the light most favourable to him. All that I hold is that the facts necessary to constitute the offence charged have not been made out, and that is all that I am concerned with in this appeal.

Appeal dimissed.

1923 Bombay. 51.

MARTEN, J.

Freeman
v.
SS. Calanda and Capt. Yanovsky

Admiralty and Vice-Admiralty Jurisdiction. Suit No. 1 of 1922, dated 22nd May 1922.

Bombay High Court Rules—Admiralty Jurisdiction—Procedure.

It is not essential under the Admiralty Rules to issue a writ of summons, in addition to issuing warrant for arrest. Not that a writ can never be issued in an Admiralty suit, but it is unnecessary if a warrant of arrest is issued.

(P. 56, Col. 2; P. 57, Col. 1).

Jinnah—for the Caveator.
Wadia—for the Purchaser.
Campbell—for the Defendants (crew and the staff of the ship.)
The Sheriff appeared in person.

MARTEN, J.:—This is a notice of motion by Captain Yanovsky, the caveator, asking

for an order that the decree made in Suit No. 1 of 1922 by my brother Crump on April 25, 1922, may be set aside, and that the sale made in pursuance of the said decree be also set aside. The notice of motion states that I have granted an interim injunction against completion of the sale until further order of the Court. That statement is admittedly incorrect and should be struck out. All I did was to give leave to serve short notice of motion for last Saturday.

The suit itself is a curious one. The application is also a curious one: and it bristles with legal points—points which are of interest from a historical aspect and also on the question of our Admiralty Jurisdiction in this Court. It also carries with it points of interest to all of us in this High Court of Bombay, *viz.*, that the various matters arising in the exercise of the Court's extensive jurisdiction should be carried out in a way which is befitting a High Court and which cannot be commented on adversely either by any other High Courts or by our important business community either in Bombay or England. It is partly for the reason that I am very jealous of the reputation of the Bombay High Court in this respect that I directed the Court to be kept open on Saturday last, a day which is normally a closed day during the vacation, and that I have sat specially to-day to hear the application, which is stated to be of great urgency and of great importance to the parties before me.

To understand the position, I must recapitulate shortly what I stated on the application to expedite the trial of the other suit, No. 2 of 1922. This ship the *Calanda* was formerly the Russian Volunteer ship *Omsk*. When she was under the Russian flag, the present caveator, Captain Yanovsky, was the Captain of the ship, and the present Chief Engineer and I think the Third Engineer were also officers on that ship. At that time they earned, so they say, certain sums for commission on freight and so on. The ship was subsequently purchased by a London Shipping Company and transferred to the British registry. I have not seen the ship's certificate, but that is admitted on all sides.

In April 1921, there was a statutory ship's mortgage in favour of a London firm of the name of D. L. Flack & Son, who are represented by Messrs. Payne & Co., solicitors in this suit. The ship sailed from Cardiff in Newport in January of this year bound for Porebunder with coal. Its orders were to proceed from there to Australia in ballast and thence home with a cargo of grain. Before the ship sailed the manager of the present British owners gave Captain Yanovsky a letter acknowledging that the English Company took over the liability for the commission, freight and so on which I have mentioned. They have already paid him £500 as part of the commission and there was an undertaking to pay the balance. But the letter concluded with an undertaking by the Captain not to take any action against the ship, and the letter also provided that the sum in question was to be paid on the return of the ship to the United Kingdom. Similar letters, I think on an earlier date, were given to the Chief Engineer and the Third Engineer. It is on these letters that Captain Yanovsky and the Engineers are suing in the second suit, No. 2 of 1922. They say in that suit that the undertaking at the foot of each letter is inoperative, because the ship has been arrested in Bombay by a third party. In that suit I have expedited the trial and it has been fixed for some day early in June.

Now to continue the voyage of the ship, she got as far as Porebunder and there the mortgagees of the ship took possession. I am told they had taken constructive possession in London and they took actual possession in Porebunder, where the English Captain of the ship received a cable from the owners in effect telling him to take proceedings for payment of his wages. I should have explained that when the ship became a British ship, a British Captain was employed as Captain, *viz.*, Captain Freeman, but the former Russian Captain, the caveator, was kept on as the ship's Supercargo.

Accordingly the ship under the direction, I gather, of the mortgagees was taken possession of, and having regard to the cable from the owners proceeded to Bombay where these two suits were filed, No. (1) by Captain Freeman on behalf of himself as master and all the other officers

and crew of the ship, and No. (2) by the Russian Captain and the Chief and Third Engineers.

In this first suit Captain Yanovsky was himself one of the plaintiffs, and his name is entered in the particulars to the plaint as one of the ship's officers to whom wages were due.

There was at once a warrant of arrest in Suit No. 1 issued for the arrest of the ship, and it was served in the usual manner by nailing it to the main mast of the ship. Then no appearance having been entered for the ship, the matter came on before Mr. Justice Crump on April 25, 1922, under R. 14 which provides that—

"After the expiration of twelve days from the filing of a warrant, if no appearance shall have been entered in the suit, the attorney for the plaintiff may cause the suit to be set down for hearing."

Then under R. 15:

"If when the suit comes before the Court, the Judge is satisfied that the plaintiff's claim is well founded, he may pronounce for the claim and may order the property to be sold with or without previous notice and the proceeds paid into the Registry or may make such order in the premises as he shall think just."

When the matter came accordingly before Mr. Justice Crump on April 25, he then passed a decree in favour of the plaintiff to recover a sum of Rs. 86,696 on behalf of himself as master and other officers and crew of the ship, and also for a further claim for further wages up to the approximate dates of their repatriation, and then the learned Judge condemned the ship in the amounts claimed without prejudice to other claims against the ship. The decree further ordered:—

"That on non-payment of the aforesaid amounts within two days from the date hereof, the said *SS. Calanda*, her papers, tackle, machinery, apparel and furniture be sold by the Sheriff of Bombay by and under the directions of this Court and the sale proceeds be applied in the first instance in payment of the said claims and costs of the suit without prejudice as aforesaid."

Now the caveator had previously entered a caveat against the release of the ship. He had done that under our Admiralty R. 27. He appeared by counsel before Mr. Justice Crump at the hearing of the suit, but Mr. Justice Crump considered that he had no *locus standi*, so I am told by his present counsel. Be that as it may, no appeal was filed against that decree, nor was any application made by the caveator to the Court touching the sale of the ship or as to fixing any reserve price or anything of the sort. On the contrary, it would appear that the Captain and his solicitor were fully aware of the sale, and actually attended it. The sale took place in fact on May 18, when the ship was sold for Rs. 52,000. It was not till Friday evening May 19th that an application was made to the Court to interfere in any way with the decree of April 25th or with the sale.

As regards the sale it was carried out by the Sheriff under R. 36 which provides that:—

"Every sale under the decree of the Court shall, unless the Judge shall otherwise order, be made by the Sheriff in like manner as a sale of moveable property in execution of a decree in an ordinary civil suit."

What has given me anxiety in the present case is that undoubtedly, as far as I can tell, the ship has been sold at a serious undervalue. The mortgage alone on the ship last year was, I think, for £34,000, and she has now been sold for approximately £3,500, *i.e.*, nearly one-tenth of the sum. Seeing that her gross registered tonnage is about 7,200 and nett tonnage about 4,800, even if one puts her value as low as £5 a ton, that would amount on the nett registered tonnage to about £24,000; *prima facie*, therefore, it would appear that the ship should have fetched a great deal more than she has in fact fetched. Really the price realized is approximately one which ship-builders are asking in Bombay for up-to-date motor launches, and it is really not very much more than an expensive motor car. That is the one point of substance here on the facts, although curiously enough there is no expert evidence as to the real value of the ship.

Now as to the numerous points of law, I must start by picking out the one about the non-service of the writ. It is alleged by the caveator that this decree ought to be set aside on the ground that the writ in the suit has never been served on the ship, and that consequently the whole decree and the subsequent sale are void.

The answer made to this is that we are dealing here with a special jurisdiction, *viz.*, the Admiralty Jurisdiction, and with special Rules set out on pages 319 to 325

of our Bombay High Court Rules: and that those rules in effect follow the old English Admiralty procedure under which you had a warrant of arrest and not a writ. It is said that the writ is an innovation so far as the English Admiralty Court is concerned, and was only introduced by the Judicature Acts 1873—1875 and that we in Bombay have kept to the old practice which existed before the English Judicature Acts. It is further argued that there is still less reason for us to change our practice seeing that even now in our ordinary civil jurisdiction we do not begin suits by a writ, we begin by a plaint just as they used to do in the old days, and it is only after the plaint has been issued that we have a writ. Consequently our present procedure is an ordinary procedure. It is totally unlike that which now prevails in England.

This argument has led to what is always of interest to me, *viz.*, the investigation of the history of Bombay and of this High Court in particular. I regret that in a week end during the vacation when the Library is shut, I have been unable to make the enquiries which I should like to have done, and the case is too urgent for me to do so now. But it is to my mind perfectly clear that what Mr. Campbell has stated as to the old practice of the English Admiralty Court is undoubtedly the fact. It is perfectly clear that the old English Admiralty practice was that in general you commenced your proceedings by a warrant of arrest and not by writ.

In *The Nautik*, (1) Mr. Justice Bruce had to consider the converse case after the date of the Judicature Act. There a writ had been served but no warrant of arrest, and the question arose whether the Court could proceed to a decree without there being a warrant of arrest. The Court held that it had jurisdiction. The learned Judge there said at page 124:—

"The question arises whether, the property not having been under the arrest of the Court, the Court has jurisdiction to pronounce judgment by default. I am of opinion that it has. Service of a writ *in rem*, upon property within the jurisdiction of the Court, is notice to all persons interested in the property of the claim indorsed upon the writ. It is quite true that, according to the older practice, a suit *in rem* was commonly commenced by a warrant arresting the property, just as, in still earlier practice, a suit *in personam* was commonly commenced by a warrant arresting the person. But all that is necessary to found jurisdiction is to give formal notice to persons interested that a claim is made against them or against their property in a Court of competent jurisdiction, and that, if they do not appear to vindicate their rights, judgment may be given in their absence.

"The Rules of the Supreme Court directed that actions *in rem* should be commenced by writ, and I think the service of the writ on the property has the same effect, so far as notice to the persons interested in the property is concerned, as service of a warrant had under the former practice. To confer jurisdiction it is not, I think, necessary that the property, the subject-matter of a suit, should be actually in the possession of the Court or under the arrest of the Court; it is enough that it should, according to the words of Lord Chelmsford, in the case of *Castrique* v. *Imrie* (2) 'be within the lawful control of the State under the authority of which the Court sits.'"

A similar note about the practice will be found in Halsbury's Laws of England, Vol. I, at page 60, the article of which is in fact written by the same learned Judge Mr. Justice Bruce.

Then if one turns to the modern English Rules of the Supreme Court, O. I, R. 1, says:

"All actions which, previously to the commencement of the Principal Act (the Judicature Act) were commenced by writ in the superior Courts of Common Law at Westminster, or in the Court of Common Pleas at Lancaster, or in the Court of Pleas at Durham, and all suits which, previously to the commencement of the Principal Act, were commenced by bill or information in the High Court of Chancery, or by a cause *in rem* or *in personam* in the High Court of Admiralty, or by citation or otherwise in the Court of Probate, shall be instituted in the High Court of Justice by a proceeding to be called an action."

Then in O. II, R. 1 it is provided that "Every action in the High Court shall be commenced by a writ of summons."

Now turning for a moment to our own Admiralty Rules, R. 3 provides that:—

"A suit shall be commenced by a plaint drawn up, subscribed and verified according to the provisions of the Code of Civil Procedure."

I am reading the rules which were approved by Her late Majesty in Council on January 29, 1894. R. 4:

"If the suit is *in rem*, the Attorney may, on the plaint being filed, on filing a prœcipe and an affidavit, take out a warrant for the arrest of the property proceeded against."

1. (1895) P. 121.

2. (1869-70) L. R. 4 H. L. 414, 418.

There is not a word there as to the necessity of issuing a writ of summons. Then, as I have already pointed out, Rr. 14 and 15 provide for the suit being set down for hearing and also for judgment being given after the expiration of twelve days from the filing of the warrant.

If, however, one turns to Rr. 10, 11 and 12, there undoubtedly one will find a reference not only to a warrant but also to a writ. It is called a writ in R. 10; a summons in R. 11; a writ of summons in R. 12; and a writ or warrant in R. 13.

Particular stress is laid by the caveator on R. 10 which provides that—

"In suits *in rem* no service of writ or warrant shall be required when the attorney of the defendant agrees to accept service and to give security or to pay money into Court."

It is said that is the only case where you can dispense with service of the writ.

Then if I may refer for one moment to the Code of Civil Procedure, if that has any particular bearing on the point, it provides in O. V, R. 1, that—

"When a suit has been duly instituted a summons may be issued to the defendant to appear and answer the claim on a day to be therein specified."

There, it will be seen that the word is "may" and not "must."

Further, under earlier sections of the Code, S. 4 provides that—

"In the absence of any specific provision to the contrary, nothing in this Code shall be deemed to limit or otherwise affect any special or local law now in force or any special jurisdiction."

Then under S. 122 the High Courts have power to vary the rules in the First Schedule. S. 128 enables special rules to to be made on various matters including (sub-rule (*j*)):

"All forms, registers, books, entries and accounts which may be necessary, or desirable for the transaction of the business of Civil Courts."

S. 129 enables the High Courts to make such "rules not inconsistent with the Letters Patent establishing it to regulate its own procedure in the exercise of its original civil jurisdiction as it shall think fit, and nothing herein contained shall affect the validity of any such rules in force at the commencement of this Code."

It seems to me that the Admiralty Jurisdiction that we possess in Bombay is a special jurisdiction. Obviously in inland High Courts in India, such as Allahabad or the Punjab, they have no such jurisdiction. Still less is it possessed by the mofussil Courts in our Presidency. This jurisdiction is conferred on us because Bombay is one of the great sea-ports of India.

When I come to see how our jurisdiction arises, I find myself taken back to the Supreme Court Charter of 1823. I have not had the time to go through all the numerous Acts, but I had a somewhat similar point to consider in another case about the exercise of our equitable jurisdiction, and there I came to the conclusion that I had to decide a certain case in accordance with the equitable jurisdiction still remaining in this Court under the Supreme Court Charter, and that this was the conjoint effect of S. 130 of the Government of India Act, 1915; Ss. 8, 9 and 11 of the Indian High Courts Act, 1861; S. 18 of the Original Letters Patent of 1862; S. 19 of the Amended Letters Patent of 1865; and certain other clauses of the Supreme Court Charter, 1823. This is rather a cumbrous mode of ascertaining jurisdiction, but it appeared in that case to be the effect of legislation by reference extending over nearly a century.

Turning next to the Supreme Court Charter of 1823, one finds from the preamble that in 1753 or earlier the Mayor's Court of Bombay was established; and that in 1797 there was a Recorder's Court which was given full power, amongst other things, "to exercise Admiralty Jurisdiction." Then under the Act of 1823 or 1824 a Supreme Court at Bombay was established with full power to exercise, *inter alia*, Admiralty Jurisdiction, and then comes the Letters Patent under that Charter.

It would rather seem from these Letters Patent that the Home authorities wished to be very careful to point out the proper procedure for this new Court. They set out the general jurisdiction of the Court under Clause 23 of the Charter. I should say that the clauses are not numbered in the original Charter, but I have numbered them beginning from the operative part and leaving out the preamble. Cl. 26 provided that proceedings should be commenced by a "plaint or bill in writing,"... "whereupon the...Court shall...issue a

summons, or precept in nature of a summons, in writing, to be prepared in manner abovementioned, directed to the said Sheriff, and containing a short notice of the cause of action set forth in the said plaint, and commanding the said Sheriff to summon the person against whom the said plaint shall have been filed, to appear, &c."

Then Cl. 31 gave power to the Court to order the Sheriff to arrest parties in suits above Rs. 150. I gather this was forthwith after the plaint, and if so it carries out what Mr. Justice Bruce said in the case I have already cited.

Then Cl. 48 provided: "That the said Supreme Court of Judicature at Bombay shall be a Court of Admiralty, in and for the said Town and Island of Bombay, and the limits thereof" and it gives the Court full power and authority to hear and determine all causes and so on, the cognizance whereof doth belong to the jurisdiction of Admiralty, and to "proceed summarily therein, with all possible despatch, according to the Course of our Admiralty of...England, without the strict formalities of law, considering only the truth of the fact and the equity of the case."

Then under Cl. 49 there was also power "to arrest, or cause or command to be arrested, according to the civil law, and the ancient customs of our High Court of Admiralty...of...England, all ships, persons, things, goods, wares, and merchandises, for the premises, and every of them, and for other causes whatsoever concerning the same wheresoever they shall be met with or found, in or throughout the said districts and jurisdictions aforesaid; and to compel all manner of persons in that behalf, as the case shall require, to appear" &c., and "to compel witnesses,...to give evidence...and to proceed in such cause or causes, according to the civil and maritime laws and customs, as well at the instance of promotion of parties as of office, mere or mixed, as the case may require; and to promulgate and interpose all manner of sentences and decrees, and to put the same in execution, according to the Course and order of the Admiralty, as the same is now used in...England".

We know that in the year 1861 or thereabouts the Supreme Court and the East Indian Company's Courts were amalgamated and became our present High Court. And then began the Indian High Courts Acts and the Charters which I have referred to. They will be found to continue in effect our Admiralty Jurisdiction, and there are clauses, I think, keeping alive our previous jurisdiction under the Supreme Court's Charter at any rate in certain particulars. I may refer in particular to Ss. 106 and 130 of the Government of India Act, 1915, and to Cls. 32 and 33 of the Amended Letters Patent of 1865.

Accordingly, I have been referred to some old Admiralty Rules of this Court of 1867, some of which are very much to the same effect as what we now have, *viz.*, R. 3: "Suit shall be commenced by a plaint": R. 4 about taking out a warrant for the arrest: and then there are provisions in Rr. 12, 13 and 14 for the sale and so on.

Many years later came the Colonial Courts of Admiralty Act, 1890 Our present rules were approved by the Privy Council in 1894.

I think, therefore, that it is quite natural to find that our Courts should maintain the old Admiralty procedure and should not think it necessary to provide that in all Admiralty cases a writ should be issued in addition to a warrant for arrest. There was no reason for making that change here, because, as I have already pointed out, suits even now do not begin here by writ but by plaint. Therefore a warrant for arrest was notice to all the world—and certainly notice to the ship's agents. It is perhaps as good a notice as you can effect, for the agents or owners find the ship seized by the Sheriff. Further the warrant for arrest provides for a citation calling upon all parties interested to appear before the Court and prosecute their claims. So, apart from the one being called a writ and the other being called a warrant, what is actually effected is in every way as good as any writ.

Under these circumstances, I think, that we are not bound by the provisions of the Civil Procedure Code in this case. We are governed merely by our own Rules dealing with our own special Admiralty Jurisdiction. In my judgment it is not essential under our Admiralty Rules to issue a writ of summons, in addition to

issuing a warrant for arrest, Rr. 3, 4, 14 and 15 do not say so. And the explanation of the reference to a writ in Rr. 10 to 14 is, I think, that they have been taken bodily from the present English Rules—O. IX, Rr. 10, 12, 13 and 14—and that the draftsman has been careless in repeating the reference to writs. A similar mistake has been made in R. 127 dealing with Third Party Procedure in ordinary suits, where the English High Court Rules have been copied including a reference to a Statement of Claim which does not exist in Bombay, and on the supposition that an action is commenced by writ which is not the fact here. As regards our Admiralty Rules, the Bombay draftsman has added some new English rules to our old 1867 rules, and has omitted to make the former entirely consistent with the old rules which are the main rules. I do not mean to say that a writ can never be issued in an Admiralty suit. My decision is that it is unnecessary if a warrant of arrest is issued.

I, therefore, hold that the present application in so far as it is based on the decree, being invalid because no writ was actually served, fails.

I should have added that this precise point was not taken before Mr. Justice Crump, but I understand he did consider whether it was necessary to serve the writ upon the owners. It was apparently said that the Captain was the person to enter an appearance on behalf of the ship, and that therefore no writ was necessary as he was plaintiff. It was also said that it was unnecessary to serve the writ on the mortgagees, because they were there and knew all about it. In what I have said, therefore, I am in no way hearing an appeal from Mr. Justice Crump. The precise point that has been put before me to-day was not taken, so far as I understand, and was not present to the mind of the learned Judge, nor was it brought to his attention by the office or any of the parties concerned.

The next point of substance that is raised is this. It is said that even if the decree for sale is good, there has been a material irregularity in carrying out the sale and that I ought to set it aside. One irregularity is this: that the caveator having filed his caveat could only be got rid of by an express order of the Court and that, that not having been done, the Sheriff has been entirely wrong in abandoning possession of the ship.

First of all, I will take the point about the caveator. It is purely technical, and the surprising thing is that the caveator is himself a plaintiff. He is one of the plaintiffs, and the decree in the suit actually awards him a part of the sum claimed. Further the decree was made in his presence, there was no protest against it, he never came before the Judge in Chambers asking that the sale should be conducted in a particular way; and the evidence is that he actually attended the sale. Now he comes forward as a caveator to protest against the decree which he himself got, and to protest against the mode of sale which he has known all along would be carried out in a particular way. Further than that, he is not in a position to pay a single pie into Court. The present position is that the old crew have been paid off, and the new crew are engaged and that the ship at present has got steam up and is ready, so I am told, to steam out of Bombay harbour.

If I was to accede to the present application to order the re-arrest of the ship, I have not at the present moment any idea who would be prepared to pay the necessary costs and charges of maintaining her. I am told that the ship's expenses are about £100 a day at any rate while the crew are on board, and even if she went into Dock, there would be still substantial charges running against her.

The present position is this that the plaintiffs in the suit other than Captain Yanovsky have all been paid off and they have no longer any interest in the present suit. The ship's purchasers say they have bought the ship at a sale by order of the Court, and they are entitled to rely on that sale Then as regards the mortgagees, they have been served with the notice of motion, and though they do not, strictly speaking, appear before me to-day, still their solicitor has informed me as *amicus curiæ* that he is without any instructions, and his position is that without further instructions his clients have now no interest in the matter. The ship has been sold and he is not prepared without any further instructions to put down

any money or take any further proceedings.

The practical result, therefore, is that this applicant is not able to give any security. In an ordinary civil suit on the Original Side a foreign plaintiff would ordinarily be required to give security for costs. The present applicant is liable under r. 28 to pay damages and costs if he delays the release of the ship without good and sufficient reason. But in fact he is not able either to bring any money into Court or really to bring forward anybody who is prepared to do it. How can I, in that state of affairs, take the serious step of setting aside all that has been done and directing the ship to be delayed for, may be, another three or four weeks?

As regards the alleged irregularity, I think the most that can be fairly urged here is this: that the Sheriff has carried out too literally what he is directed to do under the rules. It would not be fair on me to pass adverse comments on his action, first of all, becuase I have not heard him, and, secondly, because he has been acting on the strict wording of the rules, and there is nothing in the decree that has been passed or in any other order the terms of which he has in any way violated, so far as I am aware.

I have already pointed out that under R. 36 he has to carry out the sale just like a sale of moveable property in an ordinary civil suit. There is no provision there for a reserve price: there is no provision for a commission of appraisement, as will be found in English Admiralty Practice (*see* Halsbury's Laws of England, Vol. I, p. 123, para. 268), nor has he thought it advisable to grant any delay in payment of the purchase-money. The conditions at the auction were that any purchaser had to pay down cash at once. But although from a business point of view the result may be regrettable, and although it may afford grounds for consideration by the Rule Authorities as to whether these rules should not be altered in this respect, I cannot say that there is any irregularity of such a character that I ought to set aside this sale.

On the contrary, one knows that under our ordinary provisions (I am referring for a moment to the Code) where moveable property is sold by the Court by public auction, O. XXI, R. 77, says:—

> "On payment of the purchase-money, the officer or other person holding the sale shall grant a receipt for the same, and the sale shall become absolute."

Then R. 78 says:

> "No irregularity in publishing or conducting the sale of moveable property shall vitiate the sale; but any person sustaining any injury by reason of such irregularity at the hands of any other person may institute a suit against him for compensation or (if such other person is the purchaser) for the recovery of the specific property and for compensation in default of such recovery."

It is also clear from the cases set out in Mulla's Civil Procedure Code, 7th Edition, at p. 181, that, speaking generally, the Court does not interfere with a sale under a decree of the Court. For instance, if a sale has been made under an original decree of the Court, it will still hold good and will not be set aside notwithstanding that the decree may subsequently be reversed on appeal.

Mr. Wadia also cited to me out of the English and Colonial Digest a case, *The Tremont* (3) which stated that a decree of the Court affecting the sale of a ship was valid irrespective of an entry in the registry.

It did occur to me whether I ought to set aside this sale under S. 151 of the Civil Procedure Code which enables the Court in the exercise of its inherent jurisdiction to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. I say this because I cannot overlook the fact that in the practice which I am more familiar with, *viz.*, sales of real estate by the Court, the practice is for the Court to fix a reserve price and also to approve the conditions of sale. Further, the sale is not absolute until it has been confirmed by the Court. That is our practice in Bombay as also in the Chancery Division in England.

But I have got to take the Bombay Admiralty Rules as I find them, and R. 36,

3. (1841) 1 W. Rob. 168.

which I have mentioned, is not a new and untried rule. It is in almost exactly similar terms to R. 39 of the old Rules of 1867.

Under the above circumstances I am not prepared to exercise any jurisdiction I may have to set aside this sale on the ground of any irregularity, or on the ground of the sale being at an undervalue. Even if I was disposed to exercise this discretionary jurisdiction, I should only do it if I had some security, if not for the payment of the purchase-money corresponding to what has been paid by the purchaser, at any rate for some substantial amount towards costs and the demurrage of the ship. But, as I have already pointed out, I am absolutely without any financial help from anybody whatever in this Court in that respect, should such an order be made.

Then as regards the point about the caveat and that the Sheriff had no right to abandon possession of the ship without the caveat being discharged, I am of opinion that the caveator is not entitled to raise that point. He was in fact present before the Court: he was actually one of the plaintiffs who obtained this decree: and I do not think it is open to him now to contend that this decree of the Court which purported at any rate to be a decree free from incumbrances was in effect subject to the claim which he has put forward.

In the result, therefore, the motion will be dismissed with costs.

Motion dismissed.

1923 Bombay. 59.

SHAH AND CRUMP, JJ.

Pyaribibi Mard Munzi Mahomed Bahadur and another ...Defts.—Applicant.

v.

Hasanalli Mir Abdulalli Inamdar ... Plffs.—Opponent.

Civ. Application No. 242 of 1922 dated 11th July 1922 against the decision of the Court in F. A. No. 146 of 1920.

Civil P. C., S. 110—*Decree for more than Rs.* 10,000—*Value of the property involved less.*

The High Court reversed the decree of the trial Court and granted a declaration that the deed in question was void, and that the plaintiff was entitled to the possession of the property mentioned in the deed.

Held it is not necessary for the purpose of an application for leave to appeal to His Majesty to inquire into the question as to whether the property actually handed over to deft.-applicant is worth Rs. 10,000 or not, if, whatever the value of that property may be, it is clear that the whole of the property as to which the question arose in the appeal and in respect of which the decree has been passed in High Court is worth more than Rs. 10,000.

J. G. Beeble—for the Applicant.

Mirza (instructed by Mirya and Mangaldas)—for the Opponent.

JUDGMENT:—It is clear that in this case the applicants, the original Defendants 1-B and 2 are entitled to a certificate under S. 110 of the Code of Civil Procedure. This Court reversed the decree of the trial Court and granted a declaration that the deed in question was void, and that the plaintiff was entitled to possession, of the property mentioned in the deed. The only requirement that is to be satisfied by the Applicants is either that the subject-matter of the suit in the Court of first instance is over Rs. 10,000, in value and the amount of the subject-matter in dispute on appeal to His Majesty in Council is over Rs. 10,000, or that the decree or final order involves, directly or indirectly, some claim or question to or respecting property of like amount or value. It is clear in this case that the document in question which was passed for a consideration of Rs. 35,000 relates to property worth Rs. 35,000; and whatever the value of property actually handed over to the Defendants may be, it is clear that the decree of this Court which is sought to be appealed from involves questions respecting property of the value of Rs. 10,000 or upwards.

It is urged on behalf of the plaintiff that in determining the question, we must have regard only to the value of that property of which possession had been transferred to the Defendant and it is said that that is not worth Rs. 10,000. It is not necessary for the purpose of this

application to inquire into the question as to whether that property is worth Rs. 10,000 or not; because whatever the value of that property may be, it is clear that the whole of the property as to which the question arose in the appeal and in respect of which the decree has been passed in this Court is worth more than Rs. 10,000. We, therefore, make the rule absolute and direct a certificate to issue that the case satisfies the requirements of S. 110. Costs to be costs in the appeal.

1923 Bombay. 60.

SHAH, AG. C. J. AND CRUMP, J.

Rasul Musa Mafat ... Appellant.

v.

Asman Musa Dadi ... Respondent.

Civil Extraordinary Application No. 202 of 1921, dated 22nd September 1922 from the Order of the Collector of Panch Mahals.

Bombay Mamlatdars' Courts Act (Bom. Act II of 1906) *S.* 5—*Possessory suit—Procedure.*

A suit which was brought under the Act was dismissed by the Mamlatdar on the ground that the matter could be more suitably dealt with by a Civil Court. The Collector in revision directed the Mamlatdar "to proceed" with the case from the point at which he left off, to give his decision and "return the case for the necessary action." When the case went back to the Mamlatdar, he recorded some evidence, and returned all the papers to the Collector for him to pass orders. Long departmental correspondence between the offices of Collector and Mamlatdar then ensued and the Collector heard the parties and declined to interfere with the order passed by the Mamlatdar.

Held, that the procedure followed was irregular, for when the Collector sent back the case to the Mamlatdar for his decision the only proper course for the Mamlatdar to follow was to try the suit under the Act and to give a decision.

M. H. Mehta—for the Appellant.

R. J. Thakor—for the Respondent.

SHAH, AG. C. J:—This is an application under our extraordinary jurisdiction to revise the order made by the Collector on June 2, 1921. It is necessary to state the facts briefly which have led to the present application. A suit was filed in the Court of the Mamlatdar at Godhra under the Mamlatdars' Courts Act II of 1906. In that suit the Mamlatdar made an order on September 4, 1920, refusing to exercise the power vested in him under the Mamlatdars' Courts Act. The Mamlatdar held that the matter could be more suitably dealt with by a Civil Court. It was open to him to make that order under the proviso to S. 5. The plaintiff preferred an application to the Collector for the revision of that order, and the Collector made an order on October 6 (September in the original order seems to be a mistake for October), 1920 in these terms:—"I think the Mamlatdar should proceed with the case from the point at which he left off to give his decision, and return the case for necessary action."

This order is not clear in its terms, but as I understand it, it means that he ordered the Mamlatdar to proceed with the suit, and that the case papers were to be returned to him (the Mamlatdar) for necessary action. The Mamlatdar recorded some evidence, but the procedure that was adopted thereafter seems to me to have really no justification for it under the Mamlatdars' Courts Act. The Mamlatdar resubmitted the depositions of the witnesses recorded by him, and he wrote back to the Collector as follows:—"I have not recorded my decision as the orders of the Collector are not clear on the point. If the Collector decides to pass orders on the case himself, the pleaders may be given an opportunity to argue out evidence." Thereafter the matter seems to have been dealt with as a departmental matter between the Collector's office and the Mamlatdar's office; and with the details of this departmental inquiry we are in no way concerned. But after adopting that extraordinary procedure, on June 2, 1921, the following order was made by the Collector: "After hearing the parties and on perusal of the papers received from the Mamlatdar, Godhra, the Collector sees no reason to interfere with the orders passed by the Mamlatdar." The orders passed by the Mamlatdar referred to there, so far as we are concerned, can only be the order passed by him in September 1920.

The present application is made by the plaintiff for setting aside this order of the Collector and for proper directions. It is a matter of some difficulty to determine

under the circumstances as to what we should do now. It is quite clear to my mind that after the Collector made the order on October 6, 1920, sending back the case to the Mamlatdar for his decision the only proper course for the Mamlatdar to follow was to try the suit under the Mamlatdars' Courts Act, and to give his decision. That has not been done until now; and we have got the order of the Collector saying that he sees no reason to interfere with the Mamlatdar's order. That order in effect conflicts with the first order made by the Collector on October 6, 1920, and whether the parties were heard before the order of June 2, 1921, was made as stated in the order, or whether they were not heard as alleged in the petition, it makes no difference to my mind in the result. The Collector had power to revise the order of the Mamlatdar under S. 23 of the Act. He had made his order on October 6, 1920. The only thing that could have been done thereafter according to law, and should have been done, is that the Mamlatdar should have tried the case and given his judgment. That not having been done, we think that we must now direct the Mamlatdar to do that which after the first order of the Collector he was bound to do. All that has been done after that departmentally between the Mamlatdar and the Collector must be simply ignored. It is not in accordance with any procedure provided under the Mamlatdars' Courts Act, and in my opinion the disposal of this simple matter should not have been delayed in this manner either in the Mamlatdar's office or before the Collector. It is unfortunate that at this distance of time in a suit under the Mamlatdars' Courts Act, we have to direct that the suit of 1920 should be tried. But that is the proper thing under the circumstances to do in order to bring the present proceedings to a termination in accordance with law.

We, therefore, make the Rule absolute and direct the Mamlatdar to proceed with the suit and to decide it in accordance with the provisions of the Mamlatdars' Courts Act. Having regard to what has happened, we think that the suit should be tried *de novo*, unless the parties agree to accept any evidence already recorded before him as evidence in the suit. We think that each party should bear its own costs of this application. Other costs to be costs in the suit.

CRUMP, J.:—In this case the original order made by the Mamlatdar on September 4, 1920, was a legal order under the proviso to S. 5 of the Mamlatdars' Courts Act II of 1906, and the Collector in exercise of the powers conferred upon him under S. 23, Cl. (2) was entitled to call for the papers, and if he found the order to be illegal or improper, he could make such order as he thought fit not inconsistent with the Act.

The whole difficulty in this case apparently arose from the manner in which the Collector's order under that section dated September 6, 1920, is expressed. He clearly came to the conclusion that the Mamlatdar's order was not a proper order, and he, therefore, directed the Mamlatdar to proceed with the case and to pass a decision. But unfortunately the last sentence of his order was expressed in such a manner that the meaning is far from clear, and I must say, speaking for myself, that I do not exactly understand what was intended. I am, therefore, not surprised that the Mamlatdar resubmitted the papers after taking certain evidence with a view to getting further directions. At that point, all that the Collector had to do was to tell the Mamlatdar what he meant and the only legal order that he could make was that the Mamlatdar should pass a fresh decision in the case, and that I take it is what he intended when he made his order of September 6.

From that point the case wandered by most extraordinary paths for which I find no warrant in the Act or any general rule of a judicial procedure. A kind of miscellaneous correspondence ensued which only served to delay this comparatively simple matter, and finally, on June 2, 1921, the Collector passed a further order, stating that he saw no reason to interfere with the order passed by the Mamlatdar. But that order is clearly one which the Act does not contemplate, for when the order of September 6, 1920, had been made by the Collector he was *pro tanto functus officio* and nothing remained to be done, except a fresh decision to be passed by the Mamlatdar after recording the evidence offered by the parties.

I must, therefore, agree that we must restore the case to the position which it ought legally to have occupied after the Collector's first order was made. I, therefore, concur in the order proposed.

1923 Bombay. 62.

MACLEOD, C. J. AND COYAJEE, J.

Nagabhatta Timmanbhatta... Boppanhalli. Appellant.

v.

Nagappa Subbaya Havik ... Respondent.

S. A. No. 538 of 1921 dated 31st January 1922 from the decision of D. J., Kanara in App. No. 116 of 1919.

(a) *Execution-sale — Setting aside—Property outside the suit included by mistake in decree—Sale of such property—Suit to recover value of such property—Dekkhan Agriculturists' Relief Act (XVII of* 1879) *S.* 15-*B.*

The plaintiff owning eight properties, mortgaged seven of them to the predecessors-in-title of defendant No. 1 in 1893 and all the eight properties in 1897 to deft. No. 2. In a suit to redeem the mortgage of 1897 the plaintiff was ordered to pay to the mortgagee of 1893 his mortgage-money by instalments and if he would fail to pay, the mortgagee of 1893 was at liberty to bring the mortgaged property to sale. The plaintiff having failed to pay, the eighth property was sold at a Court-sale along with the mortgaged property to defendant No. 2 in 1916. The plaintiff having sued in 1918 to recover possession of the property from defendant No. 2.

Held, (1) that the suit being one to recover from defendant No. 2 what he had purchased at the Court-sale, the suit could not lie until the Court-sale was set aside unless it could be considered as a nullity; (2) that the plaintiff having been aware that the Court had sold the property which was not contained in the mortgage, had thirty days from the date of the sale to apply to have the sale set aside; (3) that, though Art. 96 of the Limitation Act might apply to the suit as originally framed, it could not apply to the suit as it ought to have been framed in view of the fact that the Court-sale had to be set aside and could not be considered as a nullity; (4) that the suit was barred under Art. 12 of the Limitation Act.

(P. 63, Cols. 1 & 2.)

(b) *Limitation Act, Arts.* 12 *and* 96—*Wrong property sold at a Court-sale—Mistake of plaintiff.*

Where plaintiff allows by mistake one of his properties to be sold at a Court-auction along with other properties of his, a suit to recover such property from the purchaser does not lie. The article applicable is 12 and not 96.

(P. 63, Col. 2.)

R. A. Jahagirdar—for the Appellant.

Nilkant Atmaram—for the Respondent No. 1.

G. P. Murdeshwar—for the Respondent No. 2.

MACLEOD, C. J. :—The plaintiff sued to recover from the second defendant the price of the materials of the house mentioned in the plaint, and also to recover possession of the house site and *Hittal* etc., appertaining thereto, the said properties having been purchased by defendant No. 2 at a Court-sale held at the instance of defendant No. 1 in Darkhast No. 295 of 1914. The suit was decreed in the trial Court, but was dismissed in appeal. The facts, as set out by the learned District Judge, show that one Ramayya, the husband of the plaintiff, owned eight properties. He mortgaged seven of them to one Venkata Bhatta, and four years later he mortgaged all the eight properties to one Tammanna Bhatta. In 1910, the plaintiff filed a suit to redeem this latter mortgage, and in her plaint she recited the fact of the former mortgage, but by mistake in describing the property mortgaged to Venkata Bhatta, she included the eighth property, which was only subject to the second mortgage. In the redemption suit a decree was passed that the plaintiff should pay to Rudrappa, the transferee from Venkata Bhatta, who had been made a party, the amount due under the first mortgage and costs by annual instalments, with liberty to bring the mortgaged property to sale in default. In the decree was included the eighth property, which as a matter of fact was not mortgaged originally to Venkata Bhatta. As the plaintiff did not pay her instalments, the first defendant (her husband Rudrappa having died) took out execution and brought all the properties to sale. At the Court-sale the second defendant was the purchaser.

This is not a suit to set aside that sale, but a suit to recover from the purchaser what he had purchased at the Court-sale, and it is difficult to see how such a suit could lie until the Court-sale is set aside, unless it could be considered as a nullity. Now it was entirely the fault of the plaintiff that she allowed the decree to be passed, because she must have been aware that the eighth property was entered in the decree for redemption which she obtained with

regard to the first mortgage, and she has allowed the Court to sell the eighth property in execution of that decree. So that on the question of mistake, it is perfectly clear that the plaintiff was alone responsible for the eighth property having been sold. It is difficult then to see how she could say that the sale was a nullity. If necessary it would have to be held that the plaintiff was not even entitled to take such a plea.

What is the proper view in such a case, when objections are raised to a Court-sale, was clearly laid down in *Malkarjun* v. *Narhari* (1). In that case the Court issued a notice to the wrong party, and not to the party against whom execution was applied for. It was then argued that the Court had no jurisdiction to sell the property, but the Privy Council at page 347 held that—

"Although the Court made a mistake, a Court has jurisdiction to decide wrong as well as right. If it decides wrong, the wronged party can only take the course prescribed by law for setting matters right; and if that course is not taken the decision, however wrong, cannot be disturbed. The real complaint here is that the execution Court construed the Code erroneously. Acting in its duty to make the estate of Nagappa available for payment of his debt, it served with notice a person who did not legally represent the estate, and on objection decided that he did represent it. But to treat such an error as destroying the jurisdiction of the Court is calculated to introduce great confusion into the administration of the law. Their Lordships agree with the view of the learned Chief Justice that a purchaser cannot possibly judge of such matters, even if he knows the fact; and that if he is to be held bound to inquire into the accuracy of the Court's conduct of its own business no purchaser at a Court-sale would be safe. Strangers to a suit are justified in believing that the Court has done that which by the directions of the Code it ought to do."

Then at p. 352 their Lordships say:

"The Limitation Act protects *bona fide* purchasers at judicial sales by providing a short limit of time within which suits may be brought to set them aside. If the protection is to be confined to suits which seek no other relief than a declaration that the sale ought to be set aside, and is to vanish directly some other relief consequential on the annulment of the sale is sought, the protection is exceedingly small."

Obviously then the plaintiff being perfectly well aware of the facts, being aware that the Court had sold the property which was not contained in Venkata Bhatta's mortgage, had thirty days from the date of the sale to apply to have the sale set aside.

There is no question of fraud in this case, and therefore, Art. 95 of the Indian Limitation Act cannot possibly apply. It has been argued that the case comes under Art. 96 on the ground that the plaintiff is seeking for relief on the ground of mistake. But although that Article might apply to the plaintiff's suit as originally framed it cannot apply to this suit as it ought to have been framed seeing that the Court-sale has to be set aside, and cannot be considered as a nullity. Therefore the case is governed by Art. 12 of the First Schedule of the Indian Limitation Act. The appeal, therefore, must be dismissed with costs.

Appeal dismissed.

1923 Bombay. 63.

SHAH, AG. C. J. AND CRUMP, J.

Bhau Daji Khade ... (Plff.) Appellant.

v.

Patlu Malu Sable ... (Deft.) Respondent.

S. A. No. 673 of 1921 dated 25th August 1922, from the decision of Asst. J. of Satara, in Appeal No. 184 of 1920.

Civil P. C., O. 2, R. II—Omission of claim—Suit for redemption.

Plaintiff sued to recover possession of one Survey Number, which along with two other Survey Numbers was mortgaged in 1869, to the defendants' ancestor. In 1911 the present plaintiff as a purchaser of the equity of redemption sued to redeem the mortgage of 1869. He mentioned only two Survey Numbers in that suit omitting the Survey Number now in suit. In that suit a compromise decree was passed as a result of which on payment of a sum of Rs. 75, he was to recover possession of the two Survey Numbers mentioned in that suit. He recovered possession of these two lands after paying the amount.

He has now filed the present suit to recover possession of the remaining land alleging that the defendants were in wrongful possession of the Survey Number.

Held, that in view of the provisions of O. II, R. 2, he cannot be allowed to sue to recover possession of the land, in respect of which he

1. (1900) 25 Bom. 337=27 I. A. 216=2 Bom. L. R. 927=5 C. W. N. 10=10 M. L. J. 368=7 Sar. 789 (P. C.).

must be deemed to have relinquished his claim by omitting to sue in respect of it, it not being suggested that the plaintiff was not aware of this land forming part of the mortgaged lands, nor it being suggested that the omission was due to any inadvertence or mistake on his part.

(P. 64, Col. 2.)

P. B. Shingne—for the Appellant.

T. N. Walavalkar—for the Respondent.

SHAH, AG. C. J.:—In this case the plaintiff sues to recover possession of one Survey Number, which along with two other Survey Numbers was mortgaged in 1869 to the defendants' ancestor. In 1911 the present plaintiff as a purchaser of the equity of redemption sued to redeem the mortgage of 1869. He mentioned only two Survey Numbers in that suit omitting the Survey Number now in suit. In that suit a compromise decree was passed as a result of which on payment of a sum of Rs. 75, he was to recover possession of the two Survey Numbers mentioned in that suit. He recovered possession of these two lands after paying the amount.

He has now filed the present suit on July 10, 1919, to recover possession of the remaining land alleging that the defendants were in wrongful possession of that Survey Number. Several issues were raised in the trial Court, but on the facts as stated above the trial Court dismissed the suit, holding that the land in suit had not been redeemed, and that the defendant's possession, therefore, was not wrongful.

The learned Assistant Judge in appeal confirmed the decree of the trial Court on the ground that the land now in the suit not having been included in the previous suit the plaintiff's claim could not be allowed.

In the appeal before us, it is urged by Mr. Shingne that after the mortgage amount fixed under the consent decree was paid by his client, the possession of this property by the defendants became wrongful, as the mortgage was satisfied. He is, therefore, entitled, to recover possession of the property. It seems to us that the contention is unsound. In the first place, it is difficult to say that when the sum fixed under the decree was paid, the whole mortgage was satisfied. It is quite possible that the parties might have fixed the amount at a lower figure in view of the fact that the plaintiff had omitted to sue in respect of the land now in suit. It is difficult to hold that the possession of this Survey Number which was rightful under the mortgage became wrongful when the decretal amount was paid.

Apart from that, however, it seems to us that it was incumbent upon the plaintiff to sue in respect of all the lands comprised in the mortgage, if he wanted to recover possession of all the lands. His omission to include the land in suit in the redemption suit seems to be fatal to his present claim for the possession of that land. In view of the provisions of O. II, R. 2, he cannot be allowed to sue to recover possession of the land, in respect of which he must be deemed to have relinquished his claim by omitting to sue in respect of it. It is not suggested before us that the plaintiff was not aware of this land forming part of the mortgaged lands, nor is it suggested that the omission was due to any inadvertence or mistake on his part. He may have a remedy by applying to the Court which passed that decree to include that Survey Number in the decree. Whether that remedy is open to him under the circumstances of this case or not is a matter upon which we express no opinion. It is clear that his present claim for possession cannot be allowed according to law. We, therefore, dismiss the appeal with costs.

Appeal dismissed.

1923 BOMBAY. 65

Emperor v.

Haji Sher Mahomed and others–

Fifth Criminal Sessions of 1921: Case No. 4 of 19.1.

Evidence Act S. 25—Scope.

A statement of a self exculpatory kind, which, if true is in favour of the accused, is admissible, in spite of the fact that, if it is shown to be false, it raises an inference of guilt; and a distinction must be made between such statements and statements, which, although intended to be made in self-exculpation and not as a confession, nevertheless contain an admission of incriminating circumstances, on which the prosecution relies.

It is for the Court to decide, according to the particular circumstances of each case, whether a statement of an accused amounts to a confession or not.

Fawcett, J.—During police inquiries into the present case the accused No. 16, Mahomed Ubhayya, was questioned by an Inspector of Police, Mr. Latham, regarding a bundle of ammunition which he produced. He is said thereupon to have made a statement that it had been given to him by Mahomed Jaffer and Mahomed Karim and it is sought to put in evidence this statement to the Police Inspector. The question is whether it is not excluded as being a confession made to a Police Officer under section 25 of the Evidence Act. Mahomed Jaffer is accused No 11, and Mahomed Karim was accused No. 10, but has since been made an approver. Mahomed Karim has given evidence that this particular ammunition belonged to the gang of dacoits, of which he and accused Nos. 11 and 16, with others, were members.

Mr. Velinkar for the Public Prosecutor argues that this statement does not amount to an admission of an incriminating circumstance so as to constitute a confession within the meaning of section 25, and he relies upon the case of *Emperor* v. *Mahomed Ibrahim* (1), where a statement made by an accused to a Police Officer that a box, which he was found carrying away at night, belonged to him, was held to be admissible, inasmuch as it did not amount directly or indirectly to an admission of a criminating circumstance There is of course no doubt that a statement of a self-exculpatory kind, which, if true, is in favour of the accused, is admissible, in spite of the fact that, if it is shown to be false, it raises an inference of guilt; and a distinction must be made between such statements and statements which although intended to be made in self-exculpation and not as a confession, nevertheless contain an admission of an incriminating circumstance, on which the prosecution relies. Instances of the latter class of statements are to be found in *Imperatrix* v. *Pandharinath* (2) and *Queen-Empress* v. *Javecharam* (3) The leading cases on the subject are collected in the judgment of Carnduff J. in *Barindra Kumar Ghose* v. *Emperor* (4) and I agree with his conclusion that it is for the Court to decide, according to the particular circumstances of each case, whether a statement of an accused amounts to a confession or not. In this particular case the statement of accused No. 16 that Mahomed Jaffer and Mahomed Karim had given him the ammunition is clearly of an incriminating kind, inasmuch as both Mahomed Jaffer and Mahomed Karim are alleged by the prosecution to have been members of the same gang of dacoits as the one to which the accused No. 16 is charged with having belonged. The mere fact that the accused in making this statement may have intended it to be self-exculpatory is insufficient. The real test is what is its effect: and having regard to the circumstances I have mentioned, there can, I think be no doubt that it is a statement which can properly and would presumably be relied upon by the prosecution as a true statement and an admission that he was associated with members of the alleged gang of dacoits.

The case is in some respects similar to that of *Queen-Empress* v. *Javecharam* (3) where a statement of one accused that he had received certain property, which was alleged to have been stolen, from his co-accused was held to be inadmissible as being an admission of a criminating circumstance, on which the prosecution evidently relied.

Following this and similar rulings I hold that the statement in question is inadmissible under section 25 of the Evidence Act.

(1) (1903) 5 Bom. L. R. 512.

(2) (1881) 6 Bom. 34.

(3) (1894) 19 Bom. 363.

(4) (1909) 37 Cal. 467–14 C. W. N. 1114–11 Cr. L. J. 453–7 I. C. 359.

1923 BOMBAY 66

SHAH, Ag. C. J. and CRUMP, J.

Jivraj Laloobhai Patel —Plaintiff

v.

Bhagvandas Gordhandas—Defendant.

O. C. J. App No. 32 of 1922 D. 11th August 1922.

Civil P. C. O- 21 R. 50 (2) (4)—Construction of — Liability of deceased partner's estate.

Sub-rule 4 is intended to make clear the implication of sub-rule (1). It does not in any sense affect a partner who has not been served with a summons to appear and answer so far as his other property is concerned. The wording of the sub-rule (2) is wide enough to cover the case of a deceased partner, and leave can be given under sub-rule (2) as against the legal representatives of a deceased partner. [P. 67 C. 1,2]

Desai — for the Appellant.

Coltman — for the Respondent.

Shah Ag. C. J.—This appeal arises out of execution proceedings. An *ex-parte* decree was passed on February 24, 1921, against the firm of Raghunathdas Mulji. The only partner of the firm that was served was Vachharaj. A summons was taken out by the assignees of the original decree-holder Keshavji Ramji against the executors of Raghunathdas Premji for leave to execute the decree against his estate on the ground that the deceased Raghunathdas Premji was a partner in the firm of Raghunathdas Mulji. Raghunathdas died on April 23, 1919, leaving a will dated February 7, 1919. The present appellant obtained probate on October 24, 1921. It appears that no notice of the suit was given to partners other than Vachharaj.

It was contended before the learned Judge who heard the summons that the original decree-holder Keshavji had knowledge of the death of Raghunathdas Premji, at the date of the suit, the suit having been filed in August 1919, and further that even if he had no such knowledge, under the provisions of rule 50 of Order XXI the transferees of the original decree-holder could not execute the decree against that part of the estate of Raghunathdas Premji which did not form part of the partnership assets. The executor did not dispute that Raghunathdas Premji was one of the partners. The learned Judge found that the original decree-holder had no knowledge of the death of Raghunathdas Premji prior to the filing of the suit. He further held against the present appellant on the construction of rule 50 and accordingly granted leave for the execution of the decree against the estate of Raghunathdas Premji.

The first point argued in support of the appeal relates to the question of fact as to whether Keshavji had knowledge of the death of Raghunathdas Premji before the filing of the suit. This question of fact is important in view of the provisions of Order 30 rule 3, as under the proviso to that rule it is clear that if the original plaintiff had knowledge of the dissolution of the partnership before the institution of the suit, the summons should have been served upon each of the partners. We have to decide this question on affidavits. The material affidavits have been read to us. On the one hand we have the affidavits of Shamji Gillabhai and Jagjivandas Oodhavji of March 9, 1922. On the other hand we have the affidavit of Keshavji, the original plaintiff, dated March 11 1922. It appears that Raghunathdas Premji died at Sihor, a place in the Bhavnagar State in Kathiawar. It is quite possible, however, that as Raghunathdas Premji had his business in the market where the parties were carrying on business, the fact of his death would be known. But the case put forward by Keshavji is that he did not know at the date of the suit that Raghunathdas Premji was a partner in the firm of Raghunathdas Mulji. That is a question upon which there is a conflict of statements in the affidavits, and in that state of the evidence, it is quite impossible to say that the view taken by the lower Court is wrong. It seems to me inconceivable that if Keshavji knew that Raghunathdas Premji, who apparently was a well-to-do merchant, was a partner and that he was dead, he would not take care to serve the summons on his legal representative. The present appeal must, therefore, be decided on

the footing that the original plaintiff had no knowledge of the dissolution of the partnership, which was essential to invite the application of the proviso to rule 3 of Order XXX.

Two questions have been raised relating to the construction of rule 50 of Order 21. First it is urged that sub-rule (4) of Rule 50 ought to be so read as to give practical immunity to any partner unless he has been served with a summons to appear and answer. Sub-rule (4) is really intended to make clear the implication of sub-rule (1). It does not in any sense affect the provisions of sub-rule (2) of that rule. The meaning of sub-rule (4) is that a decree against a firm as such will not affect a partner who has not been served with a summons to appear and answer so far as his other property is concerned. If the contention of the appellant were accepted, it would have the effect of abrogating the provisions of sub-rule (2). I see no justification whatever for such a construction. This point, however, was not seriously pressed after this aspect of the question was realised by the learned counsel for the appellant in the course of the argument.

But it has been argued by Mr. Desai that sub-rule (2) applies only to the case of a living partner, and that the provisions of that sub-rule could have no application when the partner is dead. I am, however, unable to accept this contention. It really means that in a case where the decree is passed against a firm, the estate of a deceased partner other than the partnership assets would practically remain entirely exempt from the liability to satisfy the decretal debt unless, of course, the partner has been served with a summons of the suit. That is a position which does not appear to me to be just nor does it appear to have been contemplated by sub-rule (2). I am slow to accept the construction suggested on behalf of the appellant which involves such a result. Further I do not think that on the wording of sub-rule (2) that construction is proper. That sub-rule provides that where the decree-holder claims to be entitled to cause the decree to be executed against any person other than such a person as is referred to in sub-rule (1), clauses (*b*) and (*c*), as being a partner in the firm, he may apply to the Court which passed the decree for leave to execute it. It seems to me that the wording of the rule is wide enough to cover the case of a deceased partner, and leave could be given as against the legal representatives of a deceased partner. The result therefore is that the appeal is dismissed with costs.

CRUMP J.—I concur.

Appeal dismissed.

1923 BOMBAY. 67

MACLEOD, C. J. AND SHAH, J.

Nilkanth Devrao Nadkarni and others—Plaintiffs-Appellants.

v.

Ramkrishna Vithal Bhat—Defendant-Respondent.

S. A. No. 269 of 1920, D. 7th June 1921, from a decision of the D. J., Kanara, in appeal No, 146 of 1918.

Civil P. C. S. 92-Scope

Section 92, restricts the powers of an individual to bring a suit of a particular nature without observing certain formalities, and therefore, when a point is taken that a particular suit is of a nature coming within the provisions of that section, before the Court can bar the suit for want of necessary sanction, the Court must be satisfied that the suit comes within the actual corners of the section. That section provides very distinctly that only in two cases does the section apply; either there must be an alleged breach of any express or constructive trust created for public purposes of a charitable or religious nature: or the direction of the Court must be deemed necessary for the administration of any such trust. Unless a suit falls clearly within the scope of S. 92 the mere fact that it resembles in certain respects a suit which may properly be brought under 92, can afford no good ground for holding that S. 92 should apply. [P 68 C 1,2]

S. V. Palekar—for the Appellants.

G. P. Murdeshwar—for the Respondent No. 2.

Macleod, C. J.—The plaintiffs sued for an injunction against defendants Nos. 1—4 restraining them from interfering with the plaintiffs in the management of the affairs of the temple of Shri Shanta Durga of Ankola and for a declaration that defendants Nos. 1—4 were not the properly appointed trustees of the said temple. The first issue was whether the Court had jurisdiction to try the suit or whe-

ther it should lie in the District Court. The learned Judge said: 'It is argued by Mr. Joshi that the suit is barred by section 92 of the Civil Procedure Code and also by section 14 of the Religious Endowments Act XX of 1863." It is not now suggested that the latter section applies. The learned Judge proceeds: "The relief claimed in this suit is that the appointment of defendants Nos. 1—4 as plaintiffs' co-trustees is invalid. Such a suit does not fall under section 92 of the Civil Procedure Code. That section applies where breach of trust is alleged or where the direction of the Court is deemed necessary for the administration of a charitable or religious trust of a public nature." He, therefore, proceeded to hear the suit and decided that the appointment of defendants Nos. 1—4 was not valid, and that they were not entitled, therefore, to take part in managing the affairs of the temple in question.

In first appeal the same question was argued, whether the suit was barred by section 92 as the plaintiffs had not sought or obtained permission to bring the suit. The learned Judge disagreed with the opinion of the Judge in the Court below, thinking that the allegations made in the plaint were allegations of a breach of trust and that there was no question that the suit was a suit for the removal of trustees. The learned Judge said: "It is no doubt true that in form the suit is not a suit for the removal of a trustee. It is a suit for a declaration that defendants Nos. 1—4 have not been duly appointed as trustees. But this is a distinction without a difference. Section 92 is a section which ought I think, to be liberally construed in favour of the subject." It seems to me that in bringing this suit by way of analogy within the provisions of section 92 he was construing the section liberally against the subject. However that may be, I am distinctly of opinion that the suit as framed does not lie within the provisions of section 92 of the Civil Procedure Code. That section restricts the powers of an individual to bring a suit of a particular nature without observing certain formalities, and, therefore, when a point is taken that a particular suit is of a nature coming within the provisions of that section, before the Court can bar the suit for want of necessary sanction, the Court must be satisfied that the suit comes within the actual four corners of the section. That section provides very distinctly that only in two cases does the section apply: either there must be an alleged breach of any express or constructive trust created for public purposes of a charitable or religious nature: or the direction of the Court must be deemed necessary for the administration of any such trust. In either of these two cases when a suit is brought sanction must be obtained, and the section goes on to specify what reliefs may be obtained from the Court in suits filed under the section.

Now it seems to me that it is not necessary to direct one's attention wholly to the reliefs which, the section says may be granted in particular suits, governed by the section, in order to decide whether or not the suit comes within the section. We have to look, in the first instance, to the principal portion of the section which lays down in what cases sanction is necessary. I agree with the opinion expressed by the learned Subordinate Judge that the plaintiffs here do not sue on account of any breach of trust as is contemplated by the provisions of that section, nor do they apply for any direction of the Court for the administration of the trust. Once that is conceded, then it appears that the Court had jurisdiction and no sanction was required. But, as far as I can see, we are asked to extend the provisions of the section to suits which do not come within the strict words of the section, but are suits of a cognate nature, because the relief asked in this suit may by the twisting of language be considered to be a relief something in the nature of one of the reliefs mentioned in section 92 which the Court can grant in suits brought under that section.

I quite admit that some foundation for this argument is provided by the decision in *Subramania Pillai* v. *Krishnaswami Somayajiar* (1). There the

(1) (1919) 42 Mad. 668;-26 M. L. T. 143-(1919) M. W. N. 522-53 I. C. 605.

suit was one of a very similar nature to this suit. Two out of three trustees of a temple instituted a suit in a Subordinte Judge's Court, for a declaration that the appointment by the Devasthanam Committee of one of the defendants as a trustee in the place of a deceased trustee was invalid, and for an injunction to restrain him from interfering with the affairs and the property of the temple. Mr.Justice Abdur Rahim was of opinion that it was a case which might properly be described as one in which the direction of the Court was necessary for the administration of a public trust within the meaning of section 92. It seems to have been argued that the suit was one for the removal of a trustee. The learned Judge felt doubtful whether the prayer in the plaint came within the words "removing any trustee." But he was of opinion that the subject of the suit was to have it declared that the eighth trustee was not a trustee properly appointed and also to prevent him from acting in the capacity of a trustee. Therefore, that was a relief cognate to removal of a trustee. Mr. Justice Spencer said: "In effect, this is a suit for the removal of a trustee from the office. No doubt the relief asked for in the plaint is for a declaration that the appointment of eighth defendant was invalid and for a permanent injunction restraining him from interfering with the affairs of the temple. But it cannot be denied that the eighth defendant has been appointed a trustee by a statutory body competent to make the appointment and, therefore, he is a trustee,until he is removed from his office by a competent authority." He further says: "The language of section 92, sub-section (2), Civil Procedure Code, is very clear. It declares that no suit claiming any of the reliefs specified in sub-section (1) shall be instituted in respect of any such trust as is referred to in the section except in conformity with the provisions of sub-section (1). One of the reliefs is that of removing a trustee."

I think the section must be read as a whole. It must appear from the plaint that the suit is based either on a breach of trust alleged or on the necessity of the direction of the Court being given with regard to the administration of the trust before the provisions of the section can apply. With all due respect, therefore, to the learned Judges in the case to which I have just referred, I do not think that this suit comes directly within the provisions of section 92 and I do not think that merely because the suit concerned the question of the validity of the appointment of defendants Nos. 1—4 as trustees of the temple and because it might on that account be considered that the suit is somewhat akin to suits which come within the provisions of section 92, that, therefore, we are entitled to hold that the suit, in the language of the English lawyers, is a suit that comes within the equity of the Statute, and, therefore, sanction would be necessary before the suit could be instituted. I think, therefore, that the decree of the lower appellate Court must be set aside and the appeal must be remanded to that Court to be dealt with on its merits. Costs, costs in the appeal.

SHAH, J.—I agree that the present suit falls outside the scope of section 92 of the Civil Procedure Code. In form and substance the suit is for a declaration that the defendants Nos. 1—4 are not properly appointed trustees of the temple in question, and for an injunction appropriate to that declaration. There is no allegation of any breach of trust in the case, nor is there any direction sought for the administration of the trust in question. I do not think that the mere fact that defendants Nos. 1—4 claim to be validly appointed Muktears could make any difference in the nature of the suit, nor could it be said on that account that the relief claimed by the plaintiffs is in the nature of a direction for the administration of the trust in question.

It is also difficult to accept the view that the suit is for the removal of the defendants as trustees within the meaning of clause (*a*) of sub-section (1) of that section. According to the plaintiffs, the defendants, who claim to be validly appointed trustees, are in the position of strangers; and it seems to me that it would not be reasonable to treat such a suit as a suit filed for the removal of a trustee

whose position as such is an accepted fact. That is in dispute in the present case, and, according to the plaintiffs, defendants Nos. 1—4 are not in the position of trustees at all. The case of *Subramania Pillai* v. *Krishnaswami Somayawar* (1), relied upon on behalf of the respondents, no doubt supports the view taken by the lower appellate Court that the suit is within the scope of section 92, Civil Procedure Code. But generally for the reasons given by my Lord the Chief Justice I am unable to gree with the view taken in that case. Unless the suit falls clearly within the scope of section 92, I do not think that the mere fact that it resembles in certain respects a suit which may properly be brought under section 92, can afford any good ground for holding that section 92 should apply to a suit like the present. I feel quite clear that a suit of this nature is not within the scope of section 92 of the Civil Procedure Code.

The *ratio decidendi* in *Miya Vali Ulla* v. *Sayed Bava Saheb Santi Miya* (2), which was a case decided with reference to section 539 of the Code of 1882, appears to me to lend support to the view which we take of the scope of the corresponding section of the present Code.

Case Remanded.

(2) [1898] 22 Bom. 496.

1923 BOMBAY. 70

MACLEOD C. J. AND SHAH J.

Darashan Bomanji Dubash—

v.

Lipton & Co. Ltd.—

S. C. C. R. No. 2055 of 1921 D. 27th March 1922.

Bombay Civil Municipal Act Ss. 147 & 146.—Scope.

Plaintiff let to defendant a certain property at a certain monthly rent including all taxes and rates whatsoever. Defendant sub-let the same at a much higher rent and municipal taxes were increased. Defendant haing paid them sued plaintiff for the difference. *Held*: S. 147 means this, that the lessor from whom taxes are leviable under S. 146, has a claim against a tenant if the rateable value of the premises exceeds the amount of rent payable by the tenant. Ordinarily when the lease is granted, it would be intended that the lessor should be liable to pay the taxes which would be based on the rent payable under the lease, and it is difficult to think that the parties contemplated that in case of an increase in the assessment, it should fall on the landlord and not on the tenant. Regarding the protection afforded by S. 147 stronger documentary evidence than was given in the case is required to show that the parties intended that however much the rateable value might be increased in the future, over and above the rent payable under the lease, still the landlord wouldhave to pay the whole of the tax. [P. 71 C. 1]

Strangman—for the Plaintiff.

Campbell—for the Defendant.

Macleod C. J.—The plaintiff purchased a certain property in Apollo Street, which had been leased by his vendor on the 29th June 1915 for a period of three years certain and three years optional to Messrs. Lipton & Co. at a monthly rent of Rs. 600, including all rates and taxes whatsover. Messrs. Lipton & Co. sub-let a considerable portion of the premises at a very high rent, in consequence of which the Municipality raised the assessment for 1920-21 and 1921-22, basing it not on the rent payable by Messrs. Lipton & Co. under the lease, but on the rent received by them from their sub-tenants, plus a proportionate rent at the same rate for the premises which were in their occupation. The result is that the landlord is called on to pay taxes on the assessment of over Rs. 31,000 instead of under Rs. 7,000; and he claims the protection of S. 147 of the City of Bombay Municipal Act. That section says :—

"If any premises assessed to any property-tax are let, and their rateable value exceeds the amount of rent payable in respect thereof to the person from whom, under provisions of the last preceding section, the said tax is leviable, the said person shall be entitled to receive from his tenant the difference between the amount of the property tax levied from him and the amount which would be leviable from him if the said tax were calculated on the amount of rent payable to him".

That is a somewhat involved section; but it means this, that the lessor

from whom taxes are leviable under S. 146 has a claim against a tenant if the rateable value of the premises exceeds the amount of rent payable by the tenant. The only question is whether the lessor under this lease contracted himself out of the protection afforded to him by s. 147. Ordinarily, when the lease was granted, it would be intended that the lessor should be liable to pay the taxes which would be based on the rent payable under the lease, and it is difficult to see that the parties contemplated that in case of an increase in the assessment by the Municipality, the responsibility for paying the tax in accordance with that increased assessment should fall on the landlord and not on the tenant. Regarding the protection afforded by s. 147 it seems to us that we should require stronger documentary evidence than we have to satisfy us that the parties intended that however much the rateable value might be increased in the future over and above the rent payable under the lease, still the landlord would have to pay the whole of the tax

It is sufficient, therefore, for us to say, in answer to the questions referred, that S. 147 of the City of Bombay Municipal Act affords relief to the plaintiff in the circumstances of the case, and that his predecessor-in-title did not contract himself out of the protection afforded by the section.

It is not necessary, therefore, to consider the question whether the plaintiff could have validly contracted himself out of the section.

Costs taxed as on the Original Side to be costs in the case.

1923 BOBMAY. 71
FAWCETT, J.

Emperor—

v.

Haji Sher Mahomed and others—

Fifth Criminal Sessions of 1921 case No. 4, D. 21st December 1921.

Evidence Act, S. 14 & 54-Particualr matter in question—Evidence that accused commits theft—Chrage under S. 400, I. P. C.

In a case where the offence for which the accused are being tried is the particular one of belonging to a gang of dacoits, simple theft or bad livelihood, in which the order for giving security is based on evidence merely that the accused habitually commits thefts (as opposed to dacoity and possibly robbery) is not evidence indicating an intention to commit the particular crime of which the accused is charged. It at most merely indicates a disposition to commit crimes of a similar class. It is very doubtful whether dacoity must not be put in a higher class than theft so that the evidence would not even fall within the description mentioned in the last clause of illustration (p). Therefore S. *14* does not permit of this evidence being admitted. Such evidence is inadmissible except in the case where the accused himself has given evidence that he has a good character, in which case it is admissible under S. 54. 32 Mad. 179, Foll.(*P. 72 C. 2*)

S. G. Velinkar with Haji instructed by Public Prosecutor—for the Crown.

R. S. Pandit—for the accused Nos. 4, 22, 23, 24.

Fawcett, J:—There are twenty-four accused persons before the Court charged with belonging to a gang of persons associated for the purpose of habitually committing dacoity under section 400, Indian Penal Code. It is sought to prove against one or more of these accused that they have been previously convicted for the offence of theft, or have been ordered to give security for good behaviour on the ground of being habitual thieves, &c., under Chapter VIII of the Criminal Procedure Code. The question is whether evidence of such previous convictions or orders is admissible against them under section 14 of the Indian Evidence Act. There is no doubt (1) that, in the case of a person accused under section 400, Indian Penal Code, a previous conviction of dacoity is admissible under section 14, as held in *Empress* v. *Naba Kumar Patnaik* (1) and (2) that a previous conviction of theft or an order to give security on the ground of being an habitual thief, is admissible against him in a case where he is charged under section 401, Indian Penal Code, i. e., belonging to a gang of persons associated for the purpose of habitually committing theft or robbery, as held in *Bhona* v. *Emperor* (2) and *Emperor* v. *Tukaram Mulhari* (3). In these two cases such evidence clearly falls under section 14 of the Indian Evidence Act, as

(1) (1897) 1 C. W. N. 146.
(2) (1911) 38 Cal. 408-15 C. W. N. 461-12 Cr. L. J. 97-9 I. C. 555.
(3) (1912) 14 Bom. L. R. 373-13 Cr. L. J. 539-15 I. C. 811.

showing a disposition on the part of the accused towards the particular conduct alleged against him in the charge, namely a habit of committing (1) dacoity and (2) theft. But if in order to establish a habit of committing dacoity you rely on evidence that the accused had previously committed thefts, you no doubt produce evidence which may show a diposition towards conduct of a similar description to that in question, but not of the exact description in issue. Dacoity is equivalent to (a) theft (b) more offenders than four (c) violence, and elements (b) and (c) are wanting. A person may be a habitual surreptitious night thief but this goes very little way towards showing that he has a disposition towards dacoity. It is little, if anything, more than evidence of bad character which is excluded by section 54 of the Indian Evidence Act. This lays down the general rule that ordinarily the fact that the accused person has a bad character is irrelevent, and it is only if the evidence now sought to be put in falls under section 14 that it escapes this general rule. Explanation 1 to section 14 lays down that a fact relevant as showing the existence of a relevant state of mind must show that the state of mind exists, not generally, but in reference to the particular matter in question, and illustrations (o) and (p) to the section illustrate what is meant thereby. If in illustration (p) the word "did" is substituted for the word "said" I think it clearly shows that the evidence in question is irrelevant. It will then run as follows:—

"A is tried for a crime:

The fact that he did something indicating an intention to commit that particular crime, is relevant.

The fact that he did something indicating a general disposition to commit crimes of that class, is irrelevant."

(It may be noted that there is a mistake in repeating this illustration in Ameer Ali's Evidence Act, which has persisted even to the last Edition, namely, the word "relevant" is wrongly given in the last clause instead of the word "irrelevant.)"

In a case like the present the offence for which the accused are being tried is the particular one of belonging to a gang of dacoits; and simple theft or bad livellihood, in which the order for giving security is based on evidence merely that the accused habitually commits thefts (as opposed to dacoity and possibly robbery) is not, I think, evidence indicating an intention to commit the particular crime of which the accused is charged. It at most merely indicates a disposition to commit crimes of a similar class, though it is very doubtful whether dacoity must not be put in a higher class than theft, so that the evidence would not even fall within the description mentioned in the last clause of illustration (p). Therefore I think that section 14 does not permit of this evidence being admitted. The authorities also support this view. *In The Public Prosecutor* v. *Bonigiri Pottigadu* (4) it was held that in a case under section 400, Indian Penal Code, the evidence of the commission of other offences than dacoity is only evidence of bad character and is inadmissible under section 54 of the Indian Evidence Act. The remarks in *Emperor* v. *Debendra Prosad* (5) and in *Emperor* v. *Panchu Dasi* (6) support the view I have taken. In the last-named case even the dissenting Judge, Chaudhuri J, at page 709 says:

"No doubt, evidence tending to show that accused has been guilty of criminal acts other than those covered by the indictment is not admissible, unless upon the issue whether the acts charged against the accused were designed or accidental, or unless to rebut a defence otherwise open to them."

I hold, therefore, that the proposed evidence is inadmissible except in the case where the accused himself has given evidence that he has a good character, in which case it is admissible under section 54.

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(4) (1908) 32 Mad. 179-5 M. L. T. 100-9 Cr. L. J. 567-2 I. C. 307.

(5) (1909) 36 Cal. 573 at p. 584-13 C. W. N. 973-9 C. L. J. 610-2 I. C. 601.

(6) (1920) 47 Cal. 671 at pp. 692-696 -24 C. W. N. 501-31 C. L. J 402-58-I. C. 929.

1923 BOMBAY 73

MACLEOD, C. J.

L. and I. Rapaport—Plaintiff.

v.

Kallianji Hirachand—Defendant.

O. C. J. S. No. 3083 of 1921 D. 8th October 1921.

Civil P. C. O. 11, Rr. 15, and 18-Inspection of documents-Documents referred to in pleadings but not material.

Under indent forms signed by the defendants in favour of the plaintiffs, the defendants agreed to purchase from the plaintiffs the goods mentioned in the indents at the prices noted therein and to pay for the goods at the current rate of exchange on delivery of the shipping documents, but on arrival of the goods the defendants refused to take delivery unless the plaintiffs agreed to fix the rate of exchange at two shillings to a rupee. The plaintiffs declined, and sued to recover the value of the goods according to the indent prices. Plaintiffs in the plaint incidentally referred to the invoices received from England for the purpose of showing that they had received advice of the goods they had purchased and that they would make out their own invoices and send the same to the defendants. The defendants without filing their written statement took out a summons asking for an order against the plaintiffs for inspection of the original invoices.

Held, the defendants had not made out a case for inspection of the invoices, as under their contract with the plaintiffs they had nothing to do with the prices which the plaintiffs paid in England, the said invoices not being necessary for either the plaintiffs' or the defendants' case. *Quilter* v. *Heatly* (1) (1883) 23 Ch.D. 42 Referred to.

Desai—for the Plaintiff.

Thakurdas—for Defendants.

MACLEOD, C. J.:—The plaintiffs have filed this suit to recover from the defendants the price of certain goods ordered by the defendants under various indents. Under the form of indent employed the defendants agreed to purchase from the plaintiffs the goods mentioned in the indents, or any portion of them at the prices and on the terms noted therein and to pay for the goods at the current rate of exchange for demand Bank Bills of London on delivery of the shipping documents. The goods arrived but the defendants refused to take delivery or to pay for the goods. In the plaint the plaintiffs referred to the invoices received from England for the goods which the plaintiffs had ordered to fulfil their contracts with the defendants. It appears that the defendants were willing to take delivery of the goods provided the plaintiffs were willing to fix the rate of exchange at 2 S. On the 9th February 1921 the defendants wrote:—

"Received your letter and in reply I beg to write that if you agree to give me the rate of exchange at 2s. for said five cases according to the resolution passed by our Native Piece Goods Merchants' Association, I will be prepared to take up these cases."

The defendants before filing their written statement have taken out this summons asking for an order that the plaintiffs should give inspection to the defendants of the invoices referred to in paragraphs 10 to 15 of the plaint.

Now, undoubtedly the defendants are entitled, under O. XI, R. 15, Civil Procedure Code, to give notice to the plaintiffs to produce these invoices for their inspection and if inspection is refused, they are further entitled to get the opinion of the Judge whether such a demand for inspection is justifiable. That is provided for by R. 18, under which "the Court may, on the application of the party desiring it, make an order for inspection, provided that the order shall not be made when and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the suit or for saving costs."

It appears now that the defendants claim that under their contracts with the plaintiffs they are not obliged to pay for the goods at the contract price but at some other price at which the plaintiffs may have secured the goods in England; and it is for that purpose that they are now seeking inspection of these invoices, which would shew the prices at which the plaintiffs secured the goods. On the facts alleged in the plaint and on the written contracts signed by the defendants, it is perfectly obvious that the contention raised now by the defendants is untenable, as the defendants under their contract had nothing to do with the prices which the plaintiffs paid in England. Accordingly the defendants have not made out a case for an order directing the plaintiffs to give inspection. The law is laid down under the corresponding Supreme Court Rule in *Quilter* v. *Heatly* (1), where Bowen L.J. said :

(1) [1883] 23 Ch. D. 42.

"O. 31 R. 14, provides for immediate production of any document which a party has referred to in his pleadings or affidavits. The party against whom the application is made must produce them unless he can show good cause why he should not. If he refuses, the party applying can go to the Judge, who may refuse the application if he sees good reason for so doing.....In my opinion the *onus* is on the refusing party."

So that the plaintiffs here have to give sufficient reason why they should not be ordered to give inspection of these invoices. Now it is clear that these invoices are merely referred to in the plaint as part of the narrative showing how the plaintiffs received advice of the goods they had purchased in England so that they could make out their own invoices to send to the defendants. The plaintiffs were not obliged to mention the invoices they received from England since the invoices were not necessary either for proving the plaintiffs' case or for assisting the defendants in their defence. The present application is obviously made for the purpose of delaying the plaintiffs' suit. The summons will be discharged with costs.

Summons discharged.

1923 BOMBAY 74

SHAH, Ag. C. J. AND CRUMP, J.

Emperor v. *Shivlingappa Basappa.*

Cr. Ref. No. 29 of 1922 D. 17th August 1922 from Dist. Magistrate of Sholapur.

(a) *Criminal P. Code S. 422.-Provisions imperative-Omission to give notice.*

A Sub Divisional Magistrate who was authorised to hear appeals from the Second Class Magistrate heard and disposed of a Criminal appeal, without giving any notice to the District Magistrate, as required by S. 422 Criminal P. Code.

Held: the section provides that "if the appellate Court does not dismiss the appeal summarily, it shall cause notice to be given to the appellant or his pleader, and to such officer as the Local Government may appoint in this behalf of the time and place at which such appeal will be heard". The officer appointed by the Local Government in this behalf is the District Magistrate and, though this provision would not apply so far as the District Magistrate is concerned when the appeal is filed in his Court notice of appeal should have been given to the District Magistrate in the present case. The section is imperative and the omission to give such a notice cannot be treated merely as an irregularity.

(b) *Cr. P. C. S. 439-Order of acquittal.*

Though the High Court does not ordinarily interfere with orders of acquittal it will so interfere where the appeal ordering acquittal, has been heard by a Sub Divisional Magistrate without giving notice to District Magistrate.

D. G. Dalvi—for the Accused.

S. S. Patkar—for the Crown.

Shah Ag. C. J.—In this case five persons were tried by the Second Class Magistrate of Sholapur and convicted of hurt under S. 323, Indian Penal Code. There was a charge under S. 147, Indian Penal Code, but as there is some difference between the parties as to what the correct interpretation of the charge as framed was, I do not desire to express any opinion as to whether the charge also related to the offence under S. 323, Indian Penal Code. I have referred to the charge to show what the nature of the proceeding was.

The accused appealed to the Sub-Divisional Magistrate under S. 407, Criminal Procedure Code, who was authorised to hear appeals from the Second Class Magistrate. Without giving any notice to the District Magistrate he proceeded to decide their appeal, and acquitted the accused. The case has been brought to our notice on a reference by the District Magistrate, and the learned Government Pleader has appeared to support the contention that the appeal has not been legally disposed of in so far as it was heard and decided without giving notice to the District Magistrate as required by S. 422, Criminal Procedure Code. That section provides that "if the appellate Court does not dismiss the appeal summarily, it shall cause notice to be given to the appellant or his pleader, and to such officer as the Local Government may appoint in this behalf, of the time and place at which such appeal will be heard." The officer appointed by the Local Government in this behalf is the District Magistrate, and though this provision would not apply so far as the District Magistrate is concerned when the appeal is filed in his Court, it is clear that, under the provisions of S. 422, Criminal Procedure Code, the notice of appeal should have been given to the District Magistrate in the

present case. The section is imperative, and we do not think that the omission to give such a notice could be treated merely as an irregularity. It is true that under S. 439, Criminal Procedure Code, we do not interfere ordinarily with orders of acquittal; but this is a case in which it is pointed out to us that there has been no legal disposal of the appeal, and the order which is made without a proper hearing cannot be accepted as a valid order. We, therefore, set aside the order of acquittal made by the Sub-Divisional Magistrate and direct that the appeal be heard and disposed of by him according to law.

Order set aside.

1923 BOMBAY 75

MULLA, J.

Chotelal Lallubhai—Plaintiffs.

v.

Champsey Umersey and Sons—Defendants.

O. C. J. Suit No. 213 of 1919 D. 3rd July 1922.,

Contract—Construction—Mutuality.

Stipulation in a contract, " to cancel or not to cancel the sold goods for any reasons depends upon you " (i. e. seller) does not destroy the mutuality necessary for the formation of a contract. The stipulation referred to above confers upon the sellers plaintiffs the power to determine the contract if they could assign good reasons for so doing and therefore the contrct is not void, but a vaild and binding contract. [P. 77 C. 1]

Kanga—for the Plaintiffs.

Kania, with Lalji,—for the Defendants.

MULLA J.—This is suit for the price of twenty-five bales of Japanese yarn agreed to be sold by the plaintiffs to the defendants, and in the alternative for damages for failure on the part of the defendants to pay for and take delivery therof.

By a contract dated 2nd February 1918 (Exh. A) the plaintiffs agreed to buy from Messrs. Gosho Kabooshiki Kaisha twenty-five bales of Japanese yarn of February-March 1918 shipment, but the shipment was not guaranteed.

By a contract in the Gujarathi language dated 21st August 1918 the plaintiffs agreed to sell the said twenty-five bales to the defendants. The following is an official translation of the material portions of the said contract :—

" This day we have purchased from you the goods of the below-written details in accordance with the *bazaar* rules of which you please take note. To cancel or not to cancel the sold goods for any of the reasons solely depends upon you. Cotton yarn No. 60/2-of Japan shipment for February-March 1918 bought of Messrs. Gosho Kaisha; (the delivery of the same) is to be given whenever the same may arrive earlier or later, (and) on the safe arrival (of the same) by steamer."

It may be observed that there is no word in the vernacular corresponding to " solely " in the above translation.

On 25th September 1918, the defendants addressed a letter to the plaintiffs stating that unless the goods were delivered within eight days from the receipt thereof the contract should be treated as cancelled. To the said letter the plaintiffs replied on 26th September 1918 stating that having regard to the terms of the contract the defendants were bound to accept the goods even if the goods arrived late. The eight days' period expired on 3rd October 1918. The goods arrived in Bombay on 12th October, 1918, and on the same day the plaintiffs wrote to the defendants informing them of the arrival of the goods and enquiring whether the plaintiffs should take delivery of the goods on behalf of the defendants or whether they should send the goods direct to the defendants. The defendants by their letter of 15th October 1918 stated that the eight days' period having already expired the contract stood cancelled, and they refused to pay for, and take delivery of, the goods. The plaintiffs thereupon got the goods sold by public auction and thereafter they instituted the present suit.

The bales offered to the defendants were shipped from Japan in September 1918. On arrival of the said goods the plaintiffs took delivery thereof and they were taken to their godown. There is no doubt that the plaintiffs were ready and willing to deliver the goods to the defendants.

The principal defences to the suit

are—

(*a*) that there was no valid contract between the plaintiffs and the defendants; and

(*b*) that the goods offered being of September shipment the shipment could not be said to be a shipment within a reasonable time.

As regards the first defence, the argument of counsel for the defendants was that inasmuch as the writing (Exh. B) gave an option to the plaintiffs to rescind the contract for any reasons whatsoever, the writing did not amount to an agreement in law. On the other hand, counsel for the plaintiffs relied on the judgment of Court of Appeal in *Chunilal* v. *Ahmedabad Fine Spinning & Weaving Co.* (1). as affording a complete answer to the defendants' contention.

As regards the first defence it is well established that parties to a contract may stipulate that one or both of them shall have the power to rescind the contract on the happening of some specified contingency: Fry on Specific Performance, 6th Ed., p. 486. Such a stipulation is to be construed according to its natural meaning, subject to the principle of law that a party shall not take advantage of his own wrong: *New Zealand Shipping Company* v. *Societe Des Ateliers Et Chantiers De France* (2). It has thus been held that where there is a stipulation in a contract for the sale of land enabling the vendor to rescind the contract if the purchaser makes a requisition on title with which the vendor is unable or unwilling to comply, the vendor cannot rescind capriciously and arbitrarily, that is to say, without any reasonable cause. Such a stipulation does not entitle the vendor to neglect to remove the objections to title raised by the purchaser, and then on the strength of his own neglect to annul the contract: *In re Starr-Bowkett Building Society and Sibun's Contract*; (3) *In re Jackson and Haden's Contract*; (4) *Quinion* v. *Horne* (5) and *Greaves* v. *Wilson* (6).

(1) 1922 Bom. 44-46 Bom. 806-24 Bom. L. R. 295-67 I. C. 223.
(2) [1919] A. C. 1.
(3) [1889] 42 Ch. D, 375.
(4) [1905] 1 Ch. 603; [1906] 1 Ch. 412.
(5) [1906] 1 Ch. 596, 603.
(6) [1858] 25 Beav. 290.

But the point raised by counsel for the defendants is that the contract in the present case differs from those in the cases referred to above in that the option to rescind the contract is not made dependent on the happening of any specified contingency, but that it is an option to terminate the contract for any reasons whatsoever, and that the contract is therefore void for want of mutuality. But this point also is covered by authority. In *New Zealand Shipping Co's case* (2) in dealing with the question whether a stipulation in a ship-building contract which enabled the builders to rescind the contract in certain specified circumstances, Lord Atkinson said at p. 9:

"Of course, the parties may expressly or impliedly stipulate that the contract shall be voidable at the option of either party to it."

In *Chunilal* v. *Ahmedabad Fine Spinning & Weaving Co.*, (1) which was a case of a contract for the sale of goods, the contract contained the following stipulation:—

"If you are not in a position to deliver the goods or if there be any dispute in respect of the goods or if the company do not give delivery for any reason, the utmost that will be the result will be that the 'Sauda' will be cancelled but we shall not ask for damages arising from the same from you in any way:"

Under the said contract the plaintiffs took delivery of ninety bales out of one hundred and fiftyone bales mentioned in the contract. The defendants declined to give further delivery without giving any reason for such refusal and the plaintiffs sued the defendants for damages. The defence was that the defendants were not obliged, having regard to the terms of the contract, to give any reasons for refusing to deliver the remaining bales. This contention prevailed in the Court of first instance and the suit was dismissed. The plaintiffs appealed from the decree and the decree of the lower Court was reversed by the High Court of Bombay on appeal. In delivering the judgment of the Court Macleod C. J. said at p. 297:

"It seems to me that the clause evidently means that some reason must be given by the defendants which

would justify their refusing to give delivery, and that they were not entitled merely to say that the contract was off because they did not wish to deliver any more goods under it."

Similarly, in the present case, if the plaintiffs refused to deliver the goods without assigning any reasons, they would, I think, be liable to the defendants for breach of the contract unless they assigned some reason which would justify their refusal to give delivery. I do not think that the stipulation in the contract in the present case, namely "to cancel or not to cancel the sold goods for any reasons depends upon you" destroys the mutuality necessary for the formation of a contract. I think that the writing, Ex., B, contains all the elements of a contract, and that the stipulation referred to above confers upon the plaintiffs the power to determine the contract if they could assign good reason for so doing. I, therefore, hold that the contract Ex. B is not void, but that it is a valid and binding contract.

The next point urged on behalf of the defendants is that the goods having been shipped in September 1918, the shipment could not be said to be one within a reasonable time and that it was not therefore contract shipment. In considering the question whether the shipment was contract shipment it is important to note the date and the terms of the contract between the parties. The goods are described in the contract as being those agreed to have been purchased by the plaintiffs from Messrs. Gosho Kabooshiki Kaisha. They are to be of February-March 1918 shipment, but the defendants are bound to take delivery thereof "whenever the same may arrive earlier or later, (and) on the safe arrival (of the same) by steamer." The contract was made on the 21st August 1918, that is, about five months after the last date for February-March 1918 shipment. It is significant to note that though the contract was made after that long interval, it was thought necessary to provide for late shipment in the contract. There is nothig in the evidence to suggest that either party had at the date of the contract any reason to believe that the goods had already been shipped. The words "whenever the same may arrive earlier or later" did not occur in the contract between the plaintiffs and their vendors. I think they were designedly used in the contract (Ex. B) to provide for late shipment. Such late shipment may be in August 1918 at any time after the date of the contract, or it may even be in September 1918. I say late "shipment" for, as held by the Court of Appeal in *Vallabhdas Kanji v. Runcheddas Mathuradas*, (7) the word 'late' has reference to "shipment" and not to 'arrival'. The provision for late shipment had to be made in view of the war conditions prevailing at the time. The fact that those conditions were present to the minds of the parties appears from the contract itself. The goods were to be delivered on the safe arrival thereof by steamer. Those conditions cannot be ignored in determining the question before us. The existence of those conditions influenced the judgment of the Court of Appeal in the aforesaid case.

Let us now turn to what actually happened after the date of the contract It seems that there was no communication between the plaintiffs and defendants after the date of the contract until the 25th September 1918. On that date the defendants for the first time addressed a letter to the plaintiffs stating that unless the goods were delivered within eight days from the receipt thereof the contract should be treated as cancelled. The eight days' period expired on the 3rd October 1918 and the goods arrived on the 12th October 1918. The defendants stated in their evidence that had the goods arrived on or about the 3rd October 1918 they would have taken delivery thereof. They said that they had to write the letter of the 25th September 1918 because their purchasers told them that they would not take delivery of the goods unless they were delivered to them within eight days. It seems to me that the real reason for the action of the defendants in repudiating the contract was not because they or their purchasers wanted the goods within eight days but because there was a fall in the piece-goods market.

(7) [1920] O. C. J. Suit No. 1717 of 1919.

The defendants in their evidence cited instances of goods of March-April 1918 shipment, ordered out by them from Japan having arrived in Bombay in June 1918. They also mentioned other instances in which the goods arrived within a month or two from the date of the shipment mentioned in the contracts. But those goods were glassware, hardware, canvass, toilet, etc. None of the goods were piece goods. The defendants, though they say they are merchants in a very large way of business, have not adduced evidence of a single case in which piece goods from Japan arrived within the same short period. In the present case the defendants knew that the goods had not arrived at the date of the contract. It cannot, therefore, lie in their mouth to say that they expected the consignment of the twenty-five bales to arrive in Bombay within the same short period.

There is one more point to be noted in this connection. The correspondence between the parties commenced on the 25th September 1918 and it ended on the 12th November 1918. The position first taken up by the defendants in correspondence was that they were prepared to take delivery of the goods if the plaintiffs proved that the goods were of February-March 1918 shipment (*vide* defendants' letter of 22nd October 1918) When the plaintiffs pointed out by their letter of the 30th October 1918 the clause as to late shipment, the defendants turned round and by their letter of the 5th November, 1918, they set up a new case altogether. In that letter they stated that the contract (Ex. B) was entered into through brokers and that the defendants were clearly given to understand that the goods would arrive by any one of the large batches of steamers expected to arrive shortly in Bombay and that though one such batch did arrive in Bombay within a week or so from the date of the contract, the goods did not arrive. There is not a word about this representation in the written statement of the defendants; nor was any issue raised on it by cousel for the defendants. In the course of the cross-examination of the plaintiffs Mr. Lalji introduced the alleged representation by the brokers, but as the defendants' case as disclosed in their written statement was not based on any such representation, I disallowed all questions bearing on that point.

On the whole I hold that when the parties entered into the contract (Ex. B) on the 21st August 1918, the late shipment contemplated by them was not only the shipment made subsequent to March 1918 and prior to the date of the contract (if any such shipment was made at all), but a shipment made within a reasonable time from the date of the contract. I hold, therefore that the shipment that arrived, viz, September 1918 shipment, was a contract shipment which the defendants were bound to accept. No doubt the interval between the last date for February-March shipment and the second or third week of September 1918 in which the goods must have been shipped was about five months and a half; but the date of the contract between the parties, which was made a little less than five months from the last date for February-March shipment, cannot be ignored. In other words, the date of the contract is also a material factor to be considered and coupled with it the terms of the contract.

The only other question is as regards damages. It was conceded by counsel for the plaintiffs that the property in the goods did not pass to the defendants, and that the plaintiffs were entitled to damages only. The date of the breach is 15th October 1918 on which day the defendants first repudiated the contract. No doubt the defendants wrote on 25th September 1918 stating that unless the goods were delivered within eight days the contract should be treated as cancelled, but it was not followed, as it ought to have been, by any notice of cancellation. I find that the rate on 15th October 1918 was Rs. 2-4-0 per piece. The damages, therefore, amount to Rs. 10,000.

The result is that there would be a decree for the plaintiffs for Rs. 10,000, costs, interest on judgment at six per cent.

Suit decreed in part.

1923 BOMBAY. 79

SHAH C. J. AND PRATT, J

Damodar Mahadev Bhonde—Appellant.

v.

Kashinath Sadashiv—Respondent.

S. A. No. 500 of 1920 D. 10th July 1922 from the decision of D. J. Poona in A. No. 269 of 1918.

(a) Land Tenure-Mirasi Tenure-Grant of proprietary rights by Inamdar,

Plaintiffs were mirasdars under defendants under Miraspatras of 1859 and 1864 which among other things contained a recital that the grantee had represented that he would bring the land under cultivation. The grant included Forests, Rivers, River banks-and pasture land. The quit rent was fixed as the assessment which would be imposed at the survey less the sum of Rs. 50. Beyond this no right was reserved to the Inamdars. The deed contained expressly that the Inamdars "have no right or claim whatsoever to the said lands," and allowed the grantee the right to recover any sort of tax or cess-*Kulbab Kulkanu*-from those who held under him. Survey settlement being introduced in the village which was the subject of grant, building fine was levied on the Mirasdar under rules made under Ss. 65 and 48 of the Land Rev. Code. Plaintiff sued for declaration that he was not liable to pay the fine.

Held the deed did in fact give the plaintiff rights which might be described as those of a Sub-Inamdar and they were entitled to a declaration that they were not liable to pay building fine to the Inamdar and to an injunction restraining the Inamdar from collecting such fines through the Collector. [P 80 C 2]

(b) Bombay Revenue Jurisdiction Act S. 4 (b)-Scope-Objection under,

An objection to come within either of the two heads of clause (b) of S. 4 must be an objection which reaches them directly, i. e., an objection to them *per se* which admits the liability to pay land revenue on the part of the objector but quarrels with its amount or incidence or the validity and effect of the notification of survey settlement as by themselves objectionable, not because some other right affects them or makes them inapplicable to this particular case. 28 Bom. 74 foll.

(c) Bombay Land Revenue Code S 217 Applicability-Holders under special grants,

S 217 invites the application of the provisions applicable to the occupants in an unalienated village to the holders in an alienated village "so far as may be". The special right which a holder claims in virtue of any grant or contract between him and the Inamdar is not in the slightest degree effected by s. 217 or ss. 64 and 66 which are rendered applicable to the holders in an alienated village. 28 Bom. 74 Foll.

P. B. Shingne—for the Appellants.

K. H. Kelkar—for the Respondents Nos. 1 and 3 to 7.

Pratt J.—The defendants are Inamdars of the village of Nagargaon and it is admitted that they are grantees of the soil as well as assignees of the revenue.

The plaintiffs are Mirasdars or parmanent tenants holding under the Inamdars under comparatively recent *Miraspatras* of 1859 and 1864-Exhibits 33 and 34.

Survey settlement was introduced into the village at the request of the Inamdars. The effect of this was to introduce a revised assessment of agricultural land and further under S. 217 to render all holders of land in the village liable in respect of such lands to the provisions of the Land Revenue Code.

Accordingly rules were made and notified under G. R. No. 5641 of June 5,1907, providing for the levy of building fine and assessment according to rules already made under Ss. 65 and 48 of the Land Revenue Code.

As provided by these rules the Collector has been at the request of the Inamdar levying building fines for the benefit of the Inamdar assignees of the land revenue.

The plaintiffs after fruitless appeals to the Revenue Authorities filed this suit for a declaration of their rights to hold the land free from bulding fines and for an injunction restraining the Inamdars from levying such fines.

In the lower appellate Court the plaintiffs did not question the validity of the rules under which Government levied building fines in their village but as their pleader contended that the rules were invalid the Secretary of State was made a party.

The rules are, as I have already shown, clearly valid and it seems to me equally clear that the plaintiffs are barred from raising this objection by S. 4 (*b*) of the Revenue Jurisdiction Act. The phrase 'incidence of the assessment' refers to the person on whom the assessment falls. The plaintiffs cannot object that the assessment or fine should not fall upon them or that Government in imposing the fine upon them have acted *ultra vires*.

Section 5 of the Revenue Jurisdiction Act, however, allows them to sue on the footing that though the fine is legal yet the Inamdar by the terms of his grant to them is precluded from levying it. This distinction is clearly made in *Lakshman* v. *Govind*, (1) where. it was said that S. 217 of the Land

(1) (1903) 28 Bom. 74.-5 Rom. L. R. 694

Revenue Code does not take away any right that an occupancy tenant may have acquired independently of his bare status as an occupancy tenant.

The suit must, therefore, be confined within those limits and if the plaintiffs establish their right then the Inamdar instead of appropriating to himself the fine levied by the Collector would have to hold the fine in trust for the plaintiffs and to refund it to them.

There is therefore no question of setting aside the Commissioner's order directing that the buiding fines should be paid to the Inamdars. There is also no question of limitation under Article 14. The sole point for consideration is the construction of the *Miraspatra*.

The terms of the *Miraspatra* Ex. 34 do not support Mr. Rao's contention that the grant was for agricultural purposes only. There is no doubt a recital that the grantee had represented that he would bring the land under cultivation but the operative part of the grant contains no such limitation. The grant includes forests rivers, river banks and pasture land where it was not likely that the grantee would introduce cultivation. The quit rent is fixed as the assessment which would be imposed at the survey less the sum of Rs. 50. Beyond this no right is reserved to the Inamdars. The deed says expressly that the Inamdars "have no right or claim whatsover to the said lands." The grant further allows the grantee the right to recover any sort of tax or cess —*Kulbab Kulkanu* —from those who hold under him.

It is clear that no proprietary right is reserved to the Inamdar except the rent and the reversion in default of payment of rent. But the lower appellate Court considered that the revenue and, therefore, the building fine was outside the scope of the deed.

I am unable to accept this conclusion. The grantors had not only the soil but the revenue. The quit rent reserved to the grantor was really a part of the land revenue. The grantees were conceded the right to levy other items of land revenue. The grant therefore, was a revenue as well as of proprietary rights. I do not think the word 'Miras' negatives this conclusion. The deed was a recent one and the word seems to have been used only to indicate the permanency of the tenure.

Nor can it be contended that the building fine or assessment was part of the Survey or Prat Band assessment referred to in the *Miraspatra*. They are not fixed at the Survy but subsequent to Survey by the Collector. They are based on the notion that the occupant has only an agricultural holding which is not the case here.

If the grant under this deed had been from Government direct and not from the Inamdars, could Government have claimed the right to increase the quit rent under the guise of building fine or assessment? I think not. Government would have treated the grantees as Inamdars. The deed does in fact give the plaintiffs rights which might be described as those of a sub-Inamdar. The other *Miraspatra* is not as explicit as Ex. 34 but its effect is the same—the Inamdars expressly stipulate that they will recover no more than the assessment imposed at the Survey less the amount remitted.

The plaintiffs are therefore, I think entitled to a declaration that they are not liable to pay building fine to the Inamdar and to an injunction restraining the Inamdar from collecting such fines through the Collector.

I would, therefore, allow this appeal and grant the plaintiffs a declaratory decree and injunction as above. The defendants to pay the costs of the plaintiffs throughout. The plaintiffs to bear costs of the Secretary of State unnecessarily joined as a party.

Shah Ag. C. J.—I agree. As regards the nature of the suit, it is based upon the special right which the plaintiffs claim in virtue of the *Miraspatras* and it is not merely as ordinary holders that they question the right of the Inamdar or of the Collector to fix the amount of assessment and fine leviable in consequence of any particular holding having been used for non-agricultural purposes. Their claim against the defendants is based on the ground that they are in no sense bound to use the lands only for agricultural purposes, and that they have got a right to use the land for any purpose they like, subject to the payment of assessment less Rs. 50

under the terms of the Miraspatras.

Such a suit is not barred by S. 4 (*b*) of the Bombay Revenue Jurisdiction Act. As pointed out in *Lakshman* v. *Govind* (1) "if, without questioning the legality or propriety of the amount or incidence *per se*, he asserts a right independent of and having no relation to it, such as a right to pay a certain fixed amount annually under a contract between him and the Inamdar, he cannot be said to object to the amount or incidence of the assessment" within the meaning of that clause, and it is further pointed out that "an objection to come within either of the two heads of clause (*b*) of S. 4 must be an objection which reaches them directly, i. e., an objection to them *per se* which admits the liability to pay land revenue on the part of the objector but quarrels with its amount or incidence or the validity and effect of the notification of survey settlement as by themselves objectionable, not because some other right affects them or makes them in applicable to this particular case." The present suit is really directed against the Inamdars, and the Government have no interest whatever in the suit. The appellants before us have caused unnecessary confusion by attempting to show that the rules framed in 1907 as regards alienated villages for the levy of increased assessment and fines for using agricultural holdings for building purposes were *ultra vires*. I do not think that any question as to their validity arises. They provide a method and means for the determination and realisation of the amount of extra dues for the benefit of the Inamdars: and they do not touch the special rights of any particular holders against the Inamdars. The question whether any holder is free from the liability to pay such extra dues to the Inamdar is a matter which is outside the scope of the rules and outside the prohibition of the Bombay Revenue Jurisdiction Act.

The second point relates to the interpretation of S. 217 of the Land Revenue Code. It is urged by the learned Government Pleader that what ever the terms of the Miraspatras may be, the plaintiffs are in the position of holders and as such subject to the same rights and obligations as occupants in an unalienated village in virtue of the provisions of that section. But that section in my opinion invites the application of the provisions applicable to the occupants in an unalienated village to the holders in an alienated village "so far as may be." I think that the special right which a holder claims in virtue of any grant or contract between him and the Inamdar, is not in the slightest degree affected by S. 217 or the provisions of Ss. 65 and 66 which are rendered applicable to the holders in an alienated village. On that point also it seems to me that the observations in *Lakshman* v. *Govind* (1) are applicable. In dealing with the agrument in that case with reference to Ss. 52 and 217 of the Land Revenue Code Mr. Justice Chandavarkar observes as follows:—

"The effect of the first is to give the Collector the discretion to fix the assessment; the effect of the second is to render the occupants in alienated villages subject to a settlement like the occupants in unalienated villages. But neither section takes away any legal right which an occupancy tenant may have acquired independently of his bare status as an occupancy tenant liable to pay the land revenue according to survey rates."

Those observations are a complete answer to the arguments which have been advanced by the Government Pleader. I am quite satisfied, therefore, that if on the construction of the Miraspatras the right of the plaintiffs is established, they are entitled to a decree against the Inamdars.

As regards the construction of the Miraspatras I agree with what has been said by my learned brother in the judgment just delivered. The earlier Miraspatra (Ex. 33) is not so clear in its terms as the later one (Ex. 34). But on the whole I think that the nature of the grant under Ex. 33 is the same as that under Ex. 34 which clearly conveys all the interest in the land which the Inamdar had at the time, and in the present case it is common ground that the Inamdar had a full right to the soil, the Inam not being confined merely to the royal share of the revenue.

As regards the argument urged by

Diwan Bahadur Rao that the present suit is confined to the fines and not to the increased assessment levied in consequence of certain lands having been used for building purposes, I am not satisfied that the word "fine" used in the plaint is indicative strictly of the "fine" as distinguished from the "increased assessment." But, whatever the exact scope of the prayer may be, it is quite clear that both the increased assessment and the fines levied in consequence of the lands having been used for building purposes must stand on the same footing, and the plaintiffs' right, based as it is upon the ground that they do not hold the lands only for agricultural purposes, must apply to the fines as well as to increased assessment for using an agricultural holding for building purposes.

Appeal allowed.

1923 BOMBAY. 82

SHAH, C. J. AND CRUMP, J.

Satappa Jakappa Kochcheri.—Plaintiff Appellant.

v.

Annappa Basappa Patil.—Defendant Respondent.

S. A. No. 42 of 1921 D. 29th August 1922 from the decision of Asstt. J. Belgaum in A. No. 195 of 1919.

(a) Contract Act S. 61-Time barred items.

Where there is a running account there is no reason why the payments within three years should not be treated as appropriated to the satisfaction of the earlier advances even though these advances may be time barred at the date of the suit or at the date of the payment. [P 83 C 2]

(b) Limitation Act Art. 85-Essentials.

Under Article 85 the account between the parties must be mutual, open and current indicating reciprocal demands between the parties. It is sufficient if the dealings are such that the balance might have been in favour of either party; it is not essential that the balance should in fact have been in favour of the defendants at some stage. [P 84 C 1]

Per Crump, J.—The words " where there have been reciprocal demands between the parties " in Article 85 taken literally may no doubt give rise to some difficulty, but those words have been interpreted as meaning that the nature of the accounts is such as to create reciprocal demands. They are in fact words in the nature of a definition but are not intended to postulate that there should have been reciprocal demands in fact. [P 85 C 2]

N. Almaram—for the Appellants.

A. G. Desai—for the Respondents.

SHAH AG. C. J.—The facts which have given rise to this appeal are briefly these. The plaintiffs sued to recover Rs. 2,000, or such other sum as may be found due on the accounts between them and the defendants, alleging that the plaintiffs had dealings with the defendants extending over a long period commencing in the year 1897. Defendants Nos. 1 to 11 formed a joint family and had their business at Belgaum. All the defendants except defendants Nos. 3, 4 and 6 admitted the plaintiffs' claim, but defendants Nos. 3, 4 and 6 contended that the plaintiffs' claim, was out of time. It appears from the plaint that the date of the cause of action was first stated as follows:—

" On July 1, 1916, when the Receiver refused to pay off or in July 1917 when the defendants' shop was closed or in November 1916 i. e. at the end of the commercial year." But apparently this was scored out and by an amendment the following was substituted for it " from October 30, 1897, on respective dates on which the dealings were effected." There was also an amendment in paragraph 6 of the plaint, wherein it is stated: " In the said shop at the end of every year, the balance has been shown in the name of the said Annapa. This has been done up to July 18; 1917, and this suit is brought within three years from this date and in the former suit it has been admitted by Annappa Basappa and Bhairappa Basappa that it is an amount of deposit and that interest has been paid from time to time. Therefore the plaintiffs' suit is not barred by limitation. Though interest was not paid off every three years, it was shown as balance every year, and also because it was an amount of deposit, the suit is not barred by limitation.

I may also mention that in the partition suit relating to the defendant's family, the present plaintiffs were joined as parties, and because some of the defendants objected to the Receiver who, was appointed in that suit, paying the amount now in question, the present suit was filed by the plaintiffs.

The only question of importance between the parties was one of limitation.

The trial Court decided against the plaintiffs on the ground that these were not deposits but loans, and it held that the mere book entry of interest from year to year would not bring the case within the scope of S. 20 of the Indian Limitation Act. Therefore it decided to allow only those items to the plaintiffs which were admittedly within three years prior to the date of the suit deducting those payments which were made within that period, treating the current account as really beginning at that stage. The debit and credit items prior to three years before the suit were left out of consideration. On that footing a decree was passed in favour of the plaintiffs for Rs. 276 with interest at nine per cent.

The plaintiffs appealed to the District Court, and the learned Assistant Judge who heard the appeal affirmed that decision. It appears from the judgment that the principal point argued before the lower appellate Court was whether these payments were in their nature of deposits or were loans in respect of which the suit would have to be filed within three years from the respective dates Though the learned Judge was satisfied that there was mutual and current account between the parties, he held that these were to be treated as advances made from time to time, and that only those items were recoverable which were within three years. The learned Judge adopted the same method of determining the amount due on that basis as the trial Court and accepted the conclusion of that Court.

The plaintiffs have preferred this second appeal and it is contended on their behalf, that the lower Courts are wrong in their view as to the point of limitation. The appeal is sought to be supported on three grounds relating to the question of limitation, and it is a singular circumstance in the case that all the three grounds are raised practically for the first time in this Court. The grounds upon which limitation was sought to be saved in the lower Courts have practically been given up and we have to consider the points urged in support of the appeal now. First, it is urged that the account is a mutual, open and current account evidencing reciprocal demands between the parties, and that Article 85 of the Indian Limitation Act applies. Secondly, it is urged that these accounts have been all written by one or the other of the defendants or by a clerk who was in their employ, and that limitation is saved under S. 20 of the Act. Thirdly, it is urged that even taking the view that these advances are to be taken as loans from time to time, the payments made within three years must be taken to satisfy the earlier advances, even though they may have been time-barred, i. e., the appropriation should be made in accordance with the provisions of S. 61 of the Indian Contract Act, and that in that view of the matter a much larger sum than the sum allowed by the lower Courts would be found due.

As regards the second of these points I may state at once that it is a new point; and it appears from the judgment of the lower Court, and from paragraph 6 of the plaint, that the ground as to part payments of the principal appearing in the hand writing of the debtor was not urged in that Court. The trial Court omitted to consider that aspect of the case on that ground. The consideration of that point would necessarily involve the determination of the question of fact as to which of these items were written by the debtors themselves or by their Munim, and in the case of entries made by the Munim as to whether he was their agent duly authorized in that behalf as required by S. 20 of the Indian Limitation Act. In view of the fact that though the plaintiffs had the opportunity of amending the plaint, they omitted to raise this particular point, I do not think that that ground could be allowed at this stage.

As regards the third point, it seems to me that there is really no answer to it on the part of the respondents. The lower Courts are clearly in error in treating the account as beginning practically at the date from which the advances are treated as being within time. It is a running account, and there is no reason why the payments within three years should not be treated as appropriated to the satisfaction of the earlier advances, even though these advances may be time barred

at the date of the suit or at the date of the part payment. The amount which would be found due to the plaintiffs on this basis is in dispute, but having regard to the view which we take of the first point, which I shall presently deal with, it is not necessary to pursue this point any further.

The first point is really the most important point, and by no means easy for decision. It is quite clear to my mind that the question about Article 85 of the Indian Limitation Act was not realized by the plaintiffs in either of the Courts below, and certainly was not put before the Courts for their consideration. It is, however, open to the plaintiffs to rely upon Article 85, for the very nature of the accounts would show that that is the proper Article to apply. The lower appellate Court has expressed the opinion that the account between the parties was mutual and current. Under Article 85 what we have to consider is whether the account between the parties was mutual, open and current indicating reciprocal demands between the parties. The account is in the name of Annappa Balappa, now represented by the present plaintiffs. The acoount commenced in the year 1897, and has been since that date an open and current account between the parties up to the year 1916. The present suit was filed on March 20, 1918, and is clearly within three years from the close of the year in which the last item appearing in this account is to be found. The whole question is whether the accounts kept from year to year indicate a mutual, open and current account where there have been reciprocal demands between the parties

It has been urged by Mr. Nilkanth in support of his argument that in view of the decision in *Madhav v. Jairam* (1) it is sufficient if the account is mutual, open and current and that there is no need to prove reciprocal demands. I am, however, unable to accept this reading of the decision in *Madhav v. Jairam.* (1) The Article itself requires that the account should be one in which there have been reciprocal demands between the parties. The nature of the account in that case satisfied that requirement of the Article, and the observations in that case must be read with reference to the facts in that case. If those observations are to be read in the sense in which Mr. Nilkanth has asked us to read them, I do not think that they would be in accordance with the terms of the Article; and, speaking for myself, I do not think that it was meant that the requirements of the Article could be dispensed with. Such a result could not have been intended. The difference appears more in the language used than in the meaning indicated. Mutual dealings, such as are referred to in S. 8 of Act XIV of 1859 would ordinarily indicate a mutual, open and current account where there have been reciprocal demands. I shall not attempt in the present case to define as to what would constitute a mutual, open and current account indicating reciprocal demands. For the purposes of this case it is not necessary to do so. Speaking with reference to the accounts we have in this case- and they are all accounts in the books of the defendants- they indicate a mutual, open and current account, and the only question is whether they indicate reciprocal demands between the parties. One has only to go through the accounts to find that they are kept from year to year extending over a period of twenty years in which the balance has been drawn every year regularly, but no formal adjustment has been made at any time between the parties. The debits and credits are numerous, and it is not possible to contend in the present case for the respondents that all the credits, i. e., the payments by the defendants to the plaintiffs are mere part payments of the advances already made. There were dealings between the parties, the plaintiffs residing at a place near Belgaum and the defendants doing business at Belgaum. This was really a business account on either side and clearly there were reciprocal demands. In my opinion, the accounts in the present case ranging over nearly twenty years clearly show that there was a mutual, open and current ac-

(1) [1921] 23 Bom. L. R. 540–63 I. C. 950.

count indicating reciprocal demands between the parties. Therefore, the plaintiffs' suit is within time.

It is urged by Mr. Desai that the defendants have been debtors throughout and that, therefore, it could not be treated as an account within the meaning of Article 85. I do not think, however, that any decision has laid that down as a conclusive test of a mutual, open and current account in which there have been reciprocal demands between the parties. It depends upon the nature of the dealings between the parties. It is sufficient if the dealings are such that the balance might have been in favour of either party; it is not essential that the balance should in fact have been in favour of the defendants at some stage.

It is not necessary to deal with the further argument which was urged by Mr. Desai relying upon the Purshis, Ex. 48, which has been referred to in the trial Court as limiting the plaintiffs' claim to Rs 2,000. In fact it does not so limit it, and we find at the close of the account that it does not exceed Rs. 2,000. We, therefore, vary the decree of the lower appellate Court by substituting Rs. 1,743-14-0 for Rs. 276. In other respects the decree will be confirmed. Costs here and in the lower appellate Court to be paid by defendants Nos. 3, 4 and 6.

CRUMP J.—It is somewhat curious that the lower appellate Court in this case came very close to applying Article 85 of Schedule I of the Indian Limitation Act of 1908 without observing that that Article was really applicable. The lower appellate Court correctly described this account as a mutual account, but failed to observe what the consequence would be. The reason no doubt was that parties there confined their attention to other and less tenable points. I agree that this account is within the definition contained in Article 85. That it is open and current cannot be doubted, and it is mutual because there are items upon either side independent of one another which clearly gave rise at one time or another to independent obligations. Therefore, without considering how far the decision in *Madhav* v. *Jairam* (1) is applicable to the facts of the present case, or whether that decision is not perhaps too widely expressed it is clear that, on the earlier decision of this Court in *Ganesh* v. *Gyanu* (2), this is a mutual, open and current account within the meaning of the Article in question. The words "where there have been reciprocal demands between the parties" in Article 85 taken literally may no doubt give rise to some difficulty, but those words have been interpreted as meaning that the nature of the accounts is such as to create reciprocal demands. They are in fact words in the nature of a definition, but are not intended to postulate that there should have been reciprocal demands in fact. It follows that as Article 85 is applicable, the whole claim is in time, and it is unnecessary for us to consider the arguments based upon Sec 20 of the Indian Limitation Act or Sec 61 of the Indian Contract Act. I need only say that upon these points I concur in the decision just pronounced.

Decree varied.

1923 BOMBAY. 85

SHAH, C. J. AND CRUMP J.

Shantaram Balkrishna—Appellant.

v.

Waman Gopal Wadekar—Respondent.

F. A. No. 151 of 1921 D. 9th August 1922 from the suit No. 2726 of 1919.

Hindu Law-Partition-Common way.

Both under Mitakshara and the Vyavahara Mayukha the land reserved as common passage at the time of previous partition between the parties is not divisible subsequently. (1912) 36 Bom. 379 ref.

O. Gorman and Jinnah,-for the Appellant.

Taraporevala with Kanga and B. J. Desai—for the Respondents.

Shah Ag. C. J.— The facts which have given rise to this appeal are briefly these. A plot of ground, which is shown in the plan, was originally owned by one Balkrishna. He left four sons, Shantaram, Vasantrao, Janardan and Shivshankar, and at a partition which was effected among the four brothers in the year 1916, this plot was divided into four parts. The plot marked A in the plan fell to the share of Shantaram, the

plot marked B was assigned to Vasantrao, the plot marked C was assigned to Janardan and the plot marked D was assigned to Shivshankar. There was a common passage left which is shown in the plan and which is marked E F H G. There is no special provision in the decree based upon the award relating to the partition, but it appears from the descriptions of the various plots given in the Schedules that the said land was reserved for the common passage. On September 19, 1916, Janardan conveyed his interest in the plot C to the present plaintiffs, and on September 28, 1916, Shivshankar conveyed his interest in the plot D to the 1st plaintiff on behalf of both the plaintiffs. On June 18, 1919, Vasantrao conveyed the plot B including his right, title and interest in the strip of land called the common passage to Bhagvandas Tapidas, the original defendant No. 2.

It appears that before the date of this last conveyance the present plaintiffs who had become owners of plots C and D built in such a manner as to make some encroachments upon the common passage which is shown in the plan, and a suit was filed by Shantaram and Vasantrao for the removal of those encroachments. In that suit a decree was passed on August 6, 1918, against the present plaintiffs. A copy of that decree was annexed to the plaint but has not been formally put in as an exhibit. In the course of the argument the decree has been referred to, subject to the appellant putting in a certified copy of the decree, as an exhibit. The result of this decree was that the plaintiffs were required to remove the encroachments which they had made on this common passage.

Then on August 22, 1919, the said Bhagvandas conveyed in favour of the plaintiffs his interest in the small strip of land forming part of the plot B in the south marked OPJL, and his right, title and interest in the portion of the common passage between the plots C and D and marked EFML. In virtue of these conveyances at the date of the present suit, which was filed in September 1919, the plaintiffs had become owners of the plots C and D, and it may be taken for the purpose of this appeal that they had become owners of ¾ of the interest in that portion of the common passage which is marked EFML and were interested along with the owners of plots A and B as co-owners in the remaining portion of the land described as common passage namely LMHG. I may add that the common passage joins the main road at its northern end and is closed by a wall of the adjoining premises at its southern end. As a passage it ends at the line EF. The present suit was filed with a view to seek partition of the land which has been described as common passage. and the prayer was to secure the result, that the partition should be so effected as to make the owners of plots C and D absolute owners of the portion of the passage EFML; to assign the absolute interest in the soil of that part of LMHG towards the line MH so far as the owner of the plot A was concerned, which would represent ¼ of the whole area of this passage, to the 1st defendant; and to allow to the owner of plot B the absolute interest in the soil of that portion of LMHG towards the line LG to the extent of ¼ interest in that part of the passage which is marked LMHG. The intermediate narrow strip which would be very small was to remain the absolute property of the owners of the plots C and D with the right of passage in favour of the plaintiffs over the whole of the land marked LMHG subject to such compensation being paid to the owners of plots A and B as the Court might think proper. This would make the plaintiffs the absolute owners of the southern half of the passage, while the remaining half would remain exactly as it was at the date of the suit for the benefit of all the four owners.

During the course of the suit there were various amendments made from time to time which it is not necessary to detail for the purposes of this appeal. The objection taken by defendant No. 1 who is the owner of plot A was that this was really an attempt to get rid of the clear effect of the decree against the plaintiffs for the removal of the encroachments, and to secure a partition, which in effect would deprive the 1st defendant com-

pulsorily of such right of ownership as he had in the whole of this common passage as a co-owner. Defendant No. 2, Dwarkadas, who purchased the interest of the original defendant No. 2, Bhagvandas in the plot B as also defendant No, 3, the original owner of the plot D, resisted the plaintiffs' claim. I need not detail the various defences but five issues were raised on the pleadings. The 1st issue is whether the portion of the passage marked EFLM is of no use to the defendants as alleged in the plaint, and the other material issue which I need note is the third issue ;whether the plaintiff is entitled to partition as claimed. The learned trial Judge found in favour of the plaintiffs, and made the following observations :—

"Having regard to all the considerations in the case and having seen the passage this afternoon I am fully convinced that the passage between LM and LF is absolutely useless to the proprietors of plots A and B, and this passage was kept open only for the purpose of giving access to the owners of plots C and D as they had no other access except through this passage. I think it is fit that this partition should be ordered and special directions should be given to the Commissioner "

The learned Judge gave directions as to partition practically as prayed for.

In the appeal the principal point argued is whether the partition of this narrow strip of land, which was reserved at the time of the partition in 1916 as common passage, can be allowed. In the course of the argument a further point that arose in connection with this question was whether as a matter of law such a claim for partition of the common passage was maintainable in view of the rule of Hindu law by which the parties are governed, that common passages are indivisible.

I shall first deal with the question as to whether, in view of the special rule of Hindu law, which undoubtedly is applicable to the parties to this suit, the claim for partition is maintainable. I am of opinion that it is not. The rule to which I refer is to be found in the Mitakshara Chap. I, S. 4 (Stokes' Hindu Law, Books, pp. 384 387 and 389) That section relates to "Effects not liable to partition" and the relevant passages in that section are to be found in paragraphs 16 and 25 which are as follows :—

"16. Other things exempt from partition, have been enumerated by Manu; 'Clothes, vehicles, ornaments, prepared food, women, sacrifices and pious acts, as well as the common way, are declared not liable to distribution."

Then the commentator proceeds to deal with each of these items, and the opinion expressed by Vijnaneswara as to 'common way' is to be found in paragraph 25 which is as follows :—

"The common way, or road of ingress and egress to and from the house, garden, or the like, is also indivisible."

The same rule is referred to by Nilkantha in the Vyavahara Mayukha. The same verse from Manusmriti is quoted in Chapter IV, section 7, and the word 'prachara, which has been used for the expression "common way" is thus explained in the same section: "*prachara* is the way to the house, or the like, as also a pasture-ground for cattle etc." (See Mandlik's Hindu Law, pp. 70 and 71.)

These passages make it quite clear that if this is to be treated as "common way, or road of ingress and egress", it it indivisible. I may add here that the word "prachara" which is used in the verse quoted from Manusmriti. and which has been rendered in these translations as 'common way" is translated in the Sacred Books of the East Series Vol, XXV, as "pasture ground", and I have not everlooked the interpretation which has been put by some commentators upon the word "prachara" as indicating "pasture ground." In the foot-note on this verse (Manu IX, 212) in the said volume at page 379 it is also indicated that the word "prachara" is understood by some of the commentators on Manusmriti in the sense of "common way". But what is important is that this word has been interpreted in the Mitakshara in the sense of 'common way', and that is how it is interpreted in the Vyavahara Mayukha. The author of the Vyavahara Mayukha gets over the apparent difficulty by accepting both the meanings of the word "prachara". There is no

doubt, therefore, that, on the authority of the Mitakshara and the Vyavahara Mayukha, by which we are bound, the land which was reserved as common passage at the time of partition between the parties in 1916 is not divisible.

It is urged, however, that this rule ought not to be strictly applied, under the modern conditions obtaining in a large city like Bombay. The rule to my mind is so plain that I do not see how it could be said to make any difference whether it is to be applied to any land in the city of Bombay or outside. Further it is urged that the 'common way' referred to in the texts would refer to the "common ways" existing prior to partition, but not to such "common passages" as are created for the first time and reserved by agreement between the parties at the time of the partition. I am unable to discover in this contention any real answer to the application of the plain and simple rule to the facts of this case. This point was not raised in the trial Court, and as I have already statad, it was only referred to in the course of the argument before us. But the rule is clear, and I do not see how the plaintiffs can escape the application of that rule. This rule is referred to in *Nathubhai Dhirajram* v, *Bai Hansgavri* (1). No doubt there the facts were different and the rule was referred to under somewhat different circumstances. I refer to that judgment for the purpose of showing that the rule is not an obsolete rule of Hindu law, but a rule which is capable of application, and which ought to be applied, wherever it can properly apply.

In the present case it is clear to my mind that when in 1916 the brothers divided the property and kept this passage common, they really kept it as a common way for the use of all the four brothers; and the attempt which has been made in the course of the argument to show that the owners of the southern plots C and D have greater interest than the owners of plots A and B in the north does not appear to me to derive any support from the words used with reference to this passage in the decree relating to partition. The land which is shown in the plan as passage has been described throughout as "common passage" and the plaintiffs' claim for partition is based on the footing that all the owners of the four plots are co-owners of this land. It may be that the plaintiffs have some greater use of the passage in virtue of the position of the plots C and D than the owners of plots A and B. But I do not see how the accident of the southern end of the passage being closed by a wall could make any difference in law to the rights of the parties, nor can I see how in law they can be said to have any more interest in the passage than the owners of plots A and B. Really the land which is now sought to be partitioned is 'common way' and it ought not to be divided according to the rule of Hindu law to which I have referred. That seems to afford a complete answer to the plaintiffs' claim.

But apart from this rule of Hindu law the point has been raised on behalf of the appellant that such a partition which has practically the effect of depriving one co-owner of his interest in the property ought not to be allowed. On the other hand on behalf of the plaintiffs reliance is placed upon the rule about which there can be no doubt that a co-owner of any land is entitled to seek partition of the land at his will. But in the present case it is not a simple partition by metes and bounds that the plaintiffs seek, but a partition on certain lines without which the partition would obviously be of no use to the plaintiffs. The strip of land which is marked as common passage varies in width from eight to ten feet throughout the whole length, and as a strip of land it is absolutely inconvenient to divide it by metes and bounds.

But the way in which the plaintiffs seek to get over the difficulty is by drawing a distinction between the right of passage as an easement and the right of ownership over the land as distinguished from the right of passage. The argument is somewhat ingenious and I shall not attempt to state it in detail. In the case of land

(1) [1912] 36 Bom. 379, 382–14 Bom L. R. 418–15 I. C. 818.

which is owned by certain persons, it ought to be divided in the ordinary way if it is capable of division. If it is incapable of division it must be kept as the common property of the co-owners. It is not suggested that the alternative remedy of sale under certain circumstances as provided by the Partition Act is applicable to this case nor is it suggested that such a remedy is suited to the present case. The very nature of the prayer shows that the plaintiffs do not desire a simple partition, which obviously is not possible under the circumstances of the case, but a peculiar partition to serve their own interests without due regard to the interests of the co-owners. In view of the rule of Hindu law upon which I base my decision, it is not necessary for me to arrive at any final conclusion on the general question whether, apart from that rule, such a partition as is claimed by the plaintiffs is permissible in law, and even if it be permissible in law, whether under the circumstances of the case it would be right to direct such a partition.

It is difficult to escape the inference that soon after the decree was passed for the removal of the encroachments, in 1918, against the plaintiffs, they filed this suit with a view to circumvent, if possible, that decree. If it be open to them in law to do so, they are entitled to that remedy. But in my opinion it is not open to them to do so.

I would, therefore, allow the appeal to discharge the decree of the trial Court and dismiss the plaintiff's suit with costs throughout.

Crump J.—As I agree that the decree of the trial Court cannot stand I wish to indicate briefly my reasons for that conclusion. The parties to this case stand in the shoes of the four sons of Balkrishna who were parties to the original division of this property. That partition by virtue of the decree in Suit No. 337 of 1910 was a complete partition, and I cannot see any ground on which it can now be re-opened. It is not suggested that there was any *bona fide* error there, or that the partition was of a partial nature. The effect of the decree clearly was to decide that the property of which partition is now sought should be reserved as a common passage to the houses of the four parties. That being so, it would follow from the decree itself that that passage is not property such as can be the subject of a further partition. Therefore even apart from the rule of Hindu law, as to which it is unnecessary for me to add anything in view of the judgment of the learned Chief Justice, it does appear to me that the suit is not maintainable, and that the jurisdiction which the Judge of the trial Court has exercised is a jurisdiction which he did not possess. The ingenuity of counsel has failed to discovor any precedents for such a suit as this, the reason obviously being that it is probably the first suit of its nature. If I felt any doubt as to the correctness of our view of the law, that doubt would be removed by a consideration of the motive which has impelled the plaintiffs to file the present suit. They do not in realitly desire partition of this common way. What they really desire to do is to get rid of the effect of the decree against them whereby they were ordered by this Court to remove a certain encroachment on that way. It is an ingenious course, but one which I do not think could possibly be permitted to succeed. The grounds on which tne trial Judge has proceeded are those of convenience rather than of law. It may be true that the portion of the passage which has been assigned to the plaintiffs is of no value to the other parties, but then they are the best judges, and they cannot be compelled to surrender the rights which were awarded to them by the partition decree in the previous suit without their own consent. Therefore it seems to me that the suit must of necessity fail whether it be approached on the basis of the rule of Hindu law or on the basis of any other system of law which could conceivably be applicable to the present case. I agree, therefore, that the appeal should be allowed and the suit dismissed with costs.

Appeal allowed.

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SHAH C. J. AND CRUMP J.

Jagannath Narsindas Marwadi—Plaintiff-Appellant.

v.

Raoji Tulsiram Pansare-Defendant-Respondent.

S. A. No. 721 of 1921 D. 5th September 1922 from the decision of D. J. Nasik in A. No. 226 of 1920.

(a) T. P. Act S. 59-Proof of attestation.

It is clear from S. 70 of the Indian Evidence Act that the admission of a party to an attested document of its execution by himself shall be sufficient proof of its execution as against him though it be a document required by law to be attested. Where there is no evidence or no indication on the record whatever that the attestations were not proper nor is there a plea of want of due attestation, mortgagee need not prove attestation. 14 Bom. L. R. 1034 Dist. [P. 91 C. 1].

(b) Evidence Act. S. 70—Execution, meaning of.

Per Crump, J.—The word "execution" means that the party by affixing his signature or mark has signified his assent to the contents of the document and if a party admits that he has done this, then he admits execution. The admission of execution cannot be taken to mean an admission not only of the signature or mark in token of assent by him but also that all the legal formalities connected with the document have been complied with. Nor is there any reason for holding that where a party admits execution within the meaning of this section, he must necessarily be taken to admit that the document has been attested as required by S. 59. [P. 92 C. 1].

D. R. Patvardhan—for the Appellant.

Respondents.—Not represented.

Shah Ag. C. J.—The plaintiff in this case sued to enforce his mortgage bond dated January, 8, 1912. The bond was for Rs. 500. The defendant No. 1 filed a written statement in which he disputed the claim, but he did not dispute either the execution or the validity of the mortgage bond. The defendant No. 2 was joined as a purchaser of a part of the mortgaged property subsequent to the mortgage, but he did not appear to contest the plaintiff's claim. The first issue raised was, whether the mortgage bond in suit was proved. It may be mentioned that when defendant No. 1 was examined in the suit, he admitted the execution of the bond in his evidence. The learned trial Judge, however, relying upon the decision in *Dalichand Shivaram* v. *Lotu Sakharam* (1) came to the conclusion that as there was no proof in the case of such attestations as are required by S. 59 of the Transfer of Property Act the bond was not proved and dismissed the plaintiff's suit.

In appeal to the District Court the same point was raised, and it was dealt with by the District Judge practically on the same lines. It may be mentioned, however, that he realised the circumstance which distinguishes this case from *Dalichand* v. *Lotu*, namely, that there was no evidence in the present case that the attestations had not been made in the proper manner, whereas in the other case there was such evidence.

The present appeal is preferred by the plaintiff to this Court and the respondents have not appeared before us. The defendant No. 2 has not been served, and Mr. Patvardhan for the plaintiff agrees that defendant No. 2's name may be struck off from the suit, as he does not desire to press his mortgage claim against that part of the mortgaged property which has been transferred to him. He is content to limit his security to the property in the possession and ownership of defendant No. 1.

The principal point, however, that has been urged on his behalf is that both the lower Courts are wrong in their view that the martgage bond is not proved.

The circumstances in the present case with regard to the mortgage bond are these. Defendant No. 1 not only has not denied the execution of the bond, but has in terms admitted it in his evidence. There is nothing in the pleadings to show that any point was raised by him that the attestations as appearing on the bond were not made as required by law. There are two attestations on the bond exclusive of the writer's signature after the attestations and so far as the appearance of the document is concerned, those attestations would be consistent with their having been made in a proper manner.

There is nothing in the evidence in the case to show that the attestations

(1) (1919) 44 Bom 405; R. 22 Bom. L. 136;-55 I. C. 616.

were not properly made, *i.e.*, that the attestants did not witness the actual execution of the document in their presence. Under these circumstances the question is whether the lower Courts are right in holding that unless the plaintiff adduces evidence to prove that the attestations were properly made, the bond should be held not to have been duly executed. It seems to me that the lower Courts have gone too far in holding that the bond is not proved.

In the first place, it is clear from S. 70 of the Indian Evidence Act that the admission of a party to an attested document of its execution by himself shall be sufficient proof of its execution as against him, though it be a document required by law to be attested.

In the present case, there is the other circumstance that both the attesting witnesses are dead. In the case of *Shamu Patter* v. *Abdul Kadir*, (2) there was evidence to show that the attestations were not made in the presence of the executant at the time when the executant signed the mortgage bond, and on that evidence it was found that the attestations were not in accordance with law. In the case of *Dalichand Shivram* v. *Lotu Sakharam* (1) also there was evidence to show that the attestations had not been proper. In the present case there is no such evidence, and no indication on the record whatever that the attestations were not proper.

Under these circumstances, it seems to me that the document is proved. I base my decision, first, on the ground that there is nothing in the pleadings to show that the plaintiff was put to the proof of the attestations: and, secondly, on the provisions of S. 70 of the Indian Evidence Act, according to which the plaintiff is relieved from the obligation of proving the execution of the document, if the party to it has admitted its execution. We have not had the benefit of any argument in this case on behalf of respondent No. 1. But after a consideration of the arguments urged on behalf of the appellant, and of the facts in the case, we have come to the conclusion that the view taken by the lower Courts is wrong. I would, therefore, allow the appeal, set aside the decree of the lower appellate Court and remand the suit to the trial Court to be disposed of according to law. All costs up to date to be costs in the suit.

Crump J.—The Courts in this case have held that the plaintiff cannot succeed because there is no evidence that his mortgage bond was attested by two witnesses, and therefore, it is not proved that the requirements of S. 59, paragraph 1, of the Transfer of Property Act, as explained by the Privy Council in *Shamu Patter* v. *Abdul Kadir*, (2), have been complied with. In so doing, the Courts have relied upon the decision of this Court in *Dalichand Shivaram* v. *Lotu Sakharam* (1). It appears to me, however, that the case of *Dalichand Shivram v. Lotu Sakharam* is at once distinguishable from the case now before us. In that case the validity of the mortgage with reference to S. 59 of the Transfer of Property Act was raised *in limine*, and was in fact made the subject of a preliminary issue Upon that issue evidence was adduced, and it was found that the requirements of S. 59 in the matter of attestation had not been complied with.

The District Judge in this case has observed this distinction, but has failed to draw from it the necessary conclusion that the matter was one which should have formed the subject of an issue upon which the parties would be entitled to give evidence. The reasons which he assigns for not sending down an issue upou the point are not satisfactory, for they are such as would apply in the case of every suit in which it is necessary to send down an issue. The case must, therefore, be approached apart from this decision, and if it is so approached, it appears to me that the judgment of the Court below is wrong.

First, as regards the so-called admission of execution which has been pressed upon us as dispensing with the proof that the formalities of attesta-

(2) (1912) 35 Mad. 607; 39 I. A. 218, 16 C. W. N. 1009; 23 M. L. J. 321; 12 M. L. T. 338; (1912) M. W. N. 935; 10 A. L. J. 259; 14 Bom. L. R. 1034; 16 C. L. J. 596; 16 I. C. 250 (P. C.)

tions have been complied with. Upon this point I feel considerable doubt. Section 70 of the Indian Evidence Act lays down that the admission of a party to an attested document of its execution by himself shall be sufficient proof of its execution as against him, though it be a document required by law to be attested.

Now the question that immediately arises on the application of this section is as to what is meant by "execution", and as I understand the law, the word "execution" there means that the party by affixing his signature or mark has signified his assent to the contents of the document, and if a party admits that he has done this, then he admits execution. I do not think that the admission of execution can be taken to mean an admission not only of the signature or mark in token of assent by him, but also that all the legal formalites connected with the document have been complied with. Nor do I see any reason for holding that where a party admits execution within the meaning of this section, he must necessarily be taken to admit that the document has been attested as required by S. 59 of the Transfer of Property Act. But in the present case even if that fuller meaning were given to the words "admission of execution" the result would be precisely the same, for it would be, in my opinion, impossible to hold that that which the defendant here stated can be read as meaning that he admits that the document was validly attested. He is an agriculturist and illiterate, and all that he says is "I passed this document," and when he said that his meaning was that he put his signature or mark, and he cannot, I think, be taken to have intended more. Therefore, that admission can dispense with the proof of execution, only in the limited sense in which I understand that term. But there are other legal principles to be applied which appear to me to conclude the matter. The plaintiff in his plaint sets out that he is suing on a mortgage, and when he sets that out, he must be taken to assert that it is a valid mortgage. The defendant in his written statement raises no plea that the mortgage is invalid. There is a vague statement that the claim is not admitted, But the real defence suggested was that the consideration was not as represented, and that the advance set out in the mortgage was on account of past dealings. Thus there was never any allegation by the defendant that the contract was invalid or incapable of being enforced, and that being so, the principle laid down in Order 6, rule 8, of the Code of Civil Procedure, would, in my opinion, be applicable. Of course, where it is brought to the notice of the Court that the document is in any way invalid, for instance, where it is apparent upon the face of it or where it is so disclosed in evidence, then in spite of the absence of any pleading, it might be the duty of the Court to take notice of that fact. The defendant here is an agriculturist and there are certain matters which a Court is required to inquire into as laid down in S. 12 of the Dekkhan Agriculturists' Relief Act. But the present point is not covered by that section and so far as I understand the case, it was never pleaded in the suit, and there is nothing upon the face of the document or anything in the evidence to bring to the notice of the Court, that this document was not validly attested. In that aspect of the case, it appears to me that the Courts were wrong in going into this question and that, as that question did not properly arise, the mortgage cannot be held to be invalid on account of the absence of proof which the plaintiff was never properly called upon to give.

For these reasons, I agree in the conclusions reached by my Lord the Chief Justice and in the order proposed by him in the case.

Suit remanded.

1923 BOMBAY 92

MULLA, J.

N. Buch and Co. — (Plaintiff) Appellant.

v.

Gordhandas Mavji—(Defendant) Respondent.

O. C. J. Suit No. 5095 of 1921 D. 17th January 1922.

(a) Contract Act, Ss. 82 and 83—When property in goods passes to buyer.

The combined effect of those sections is that where goods agreed to be sold are not ascertained at the time of making the agreement but goods answering the description in the agreement are subsequently appropriated by one party for the purposes of the agreement and that appropriation is assented to by the other, the sale is complete, and the property in the goods passes to the buyer. In order that the property may pass to the buyer it is necessary that the goods appropriated to the contract by the seller must answer the description in the agreement. Mere appropriation by the seller does not pass the property in the goods to the buyer. The effect of appropriation is that the seller loses the possibility of withdrawing the goods from the contract and he would break his contract with the buyer if he offered any other goods to him, though the goods still remained his property. The appropriation must be assented to by the buyer to pass the property. [P. 95 C. 1, 2]

(b) Contract Act, S. 118—Acceptance.

The question of acceptance does not arise when the property in the goods has passed to the buyer. The provisions of S. 118 do not apply where the property in goods has passed to the buyer; for where the property in goods passes by appropriation on the part of the seller and assent on the part of the buyer, since the appropriation can only be of goods of the contract description, the conditions of the contract are *ex-hypothesi* complied with. The case contemplated by S. 118 is one where there has been a contract with a condition and the condition is broken. In such a case the buyer may waive that right of rejection and accept the goods. The property in the goods then passes by the buyer's acceptance and if the buyer thereafter refuses to pay for and take delivery of the goods, the seller is entitled to sue the buyer for the price. [P. 96 C. 1]

Kania and Lalji—for the Plaintiffs.

Munshi with Kanga—for the Defendant No. 1.

Mulla J.—This suit arises out of a contract (Ex. B), dated January 31, 1920, whereby the plaintiffs agreed to sell and the defendants agreed to buy five cases of black and coloured worsted venetian at the price of 8*s* 6*d*. per yard. The goods were to be shipped "in two lots monthly from October approximately." The suit is to recover the loss on re-sale of two out of the five cases and damages for breach of the contract in respect of the remaining three cases.

The plaintiffs carry on business as commission agents and merchants in piece goods. The defendants at all times material to this suit carried on business in partnership in piece-goods in the name of Laxmidas Gordhandas. Two out of the said cases arrived in Bombay per S. S. *City of London* on August 10, 1920. On August 17, 1920, the plaintiff sent an invoice and also shipment samples in respect of the said two cases to the defendants. On September 28, 1920, the plaintiffs sent an invoice and shipment samples in respect of the remaining three cases to the defendants. On October 22, 1920, the said cases arrived in Bombay per S. S. *Baronjedburgh*. The defendants admit receipt of shipment samples in respect of all the five cases, but none of them was produced in Court at the hearing of the suit. The defendants had instructed the plaintiffs to put the initials of their firm, namely, L. G, on the cases, and the same was done accordingly. The invoices (Ex. C and D) show the mark put on the bales.

The contract being f. b. h., the defendants had to pay customs duty and clearing charges and to clear the same at their expense. As is usual, however, in such cases, the defendants requested the plaintiffs' *muccadam* to clear the goods on their behalf. They paid customs duty and clearing charges to the *muccadam*, and the goods were cleared by him and they were subsequently placed in the duty paid ware-house of the Bombay Port Trust.

The plaintiffs were entitled under clause (*c*) of the contract (Ex. B) to fix the rate of exchange at any time within thirty days from the date of the arrival of the steamer. The defendants requested the plaintiffs to wait as they thought the exchange would turn in their favour within a short time and the plaintiffs waited accordingly. On October 23, 1920, the plaintiffs at the request of the second defendant fixed the rate of exchange in respect of the two cases that arrived per S. S. *City of London*. On the next day the plaintiffs sent a bill in rupees (Ex. G) to the defendants in respect of the said two cases.

On December 4, 1920, the plaintiffs sent a bill to the defendants for Port Trust rent in respect of the two cases that arrived per S. S. *City of London* and the defendants paid the bill on December 27, 1920, (Ex. F.).

Thereafter the plaintiffs repeatedly requested the defendants to pay for

and take delivery of the said five cases, but the defendants asked for time and the plaintiffs gave time to the defendants. As the defendants did not pay for and take delivery of the goods, the plaintiffs through their attorneys addressed a letter to them on August 10, 1921, stating that though the defendants had repeatedly promised to pay for and take delivery of goods, they had failed to do so, and intimating that unless the goods were paid for within two days from the receipt thereof the plaintiffs would sell the said goods on account and at the risk of the defendants. In the said letter the plaintiffs also stated that, though the rate of exchange in respect of the first lot of two cases was fixed with defendant No. 2, the rate in respect of the remaining three cases had been kept open at the request of the defendants.

The plaintiff's thereafter got the said five cases advertised for sale and the sale was fixed for August 25, 1921. On that date a little before the auction commenced, defendant No. 1 requested the plaintiffs to postpone the sale stating that he would arrange to sell the goods privately at better rates. Defendants No. 1 denied having requested the plaintiffs to stop the sale, but his denial is false; for, on the same day, that is, August 25, 1921, the plaintiffs addressed a letter to the defendants recording the fact that the sale had been stopped at the defendants' request and this was not denied by the defendants. Subsequently the defendants asked the plaintiffs to procure them samples of the goods to enable them to sell the goods by private contract and the plaintiffs sent samples accordingly. Defendant No. 1 denied that he asked for samples of the goods in suit and said that the samples were of other goods. I hold that this denial is false. Defendant No. 1 asked for samples both of goods comprised in the said contract and of other goods. The plaintiffs waited for four weeks, but as nothing was done by the defendants in the matter, the plaintiffs wrote to the auctioneers on September 23. 1921 (Ex. S.) to advertise for sale of the two cases that arrived by S. S. *City of London*. The two cases were advertised for sale, and they were sold by public auction on October 3, 1921. The auctioneers' memo is Ex. L in the case. The plaintiffs claim the the loss on re-sale in respect of the said two cases and damages on the basis of the rate realised at the auction sale in respect of the remaining three cases.

At the hearing of the suit counsel for the defendants raised *inter alia* the following issues:—

(1) Whether the property in the goods passed to the defendants ?

(2) Whether the goods offered to the defendants were of the quality and shipment agreed upon ?

As there was no objection taken by the defendants on the score of shipment either in the correspondence before suit or in their written statement, counsel for the plaintiffs objected to issue No. 2 so far as it related to shipment. Thereupon counsel for the defendants asked for leave to amend the written statement and leave was granted to them on the defendants paying the costs of the day and the costs of the amendment. The defendants have since then amended the written statement.

The defence so for as it related to quality was given up by the defendants at the subsequent hearing of the suit, not a word having been said about it by the defendants or their counsel.

At the hearing of the suit it was contended on behalf of the defendants that the goods were not of the contract shipment, that the property in the goods had not passed to the defendants, and that, even if property did pass, the goods were not accepted by them within the meaning of S. 118 of the Indian Contract Act and the defendants were justified in refusing payment for the goods.

As regards shipment, the contract (Ex B) provides that the goods should be "in two lots monthly from October approximately." The first lot of two cases arrived in Bombay on August 10 1920, and the second lot of three cases on October 21. 1920. Due intimation of the arrival of the goods was given by the plaintiffs to the defendants. Though the defendants knew that the goods had arrived partly in August and partly in October, the defendants

paid the customs duty and clearing charges in respect thereof and got the same cleared on their behalf by the plaintiffs' *muccadam*. The defendants also paid godown rent in respect of the first lot of two cases. Further, though the plaintiffs repeatedly demanded payment from the defendants of the price of the goods and wrote several letters to the defendants demanding payment (Ex. H), the defendants did not object to payment on the ground of late shipment at any time. Nor was the objection that the goods were not of the contract shipment taken by the defendants in their written statement. The objection was taken for the first time when issues were raised by the defendants' counsel. I hold that the goods that arrived in Bombay on August 10, 1920, and on October 21, 1920, were of contract shipment. The words in the contract are "shipment from October approximately" which are quite different from "October shipment." I think that the reason why no objection was taken by the defendants on the ground of shipment was that the defendants themselves treated the goods as of contract shipment though they arrived in August and October.

The next point to consider is whether the property in the goods passed to the defendants, for if the property did not pass the plaintiffs are not entitled to the loss on re-sale, but they are entitled to damages only on the basis of the rate prevailing at the date of the breach. The material sections of the Indian Contract Act bearing on this subject are Ss. 82 and 83. The combined effect of those sections is that where goods agreed to be sold are not ascertained at the time of making the agreement, but goods answering the description in the agreement are subsequently appropriated by one party for the purposes of the agreement and that appropriation is assented to by the other the sale is complete, and the property in the goods passes to the buyer. In order that the property may pass to the buyer it is necessary that the goods appropriated to the contract by the seller must answer the description in the agreement. Thus in *Vigers Brothers* v. *Sanderson Brothers* (1) the plaintiffs had contracted to sell to the defendants two parcels of sawn laths to be shipped at Wasa for Hull and to be of particular specified lengths, and it was expressly privided that the property should pass on shipment; it was nevertheless held by Bigham J. that the latter provision only applied to laths of the description contracted for and the sellers not having supplied laths of that description were not entitled to recover the price. As regards the buyer's assent to the appropriation, it is to be noted that the assent may be express or implied. See *Badische Anilin Und Soda Fabric* v. *Hickson* (2) and *Pignataro* v. *Gilroy* (3).

In the present case, as I have held before, the goods offered to the defendants answered the description in the agreement. The act of the sellers in sending the invoices to the buyers amounted to a notification of appropriation by the sellers [*The Parchim* (4); Benjamin on Sale, 6th Ed, p. 420 cited with approval in *Re Cargo ex S S. Rappenfels* (5)] and the subsequent acts of the buyers, namely, the requests to the plaintiffs' *muccadam* to clear the goods on their behalf, coupled with the payment of customs duty and clearing charges to the *muccadam* and the payment of Port Trust rent, constituted an assent by the buyers to the appropriation, with the result that the property in the said five cases passed to the buyers. Of course, mere appropriation by the seller does not pass the property in the goods to the buyer. The effect of appropriation is that the seller loses the possibility of withdrawing the goods from the contract and he would break his contract with the buyer if he offered any other goods to him, though the goods still remained his property. The appropriation must be assented to by the buyer to pass the property.

The next point urged on behalf of the defendants was that though the property in the goods passed to the defendants, it was competent to the

(1) [1901] 1 K. B. 608.
(2) [1906] A. C. 419, 421.
(3) [1919] I. K. B 459.
(4) [1918] A. C. 157, 171.
(5) [1914] 42 Cal. 334, 342, 343,—30 I. C. 174.

defendants, if the goods were not of the contract shipment, to repudiate the contract and to refuse payment for the goods as the defendants had not accepted the goods within the meaning of S. 118 of the Indian Contract Act. The first part of S. 118 is as follows :—

"Where there has been a contract, with a warranty, for the sale of goods which, at the time of the contract, were not ascertained or not in existence, and the warranty is broken, the buyer may accept the goods or refuse to aceept the goods when tendered."

The word "warranty" is used in this section in the wide sense of condition, that is, a stipulation, the breach of which may give rise to a right to treat the contract as repudiated, as distinguished from a stipulation, the breach of which may give rise to a claim for damages. In connection with this section it is important to observe that the question of acceptance does not arise when the property in the goods has passed to the buyer. This, as stated in Benjamin on Sale (6th Ed. p. 853), follows from principle. The result is that the provisions of S. 118 do not apply where the property in goods has passed to the buyer; for where the property in goods passes by appropriation on the part of the seller and assent on the part of the buyer, since the appropriation can only be of goods of the contract description, the conditions of the contract are *ex hypothesi* complied with. The case contemplated by S. 118 is one where there has been a contract with a condition and the condition is broken. In such a case the buyer may waive that right of rejection and accept the goods. The property in the goods then passes by the buyer's acceptance and if the buyer thereafter refuses to pay for and take delivery of the goods, the seller is entitled to sue the buyer for the price.

In the present case, as I have already stated, the goods offered to the defendants complied with the description in the contract and the property in the goods passed under Ss. 82 and 83. But, even if the goods were not of the contract shipment and the property in the goods did not pass to the defendants I hold that the defendants by their conduct waived the condition as to shipment. It is, therefore, too late for the defendants to contend that they are not bound to pay for the goods on the ground that the goods were not of the contract shipment. By waiving the stipulation as to shipment the defendants accepted the goods. It is elementary law that a party may waive a stipulation which is for his own benefit.

As the property in the goods passed to the defendants, they are bound to pay the loss on re-sale in respect of the two cases that were sold on 3rd October 1921.

As regards the remaining three case which were not sold, the plaintiffs are entitled to damages only. I hold that the breach took place on September 23, 1921, that being the date on which the plaintiffs wrote to the auctioneers to advertise the two cases for sale (see Ex. S). On the evidence before me I hold that the market rate of the goods in question on September 23, 1921, was Rs. 3 nett. per yard.

The rate of exchange in respect of the two cases was agreed at 1 S. 71/16 d. As regards the rate of exchange in respect of the remaining three cases, the parties have agreed to take it at 1 S. 5 9/32 d. being the rate prevailing on October 3, 1921.

The result is that there will be a decree for the plaintiffs for Rs. 9,094 costs and interest on judgment at six per cent per annum.

Suit decreed.

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SHAH AG. C. J. AND PRATT, J.

Ratanbai Rustomji Dadachanji.

v.

Cawasji Edalji Dadachanji.

O. C. J. App. No. 25 of 1922, D. 2nd August 1922.

(a) Will-Construction-Terms used.

A will provided.—" My present surving wife Ratanbai is now in the family way. And she has expressed in my presence of her free will and accord to live as member of the family with my executor *(i. e.)* my elder *(or* eldest*)* brother Cawasji. As to whatever (child) children there may be born of her womb my brother shall bring up and maintain the same, And my said executor shall defray all the expenses in connection therewith out of my property and effects. And he shall maintain the family. The expression 'maintenance of the family,

includes the maintenance of my said executor also. Should a son be born he also shall be cherished and maintained, and educated, and brought up. And when he comes of age my executor or after his death his executors shall make over the whole of my remaining properties to the said son. Should the child die in tender age, *i e.* a minor and should my wife for any reason whatever be unwilling to live as a member of the family with my executor, then my executor shall out of my property purchase Bonds for Rs. 5,000 bearing interest at 4 per cent. at the market rate and shall transfer the same to the name of my said wife, Ratanbai.

Held that (1) the bequest in favour of the son was vested interest at the date of the testator's death, (2) that the intention of the testator undoubtedly was that the property on death of the son, if he died a minor, should not go to the widow. But that is an intention which if the bequest is vested, is defeated by the operation of law, and the situation cannot be saved by reading that clause as divesting the estate which on the application of the provisions of S: 107 of the Succession Act must be treated as vested. (3) that the plaintiff would be the heir of the infant son according to the rules of Intestate Succession among Parsis under Act XXI of 1885, subject to the proviso that the Letters of Administrations are obtained.

(b) Succession Act S. 107—Exception-Scope.

Where the provisions in a will amount to a direction to spend a part of the income for the benefit of the legatee, it would be sufficient to bring the case within the Exception.

(c) Will—Construction-Rules.

To construe one will by reference to expressions of more or less doubtful import to be found in other wills is for the most part an unprofitable exercise. To search and sift the heaps of cases on wills which encumber English Law Reports in order to understand and interpret wills of Indians who speak a different tongue, are trained in differint habits of thought and brought up under different conditions of life, seems almost absurd. [P 98 C 1]

D. S. Sethna.—for the Appellant.

Jayakar, with Jinnah and Coyajee—for Respondent No. 1.

Pendse.—for the Respondent No. 2.

Shah Ag. C. J:—This is an appeal from a judgment of Mr. Justice Kanga. The Originating Summons which has given rise to this appeal was taken out by Ratanbai, the widow of Rustomji Edaljee Dadachanjee, for the construction of a will dated February 10, 1913, made by her husband, who died on July 17, 1913. When he made his will in February his wife was pregnant and she gave birth to a son on May 27, 1913. The infant died on July 2, 1914. The defendant No. 1 is he brother of deceased Rustomji and the sole executor under the will. Defendant No. 2 who was subsequently joined, is the daughter of Rustomji by another wife who had predeceased him. The defendant No. 1 took out probate of the will on October 3, 1913. The probate with a copy of the original will which is written in Gujarati language and its translation is marked Ex. A. The questions that were raised in the summons were these :—

(1) Whether under the will of Rustomji Edalji the bequest of the residue of his estate to his son was vested interest at the date of the testator's death or was contingent on the said son attaining the age of majority ;

(2) Whether, if the bequest was vested, it was divested by the death of the said son before attaining the age of majority ?

(3) Whether the plaintiff as the heir of the said son is entitled to the said bequest ; and

(4) Whether the estate of the said Rustomji Edalji Dadachanjee should be administered by and under the directions of this Hon'ble Court ?

The fifth question was subsequently added which is as follows.

(5) In the event of the bequest of the residue to the son being held to be contingent, whether the 1st defendant is entitled to the residue under the said will or whether the testator died intestate as to his residuary estate?

The learned Judge was of opinion that the bequest of the residue of his estate in favour of his son was contingent on the said son attaining the age of majority.

The second question did not survive for consideration.

The answer to the third question really depended upon the answer to the first question, and the question was answered in the negative.

The fourth question as to the direction to administer the estate was also answered in the negative, and it was held as regards the fifth question that the first defendant was entitled to the residue of the estate

In the appeal before us the same questions have been reagitated, and the most important question among them is the first question whether the bequest in favour of the son was con-

tingent or vested interest. The other question is whether under the residuary clause the executor got the estate subject to the payment of the legacies mentioned in the will.

In the course of the argument several English cases were cited. but it seems to me that the questions, so far as they relate to the construction of the will, must be answered with reference to the terms of this particular will. It is hardly necessary to point out that the reference to the English decisions cannot be of any help on those questions. Their Lordships of the Privy Council pointed out in *Norendra Nath Sircar* v. *Kamalbasini Dasi* (1) that" to construe one will by reference to expressions of more or less doubtful import to be found in other wills is for the most part an unprofitable exercise, " and they further point out that " to search and sift the heaps of cases on wills which cumber our English Law Reports, in order to understand and interpret wills of people speaking a different tongue,trained in different habits of thought and brought up under different conditions of life, seems almost absurd " To the same effect are the observations in *Bhagabati Barmanya* v. *Kali Charan Singh* (2) and these observations are emphasised in the recent decision of *Dinbai* v. *K. B. Nuserwanji Rustomji* in Privy Council Appeal No. 47 of 1921, not yet reported. [Subsequently reported in (3)] In dealing with the construction of the will I propose to confine my attention as far as possible to the terms of this will. In the case of *Dinbai* v. *K. B. Nuserwanji Rustomji*. the general principle is stated in these terms: "The rule of law is to ascertain the intention of the testator as declared by him, and apparent in the words of his will, and to give effect to this intention so far as, and, as nearly as, may be consistent with law."

The will in question was made by a Parsi gentleman who left considerable moveable and immoveale properties in Bombay, Deolali, Nasik, Kherwadi and Naosari, and a flourishing business in Bombay. It is written as I have said, in the Gujarati language and in the handwriting of the testator himself. He does not appear to have consulted any lawyer, and on its face it is a will written by a layman. As regards the translation of this will in the trial Court there was some difference between the parties but ultimately the learned Judge accepted the translation of the will which was attached to the probate. That is the translation which has been referred to in the course of the argument before us, and that is the translation to which I shall refer. I may also mention that I have referred to the original will which is in Gujarati, and derived such assistance as the perusal of a document of this nature in the original may give; but I may say generally that the sense of the original is fairly conveyed almost on all points in controversy in the translation to which I have referred.

It will be convenient to set forth the material parts of the will before proceeding to deal with the questions which have been raised in the argument before us. It may be mentioned that though the paragraphs are numbered in the translation and in the copy of the will there are no paragraphs in the original.

The testator has appointed his brother Dr. Cawasji Edalji Dadachanjee as the sole executor.

In the fourth clause the testator directs that after thirteen months have elapsed after his death the legacies (the word used for that in the original is 'Varsa') shall be paid without interest and that none of his heirs was to raise any objection thereto, and that if any of them raised any objection the legacies shall not be paid to them.

(1) [1896] 38 Cal. 468–23 I. A. 18 (26) –15 C. W. N. 393–9 M. L. T. 411–21 M. L. J. 387–8 A. L. J. 433–13 C. L. J. 434–13 Bom. L. R. 375-(1911) 2 M. W. N. 295–10 I.C. 641.

(2) [1911] 38 Cal. 468–38 I. A. 54–15 C. W. N. 393–9 M. L. T. 411–13 C. L. J. 434–21 M. L. J. 387–8 A. L J. 433–13 Bom. L. R. 375–(1911) 2 M. W. N. 295–10 I. C. 641 (P. C.)

(3) 1922 P. C. 311–49 I. A. 323–27 C. W. N. 199–31 M. L. T. (P.C.) 213–(1922) M. W. N. 787–69 I. C. 323.

The next paragraph which appears as paragraph 5 in the translation is very important and runs as follows:—

My present surviving wife Ratanbai is now in the family way. And she has expressed in my presence her free will and accord to live as a member of the family with my executor (i. e.) my elder (or eldest) brother Doctor Cawasji Edalji Dadachanjee. As to whatever children ? (child) there may be born of her womb my brother shall bring up and maintain the same. And my said executor shall defray all the expenses in connection therewith out of my property and effects. And he shall maintain the family. The expression "maintenance of the family" includes the maintenance of my said executor also. Should a daughter be born of the womb of my wife Ratanbai, she shall be brought up and maintained and shall be educated properly and my executor or after his death his executors or executrices shall after making outlays in accordance with my circumstances get her married at a proper place (i. e. in a suitable family). Should a son be born he also shall be cherished and maintained, and educated and brought up. And when he comes of age my executor or after his death his executrices shall make over the whole of my remaining properties to the said son. Should the child (whether daugher or son born of the womb of my wife), die in tender age, i. e., a minor, and should my wife for any reason whatever be unwilling to live as a member of the family with my executor, then my executor shall out of my property purchase Bonds for Rs. 5,000 bearing interest at 4 per cent, at the market rate and shall transfer the same to the name of my said wife, Ratanbai.

In the sixth paragraph the interest in the Bonds which are referred to at the end of the above paragraph is absolutely given to his wife.

In the next following paragraph certain furniture and effects and pots and pans belonging to the testator have been given to his wife absolutely. The testator further provides as follows:—"Except this my said wife, Ratanbai, shall have no right over my estate and effects for maintenance or (no right) of any kind whatever or shall have (no right) even to her funeral (and subsequent) expenses (being paid by my estate). This arrangement (or provision) has been made at the desire of the said Ratanbai herself." She is also given the ornaments or trinkets, clothes, and wearing apparel made for her.

In the next paragraph the testator provides for the funeral expenses of his mother-in-law and directs certain legacy to be given to his daughter Dehebanu by his predeceased wife. Then he provides that "(save and) except this my daughter Dehebanu shall not have any right to or interest in my property whatever the same may be or wherever the same may be situated."

Then he gives certain legacy to his female Mukadam Muktibai Bhikaji Jayakar.

He also gives a legacy of Rs. 3,000 to his sister Avabai, and the same sum to his other sister Bai Bachubai.

He provides then for outlays in connection with his death at the discretion of his executor.

Then he provides for the withdrawal of his moneys from his business at the discretion of his executor.

In paragraph 14 the testator provides as follews:—

"After having defrayed all the household expenses out of the income of my *punji* (property), as to whatever there may remain over my executor shall, if he thinks proper, expend the same in giving encouragement to education and the works of science and arts as well as in erecting throughs for cows (and) cattle to drink water from. In case my executor should not do that he has absolute authority. If he likes he may make outlays in this manner or he may not even make the same."

In paragraph 15 he makes a certain bequest in favour of his brother and provides that he shall be the absolute owner of the interest in those properties.

Though in the translation under clause 16 there are two paragraphs, in the original it is all in one paragraph, and he provides in that paragraph as follows:—

"As to the whole of the effects and

furniture chattels in my house and the goods and property whatever there may remain over after payment of the above '*Varsas*' I bequeath the same to my said executor."

In paragraph 18 the testator further says:—

"Should (any *Varsa*) in respect of the above matters become null (and void) through objections connected with any law whatever or in any other way, then I bequeath all those '*Varsas*' to my said executor."

It is contended on behalf of the widow that under clause 5 the bequest in favour of the son was vested in interest at the death of the testator and that as the infant son survived the testator the property must go on the death of the son according to the rule of Parsi Intestate Succession to the heir of the infant son. It is contended that having regard to the provisions of S. 106 the Indian Succession Act there is a bequest in favour of the son which is not in any sense contingent upon his attaining the age of majority but which only specifies the time for the delivery of possession of the property in question. It is further contended that, even if the bequest in favour of the son be treated as contingent on his attaining the age of majority, in view of the provisions in the will as to the maintenance of the son, the case falls within the exception to S. 107, and that, as in substance either the whole or part of the income, or the whole of the income with a part of the corpus is to be used for the benefit of the son, the case is clearly covered by the exception.

On the other hand, on behalf of respondent No. 1, it is argued that the bequest in terms is contingent as there are no words of prior gift to the son but there is only provision to hand over the property to his son "when he (the son) comes of age," and that S. 106 of the Indian Successsion Act does not apply but S. 107 would apply. It is also contended that the exception to S. 107 would have no application as the provision as to maintenance does not mean that any income or any part of the income as such is to be applied for the benefit of the son, and further that even if that clause be read in that sense, it is capable of being read as indicating a direction that even more than the income may be spent for the benefit of the son which would take the case out of the Exception. Apart from the effect of the Exception to S. 107 of the Indian Succession Act, it seems to me on a fair reading of clause 5 of the will that the bequest in favour of the son is contingent. As provided in S. 107 a legacy bequeathed in case a specified uncertain event shall happen, does not vest until that event happens. The operative words here are "and when he comes of age my executor or after his death his executor or executrices shall make over the whole of my remaining properties to the said son." I may mention here that this sentence which appears as a separate sentence in the translation from the preceding one is really all one in the original and there is no full point in the original after the words "brought up."

It is contended that the words used is '*tyare*' which would indicate by necessary implication the use of the correlative term '*jyare*' meaning 'when' and not '*to*' which by the same process would imply the use of '*jo*' corresponding to the English word 'if'. It is contended on behalf of the appellant that if the gift was dependent upon the happening of that uncertain event the word to be used in the Gujarati language would be '*to*' and not '*tyare*'. I do not think, however, that in view of Illustration (b) to S. 107 which in terms refers to the expressions "in case he shall attain the age of 18", and "when he shall attain the age of 18," this contention could be allowed. I admit that the word '*tyare*' in the Gujarati language and 'when' in the English language would not be so strong as the words '*to*' and 'if' but it is possible and not by any means uncommon to use the word to indicate the same sense as the word 'if'. Any hesitation that I might feel in deciding this point is removed by the words used in the following sentence. The testator uses these words:— "Should the child (whether) daughter or son born of the womb of my wife die in tender age (i. e. a minor." The important words in Gujarati are '*agarjo*' which would mean 'if, however.' The

translation conveys the same sense. I have no doubt in my mind that the testator, when he wrote that clause, had before his mind the contingency of the son or the daughter dying before attaining majority, and when he refers in the previous sentence to the period when the son was to get the property, I have no doubt in my mind that he really means " in the event of his attaining majority". I have given my best consideration to the arguments urged on behalf on the appellant on this point, but on the wording of the will I do not think that the bequest could be read as implying a prior gift to the son, nor can I think that the words, which I have referred to, indicate only the time when the property was to be handed over to him. So for as the intention of the testator is indicated by the language used by him, I think that the appellant's contention cannot be accepted, I may mention that this becomes clear from the further provision in paragraph 7 that his wife Ratanbai shall have no right over his estate and effects beyond those which are given to her under the will. This also indicates to my mind that the bequest to the son was intended by the testator to be contingent. To that extent I am in agreement with the view taken by the trial Court.

The question, however, whether the other provisions in the same paragragh bring the case within the Exception to S. 107 is far more difficult. The material clauses on that point are, first, "As to whatever children (child) there may be born of her womb my brother shall bring up and maintain the same. And my said executor shall defray all the expenses in cannection therewith out of my property and effects. And he shall maintain the family. (The expression) maintenance of the family includes (that of the maintenance of my said executor also)." Then, after making provision for the daughter, if one be born, the testator provides: "Should a son be born he also shall be cherished and maintained, and educated and brought up." And then follows the bequest. Those words providing for the maintenance and bringing up of the children, and the son in particular, indicate to my mind that the testator had clearly before him the desire to make provision for bringing up, maintaining and educating his boy. I am not raferring to the provisions as to the daughter because no daughter was born. These provisions indicate to my mind that there is a direction to the executor that he shall apply the income, or so much of it as may be necessary, for the benefit of the infant son. It is true that the word 'income' is not used expressly, but in substance it is clear that the income was to be used for the purpose of the maintenance of the boy and all the other persons indicated in that clauee. That would involve a direction to the executor to apply a part of the income for the benefit of the infant son. That the testator had the "income" in view is to a certain extent apparent from the expression used in paragraph 14. He uses the word '*upaj*', i e. income, and provides that after having defrayed all the household expenses out of the income of his '*punji*' or property, as to whatever there may remain over it may be spent by the executor for educational and other purposes at his discretion. I am not sure that the testator really used the word 'income there in the sense of 'income' as distinguished from the 'corpus'. It is possible that he meant the whole of the corpus with the income as realised by the executor. The word used, however, in Gujrati which has been correctly rendered in English by the word 'income' indicates ordinarily and primarily income as distinguished from the corpus, and the testator evidently contemplated that the maintenance of the family including the maintenance of the son was to be out of his estate. I do not think that it is essential for the application of the Exception that the direction to the executor should in terms refer to 'income' or a part of it It is sufficient in my opinion if in substance that meaning is indicated and I find it difficult to avoid the inference that that was really the meaning of the testator.

It remains to deal with the further contention that these provisions as to maintenance are not in terms limited to the income but they may extend to the use of the corpus. It is quite true that under the provisions of the will

expenses incurred for the maintenance of the son and other persons may go beyond the income, but that would not be sufficient to take the case out of the Exception. This is by no means an easy point. Though it has been urged on behalf of respondent No. 1 that if the direction to the executor is to use the property for the benefit of the legatee, so as to include the power to exceed the income, the Exception would not apply. No authority has been cited on his behalf in support of that proposition, and on principle I am unble to see any reason why the direction to use the property including the income primarily for the maintenance of his son should not be sufficient to bring the case within the Exception. I recognise that this view of the Exception to S. 107 would tend to defeat to a large extent the intentions of the testator as I gather them from the language used by him. But I am unable to see my way to hold that these provisions as to maintenance of the family and of the son are insufficient to bring the case within the Exception to Sec. 107. The ignorance of the testator as to what constitutes the vesting of legacies may lead to the use of language which may tend to defeat at times the intentions which he has most at heart. This case appears to me to be of that type. It is needless to refer to any of the cases which have been cited. I rest my decision upon the meaning of the words used in the will and upon the application of the Exception to S. 107 to the provisions of the will as I understand them. On this point I am unable to agree with the view taken by the lower Court. After referring to certain English decisions the learned Judge has come to the conclusion that the Exception to S. 107 does not apply because the provisions as to maintenance do not refer to the whole income but to a part of it, and, secondly, because those provisions are wide enough to include the power to the executor to spend the corpus also. As regards the first point, it seems to me that the rule referred to in the English decisions would not apply because the Exception here in terms refers not only to the whole income but to a part of the income as well. Where the provisions in the will amount to a direction to spend a part of the income for the benefit of the legatee, it would be sufficient to bring the case within the Exception. As regards the power of the executor to spend a part of the corpus, if necessary, I do not think that it is sufficient to repel the application of the Exception if it otherwise applies. I think, therefore, that the first question should be answered in the sense that the bequest in favour of the son was vested in interest at the date of the testator's death.

The second question which did not arise in the view which the learned Judge below took of the first question; it is enough to say that there is no divesting clause in the will, and the only clause which may possibly be referred to as divesting the estate vested in the son would be the clause relating to the bequest of Bonds worth Rs. 5,000 in favour of his wife in case the son died before attaining majority. But the simple answer is that really speaking there is no divesting clause, The intention, as I have already said, of the testator undoubtedly was that the property on the death of the son, if he died a minor, should not go to the widow. But that is an intention which, if the bequest is vested, is defeated by the operation of law, and the situation cannot be saved by reading that clause as divesting the estate which on the application of the provisions of S. 107 must be treated as vested. I would answer it in the negative.

As to the third question, if the bequest was vested in the son, it would go to his representatives after his death. Until the Letters of Administrations are taken out it is difficult to say that the plaintiff is his representative, in view of the provisions of S. 190 of the Indian Succession Act. At the same time it is clear that the plaintiff would be the heir of the infant son according to the rules of Intestate Succession among Parsis under Act XXI of 1865. That question may be answered in the affirmative subject to the proviso that the Letters of Administration are obtained.

As regards the fifth question, I think that if the bequest of the residue

vesting? It is no doubt inconsistent with the direction to postpone payment or possession, but it is no more inconsistent with immediate vesting than a power of advancement: see, for instance, *Vivian* v. *Mills*(3), *In re Parker*; *Barker*. v. *Barker* (4). A power of advancement is generally an argument in favour of vesting; see Theobald on Wills, p. 588. But I do not think the power to defray maintenance expense "out of my property and effects" was intended to give a power to deal with the corpus. In para 14 the testator speaks of all his household expenses being defrayed out of income.

I am, therefore, of opinion that the bequest to the son is within the Exception to S. 107 and that he took a vested interest.

This conclusion is further supported by the fact that the bequest was of the residue and the phrase used is "*swadin karo*" or "make over." As said by the Privy Council on a similar phrase in *Harris* v. *Brown* (5), "the executor as guardian would have charge of the share vested in the son and these words merely point to the possession or enjoyment of it".

The direction that in case of the death of the son or daughter the executor should pay the widow a lump sum for the maintenance is inconistent with the son taking a vested interest. But it has not the effect of divesting the interest and, in so far as it applies to the case of a son, is in my opinion void for repugnancy: *In re Dixon*; *Dixon* v. *Charlesworth* (6). The answers to questions will, therefore, be :—(1) The bequest of the residue was vested at the time of the testator's death. (2) It was not divested by the death of the son. (3) The plaintiff as heir of the son is entitled to the bequest on obtaining Letters of Administration. (5) Not necessary.

Question No. 4 is a prayer for administration by the Court. We have heard the parties on the question of costs. It is usual to include a prayer for administration "so far as may be necessary" in order to give the Court wider power to deal with the matters raised in the summons. It is not obligatory on the Court to make an order for administration if the questions between the parties can be determined without such order being made. See Rules of Supreme Court, Order 55, rule 10. The rights of the parties have been determined and as to the enforcement of these rights there may be defences. I, therefore, answer question No. 4 in the negative.

As to costs, the usual practice in summons for construction and in administration actions where the executor has not been guilty of misconduct should be followed. Costs of all parties as between attorney and client should come out of the estate.

Appeal allowed.

(3) (1839) 1 Beav. 315.
(4) (1880) 16 Ch. D. 44.
(5) (1901) 28 Cal. 633—28 I. A. 159—5 C. W. N. 129—3 Bom. L. R. 808—8 Sar. 92.
(6) [1903] 2 Ch. 458.

1923 BOMBAY 105

SHAH AG. C. J. AND CRUMP, J.

In re Vasudeo Ramchandra Joshi

Cr. Rev. No. 158 of 1922. D. 24th August 1922 against an order passed by the first class Mag. of Jalgaon.

(*a*) *Practice-Prosecution of witness during trial.*

Prosecution of a pleader defending an accused person while that proceeding is pending, and before the evidence of the witnesses who are said to have been instigated to give false evidence, has been appreciated by the Court, is inadvisable, If such a prosecution is to be started it ought to be started after the principal proceeding, in relation to which the offence is said to have been committed, has terminated. (P. 107 C. 1)

(*b*) *Cr. P. C. S. 195 (b)-'In relation to' proceeding not before Court.*

Where it was alleged that the petitioner on April 10 instigated certain persons to give false evidence in a criminal proceeding which was about to come before a Magistrate on April 15.

Held, that the words "in relation to" in S. 195 (b) are very general, and are wide enough to cover a proceeding in contemplation before a criminal Court though it may not have begun at the date when the offence was committed, and therefore, the proceedings which had been undertaken against the petitioner were null and void without sanction under S. 195 (b). (P. 106 C. 2; P. 107 C. 1)

P. B. Shingne,—for the Petitioner.

S. S. Patkar,—for the Crown.

Shah, Ag. C. J.—The facts which have given rise to the present application are briefly these. Apparently

in March last there was a proceeding before the Magistrate at Bhusaval against one Vana Khusal in respect of a charge under S. 401, Indian Penal Code. An application was made for bail on his behalf by the present petitioner as his pleader, but that application was refused on April 1, 1922. Then the statements of three witnesses were recorded under S. 164, Criminal Procedure Code on April 18, 1922, from which it appeared that on April 10 these witnesses had an interview with the present petitioner and the petitioner had instigated them to give false evidence.

On April 15, another case against Vana Khusal in respect of a dacoity, which has been described to us as the Budhgaon decoity case, was sent up to the Magistrate; and the case for the Crown is that it was in connection with this case of dacoity which was sent up to the Magistrate on april 15, that the alleged instigation by the present petitioner instigated the witnesses to give false evidence.

On June 2, these witnesses were examined before the Magistrate in the Budhgaon dacoity case, and on June 7, a complaint was filed by the Police Officer against the present petitioner charging him with having abetted the giving of false evidence.

On June 14, the present petitioner made an application to the learned Magistrate before whom the complaint was filed that as no sanction was obtained under S. 195, Criminal Procedure Code, the Court had no power to take congnizance of the complaint. The learned Magistrate came to the conclusion that no sanction was needed because he was of opinion that the alleged offence was not committed in relation to any proceeding in any Court, and that the matter of abetment was never considered by any Court.

The present application is made to this Court on the ground that a sanction is deeded under S. 195, Criminal Procedure Code, because the alleged offence, if committed at all, was committed in relation to the proceeding before the Magistrate against Vana Khusal. It is urged that the alleged offence would have relation to the proceedings, which were already before the Magistrate on April 10, in connection with the charge under S. 401, Indian Penal Code.

On behalf of the Crown it is urged that no sanction is necessary because at the date of alleged abetment no proceeding in relation to which the offence is said to have been committed, was pending It is contended that the offence had no relation to the proceedings pending on April 10 and that the proceedings, to which it related, were sent up to the Magistrate on April 19 and were not pending at the time.

It is quite clear, however, from the very nature of the offence alleged against the present petitioner that if the offence was committed, it was committed in relation to the proceeding in which those three persons were to be examined as witnesses, and it is difficult to understand how it could be said that the present proceedings against the petitioner could go on without the sanction of the Court before which these proceedings are pending at present, and in relation to which the offence is said to have been committed. I assume, without deciding, that the offence alleged against the petitioner related to the Budhgaon dacoity case and not to the case under S. 401, Indian Penal Code, then actually pending. Even then the offence related to proceedings which were clearly under contemplation then and which were sent up to the Magistrate on April 15. The expression used in S. 195 (1) (*b*) is wide enough to cover such a proceeding and the decisions of this Court in *In re Khanderao* (1) and *In re Mahadev Yadneshwar* (2) support that conclusion. I am unable to follow the reasoning adopted by the learned Magistrate in holding that no sanction is necessary. We, therefore, quash the present proceedings, without prejudice to any proceeding that may be taken after obtaining the necessary sanction.

I may also point out that the prose-

(1) (1912) 14 Bom. L. R. 362-13 Cr. L. J. 527-15 I. C. 799.

(2) (1912) 14 Bom. L. R. 715-13 Cr. L. J. 751-17 I. C. 63.

cution of a pleader defending an accused person while that proceeding is pending, and before the evidence of the witnesses who are said to have been instigated to give false evidence has been appreciated by the Court, is inadvisable. If such a prosecution is to be started it ought to be started after the principal proceeding, in relation to which the offence is said to have been committed, has terminated. It is hardly necessary to refer to the observations in *Reg* v. *Kashinath Dinkar.* (3) Those observations relate no doubt to the prosecution of witnesses before the proceeding has terminated but the reason of the rule appears to me to apply to a prosecution like the present.

Crump J.—It is alleged in this case that the petitioner on April 10 instigated certain persons to give false evidence in a criminal proceeding which was about to come before a Magistrate, and did in fact come before that Magistrate on April 15. It is sought to be argued on behalf of the Crown that S. 195 (*b*), Criminal Procedure Code, has no application to the offence so committed. In order to accept that view, it would be necessary to cut down the meaning of the words "in relation to" to an extent, which is, I think, unwarranted. The words are very general, and are wide enough, in my opinion, to cover a proceeding in contemplation before a criminal Court, though it may not have begun at the date when the offence was committed. If that is so, it is plain that sanction was necessary in the present case, and, therefore, the proceedings which have been undertaken are null and void without such sanction. I agree therefore, that those proceedings must be quashed; and I also agree entirely with the remarks of the learned Chief Justice as to the impropriety of starting the present proceedings against the pleader of an accused person before the trial of that accused person has been finished. It is obvious that in the circumstances of the present case this cannot be done without coming to a conclusion as to the credibility of certain witnesses whose evidence will have to be recorded in the main case.

Rule made absolute.

(3) (1871) 8 B. H. C. R. 126 (154.)

1923 BOMBAY 107

MARTEN, J.

In re Mahomed Hasham and Co.,

O. C. J. Insolvency Petition No. 282 of 1922 D. 5th June 1922.

(*a*) *Presidency Towns Insolvency Act S. 12 (1) (c)—Transfer within three months.*

Where there are certain properties of the insolvents assigned absolutely by way of mortgage and certain other properties charged by way of floating security the fact that these other properties are charged by way of floating security, does not prevent there being any "transfer" of their property, until the mortgagee takes possession. [P. 109 C. 1, 2]

Where the mortgage was executed beyond three months but the mortgagee took possession within three months of the application. *Held*, that there was no transfer by the insolvents in law or in equity within the meaning of the Act at any time within three months before the presentation of petition. [P. 110, C. 1]

(*b*) *Presidency Towns Insolvency Act S. 9 expl.—Act of one partner.*

In the case of a firm with two partners, the departing from the usual place of business, with intent to delay and defeat the creditors, must be a departure of both the partners and not merely the departure of one of them. [P. 111 C. 1]

(*c*) *Transfer of property Act S. 5—'Transfer' Applicability to presidency Insolvency Act.*

The definition of 'transfer in the T. P. Act does not apply to Presy. Town Insolvency Act.

Mulla—for the Applicants.

Jinnah—for the Petitioning Creditors.

Marten J.—This is an application by one Abdul Sakoor Ismail, a partner in the firm of Mahomed Hasham & Co. and M. H. Madden & Co., to set aside an adjudication order made against the firm of Mahomed Hasham & Co, on the 31st of March 1922, by Mr. Justice Kanga. The grounds on which the adjudication order was made were two viz, (1) "That in British India the said debtors have made a transfer of their property or a substantial portion thereof with intent to defeat or delay their creditors" and (2) "that with like intent the partners of the said debtors, firm have departed from their usual place of business or are otherwise absenting themselves."

The petitioning creditor Padamsey Munji obtained a decree, on the 27th February 1922, for Rs. 51,000 odd, of which after giving credit for certain sales of goods, a sum of Rs. 34,650 still remains due.

As regards the first point under the adjudication order, viz., the alleged statutory transfer, the ground of objection raised by the present applicant is

that this transfer was not executed within three months before the presentation petition as required by S. 12 (1) (c) of the Presidency Towns Insolvency Act 1909.

The petition was presented on the 30th March 1922 and it is common ground that the mortgage relied upon is dated the 10th of October 19.1. It is, however, alleged by the petitioning creditors that in effect the mortgage amounted to a statutory transfer because the mortgagee did not take possession until some date within three months before the presentation of the insolvency petition. I have not got the original of this mortgage before me but I have a copy or what purports to be a copy, and though it seems to be inaccurate in several places, I think it will suffice for the purpose of my present decision.

Before turning to the mortgage, I should explain that there are two partners in this firm of Mahomed Hashan and Co., viz, Abdul Sakoor Ismail and Premchand Nandlal. It is common ground that Premchand Nandlal has absconded, and it is not disputed that he has absconded with intent *inter alia* to defeat, or defraud delay the creditors of this particular firm. But it is the other partner who denies all intention to defeat or delay the creditors, of the firm with which we are concerned. I may also say that the two firms of Mahomed Hasham and Co. and M. H. Madden and Co. appear to be the same, although M. H. Madden and Co. are not named in the adjudication order. I mention this because the applicant Abdul Sakoor in his first affidavit does not refer to Mahomed Hasham and Co. at all but refers to M. H. Madden and Co. That is explained afterwards in another affidavit to be merely an error, and that the two firms are substantially the same.

Now this mortgage of the 10th of October 1921 is interesting to this extent. The draftsman seems to have copied some of the English forms relating to limited liability companies and used them for the affairs of an ordinary partnership firm. The result is that at any rate to an English conveyancer some of the conveyancing is most extraordinary. We are introduced to something which is novel as far as I am concerned, *viz*, an assignment in one place, and a charge in another place both by way of so-called floating security in connection with the assets of A and B the partners in the firm. Possibly my unfamiliarity with a floating charge over partnership assets arises from the fact that any such charge in England would probably be void under the Bills of Sale Acts. On the other hand a floating charge contained in a debenture of a limited liability company is excepted from the operation of those Acts.

However I find that there are certain clauses in this mortgage which purport at any rate to assign absolutely substantial portions of the alleged insolvent's property. In clause 2 the borrowers assign unto the lender "(1) all the several debts or sums of money specified in the second column of the said schedule hereto due owing to the borrowers as aforesaid from the several persons whose names are set opposite to such respective sums in the first column of the said schedule." Then in sub-clause (3) they assign "all capital profits and other moneys belonging to or to be received by the borrowers in respect of the said business." Now the debts mentioned in the Schedule amount to a substantial sum, some Rs. 57,000, and they represent book debts due to the firm. This sub-clause (3) is certainly in very wide terms "All capital profits other moneys belonging to or to be received by the Borrowers."

In sub-clause (2) they assign "by way of floating security all beneficial interest and good will of the borrowers in said business and the exclusive right to use or confer on others the right to use the said style or true name of Mahomed Hasham & Co. and also the full benefit of all contracts and engrossments entered into by or with the borrowers in respect of the said business. If one is to construe the words strictly I do not know how you assign by way of floating security. If, however, a charge is intended the wording should be "charge by way of floating security" and not assign. However that may be, I do not suppose that the good will of this particular

firm is worth very serious consideration.

Then in clause 3 they purport to charge the payment of the principal sum and interest thereon by way of floating security (not hindering any sale or other dealing in the ordinary course of business of the said firm) on the borrowers' shop in the Jakeria, Musjid at the approximate value of Rs 60,000 (but not the borrowers' goods which have been already pledged by them to the Central Bank of India Ltd.) and all papers, documents and vouchers relating to the stock-in-trade, goods, cattels (I suppose that means chattels) " merchandise, as are ordered out by the borrowers and as may be received by them at said shop and payment of the moneys due thereon including the goods now pledged with the said Central Bank of India Ltd. as may hereafter come into their possession and all the documents of title relating thereto or which may be purchased by or assigned to them "

I suppose that means that it is to be a floating charge on the stock in-trade at the shop exclusive of certain goods already pledged to a third party. Possibly the charge also extends to the shop itself.

Then in clause 4 there are certain covenants by the borrowers: " (*d*) That the borrowers shall forthwith cause the lease if any of the shop and godowns transferred in the name of the lender." There are also numerous other clauses. In clause 7 the borrowers appoint the lender the attorney to do a large number of things. In clause 9 there is a power of sale. Clause 11 provides for the security becoming immediately enforceable in certain events. Clause 12 provides: " This security shall extend to all stock-in-trade, goods and chattels which the borrowers may hereafter acquire for the purpose of their business and all book debts which may accrue due in the course of the said business."

Let me assume for the sake of argument that this document amounts to this: that there are certain properties of the insolvents which were assigned absolutely by way of mortgage and certain other properties which were charged by way of floating security How does the fact that these other properties are charged by way of floating security (whatever that means as regards the assets of private individuals) prevent there being any " transfer " of their property until the mortgagee takes possession ? On the facts of this particular case I do not think it does. If one applies the analogy of floating securities on the assets of a company, one knows that a floating security does not actually fasten specifically on any particular asset until it has what we call crystallised, but it will nevertheless take priority over certain rights of certain unsecured creditors. For instance it is stated in Buckley on Companies. 9th Edn., p. 233 :

"As between execution creditor of the company and debenture-holder by way of floating security, the former takes subject to the equity of the latter, even if the equity arises not from an actual issue of debentures but from a mere agreement for value to issue them; and the rights of the debenture-holder prevail, at any rate until the sheriff has sold, whether a receiver has been appointed or not; also notwithstanding sale if before sale a receiver has been appointed."

There is one further matter in this particular case. There was a partnership suit brought by the applicant Abdul Sakoor against his partner Premchand alleging in effect that he had been grossly defrauded by Premchand. On the 19th December 1921 this mortgagee, that I have referred to, was by agreement between the parties appointed by Mr. Justice Kajiji Receiver of the partnership assets and there was a clause providing that the receiver was to collect the partnership outstandings but he was not to pay any creditor without the leave of the Court.

Then, on the 23rd March 1922, this mortgagee receiver resigned and Mr. Moos was appointed in his place.

It seems to me that in the face of these orders it is practically impossible to construe the mortgagee's taking possession in January or February 1922 as being a transfer of that date by the insolvents. The only document the insolvents ever entered into was in the preceding October, and by the

time they came to January or February 1922 a Receiver had been appointed by the Court and they had no right to put anybody in possession of anything. Further, the person who was appointed Receiver was the mortgagee, and he had no right as mortgagee to take possession from himself, the Receiver, without obtaining the leave of the Court which at any rate he did not do until the 23rd of March.

On these facts I utterly decline to hold that there was a transfer by these insolvents in law or in equity within the meaning of the Presidency Towns Insolvency Act at any time within three months before the presentation of this insolvency petition. Consequently the first ground on which the adjudication order was made is, in my opinion, unfounded and to that extent the order is, in my opinion, bad.

Now we come to point No. 2. It will be remembered that it depends on whether the partners departed from their usual place of business or otherwise absented themselves. One argument that has been submitted to me on behalf of the petitioning creditors is this that it is sufficient for one partner to absent himself and that it does not matter whether the other one does. That seems to me to be an impossible view to take of the Presidency Towns Insolvency Act. I am not going to lay down any general rule as to what acts of a partner may in certain circumstances bind the firm so as to amount to an insolvency of the firm. The explanation to S. 9 of the Presidency Towns Insolvency Act says;

"For the purposes of this section, the act of an agent may be the act of the principal, even though the agent have no spicific authority to commit the act."

But it seems to be only common sense that where you put forward as an alleged act of bankruptcy that the partners of a firm have departed from their usual place of business or otherwise absented themselves, that must refer to the individual partners A, B, C and D. One man cannot as an agent for another depart from his usual place of business. It seems to me, in other words, to be a personal matter and there is no question of any agent acting for him. Accordingly, I declaine to hold that because Premchand Nandlal departed in this manner that that amounted to a constructive departure of the other partner Abdul Sakoor.

I was not given much assistance by way of authority on this point during the course of the argument. And I can quite understand that where a case is based on its particular facts, although it is of legal interest to consider points of law, it may be unnecessary to do so where the Judge has not got to lay down any particular rule. But I wish to draw attention to two points.

In India, unlike in England, it is not an act of insolvency to fail to comply with a bankruptcy notice to pay a liquidated debt. Also as a small matter of procedure an adjudication order can be made against a firm in the firm's name. In England a receiving order can be made against a firm, but the adjudication order is made out in the names of individual partners. But because we have that different procedure in India one must not think that an ordinary partnership firm is a legal entity. We only sue a firm on the Original Side in the firm's name for the purpose of convenience and because it is often difficult to know who the precise members of the partnership are. But whether we sue them in the firm's name or whether we do not, in India it is the individual partners in the firm who are in law liable and they and they only.

I may refer to *Ex Parte Blain, In re Sawers* (1) where at P. 529 Brett L. J. says:

"He says it is an act of bankruptcy by the firm. He is met and challenged by being asked whether a firm as such can commit an act of bankruptcy. He assumes that it can. I beg leave to doubt it. Nay, more, I am of opinion that a firm as such cannot commit an act of bankruptcy. An act of bankruptcy must be the personal act or the personal default of the person who is to be made a bankrupt."

Then in Wace on Bankruptcy, p. 38, there is a reference to the cases of

(1) [1879] 12 Ch D. 522.

Ex parte Mavor (2) and *Mills* v. *Benne* (3) in these terms :—

"The act of a firm of bankers in shutting up the bank is not necessarily an act of bankruptcy on the part of each individual partner. Thus where one partner who resided at the place of business, and was the only partner transacting the business (the others residing at a distance), shut up the banking-house and absented himself from it and stopped payment, it was not evidence of a joint act of bankruptcy."

On the other hand, while I am referring to Wace, I wish to add a guarding word against the possibility of, say, in a firm of eight partners, seven partners absconding and leaving the eighth partner detained in Bombay on the ground of serious ill-health, and it being then said that no bankruptcy order can be made against the firm. That case I will deal with when it arises. But it seems to me to be a question of fact in each case to determine the grounds for abstention from business and whether on all the facts an act of bankruptcy has been committed. I may refer to the authorities cited in Wace at pp 38-39.

In the present case, viz., of a firm with two partners. I hold that on the true construction of our Indian Insolvency Act the departing from the usual place of business, with intent to delay and defeat the creditors, must be a departure of both the partners and not merely the departure of one of them.

I next come to this point. It is said that the applicant Abdul Sakoor in fact did depart with intent to delay and defeat his creditors. That he departed is admitted, but that he did it with any intention of defeating his creditors is denied, and the reason he puts forward for his absence from business, viz., that of ill-health, is supported by medical evidence of a strength which is unusual in these Courts. I have medical certificates from, in all, five doctors for a period between the 23rd of January and the 13th of May. They are couched in the strongest terms and they show that Abdul Sakoor was suffering from chronic dysentery with inflamed liver and a weak heart. The certificates are given not only in Bombay but also in Mysore and they are by medical gentlemen whose position and character makes it quite impossible to suggest that they are unfounded or that they are in any way exaggerated or untrue.

Further than that we have this: that in one suit on the Original Side a commission to examine the applicant *de bene esse* was ordered. The Court's Commissioner went to take his evidence but found the applicant so weak that he did not feel justified in taking the examination and accordingly he returned without that examination being held.

As regards the medical certificates I will take as an instance the certificate of Lieut. Col. Markham Carter of the 25th of January 1922 where he says :—

"I understand his presence is required at the High Court on 26th January 1922. I certify that he is totally unfitted to attend, being physically incapable of undergoing the strain of a journey to the Court and of examination therein. His mental state is apathetic and his intellect somewhat clouded by his state of low toxæima. In my opinion his convalescence will be a slow one. His chances of recovery depend on his having complete rest, and suitable treatment for his conditions. I do not think he will be fit for Court purposes for at least two months."

Then Dr. Naidu, Civil Surgeon of the Mysore Government, on the 15th of April certified that he was "now bedridden and not at all able to undertake any journey. He may require at least three months to recover his health."

Then Col. Standage on the same day certified that "he will require proper treatment and mental and physical rest and diet for some months. He is at present quite unfit to travel to Bombay, and to attend lengthy legal proceedings in Court in Bombay."

Then the last certificate dated the 13th of May states that he "is still suffering from amoebic dysentery and is too weak to travel for three months more."

Now with a man in that condition

(2) (1816) 19 Ves. 539.
(3) (1814) 2 M. and S. 556.

how can it possibly be said that his keeping away from his place of business was done with intent to delay and defraud his creditors ? It will be remembered in the first place that his business was already in the hands of the Court's Receiver who had been appointed on the 19th December, and obviously if a man was not even fit to be examined at his house by the Court's Commissioner, he was not fit to attend to his business.

Then it was said that the applicant went first of all to Versova and that he went to Bangalore a day before his warrant of arrest so as to get outside the jurisdiction of this Court. The answer is that he did first go toVersova for a change of air but was told by his medical advisers that he must go to a much drier climate, and it was on that advice that he was taken to his brother's house at Bangalore. It was suggested that he could have gone to Poona or some other place in the Bombay mofussil having a dry climate, but I cannot see anything unresonable in a man in such a serious condition as I am satisfied this alleged insolvent was, going to the house of his brother in Bangalore which has presumably a better climate than Poona.

Then as regards the warrant of arrest, I cannot conceive that any Chamber Judge, if he had had brought to his attention the state of health of this unfortunate gentlman, would ever have dreamt of making a warrant for his arrest. I do not suppose for a moment that the matter was brought to the Judge's attention, and I say this partly because in Chambers during this vacation I myself was asked to grant a warrant on the Original Side for the arrest of this particular man. I raised certain queries because it appeared that he was already insolvent, and I did not understand why I was being asked to exercise the Original Side jurisdiction which was doubtful, as opposed to the insolvency jurisdiction which in certain cases is clear. Eventually I was told the real reason was that the man was ill and therefore they wanted to get hold of him. I pointed out there and then that that should have been so stated in the application to the Court and that the true ground should not have been suppressed. I heard no more of the appllcation. But I have very little doubt that if the matter was investigated, it would be found that the Chamber Judge who granted this warrant of arrest was not told of the condition in which this applicant was and that if he had been he would not have made this order.

The result, in my opinion, is that the applicant did not absent himself from his ordinary place of business or otherwise with a view to defeat or delay his creditors. He absented himself from his place of business because he was in a very serious state of health and totally unfit to attend to his business at all.

That being so, the grounds on which the order for adjudication was made are both of them wrong and accordingly the order must be discharged.

There have been certain other matters put forward in the affidavits as a possible ground for making the adjudication order, but I can only deal with the grounds on which the original adjudication order was made.

But there is this further point that arises, viz., that subject to anything that counsel may say I do not see why the whole of this order should be discharged. I do not see why it should not stand as an adjudication order against the other partner Premchand Nandlal. What I suggest may be a convenient way of protecting the interests of creditors will be for the Official Assignee promptly to be made a party to the partnership suit, and that in that partnership suit or in the insolvency he can take such proceedings as he may be advised to set aside, if he can, this mortgage of 1st October 1921 and he may also take such other proceedings in the partnership suit as may be necessary. Further, if the present applicant Abdul Sakoor gets in a fit condition to give evidence, it will be quite easy under the insolvency jurisdiction to direct him to be examined in the insolvency of his partner. If, again, the petitioning creditors consider they have other grounds for making Abdul Sakoor also an insolvent, of course they will be at liberty to do so. They make a considerable number of

charges of general insolvency against this firm which are more or less denied. But if there is anything substantial in them and if they can bring their case within the Indian Insolvency Act by some future application, they will of course be at liberty to do so notwithstanding my present order for annulment of the adujdication order.

In dealing with the first point, viz., as to whether there had been a fraudulent transfer, I had intended to refer to one section in the Transfer of Property Act about the meaning of the word "transfer", that is S. 5, and it says:

"In the following sections 'transfer of property' means an act by which a living person conveys property, in present or in future, to one or more other living persons or to himself and one or more other living persons; and 'to transfer property' is to perform such act."

I do not see that that definition applies to the Presidency Towns Insolvency Act, and I am not absolutely sure what the words "in present or in future" refer to- I should have thought that grammatically they referred to-property. There, again, I take it that a conveyancer would say that you cannot transfer future property. Such a purported transfer can only operate as an agreement to transfer and when the future asset comes into existence it is seized on in equity by reason of such agreement. But all this is English equity, and how far that applies to India, particularly to the Transfer of Property Act and its special provisions such as the concluding portion of clause 54, I do not propose to discuss and much less to decide. I only mention this to show that I have not overlooked that particular definition in the Transfer of Property Act.

One remaining matter is about costs. In the petition on which this adjudication order was founded there is not one word there said about the illness of Abdul Sakoor. The parties must have known it, and I think in such cases where parties apply for *ex parte* orders, it is incumbent on them to tell the Court all the material facts. They have not disclosed a word about this in the petition on which this order was made. I accordingly direct that the petitioning creditors pay the costs of the present application. If any difficulty arises as regards the precise form of the order, it should be mentioned to me.

Order discharged.

1923 BOMBAY 113

MULLA, J.

Najan Ahmed Haji Ali—Plaintiff.

v.

Salemahomed Peermahomed—Defendant.

S. C. C. Suit No. 766-9736 of 1920 D. 8th Aug. 1922.

(a) Accounts-Limitation-Part time-barred.

Where a tradesman has a bill against a party for any amount in which the items are so connected together that it appears that the dealing is not intended to terminate with one contract, but to be cantinuous, so that one item, if not paid, shall be united with another and form one continuous demand, the whole together forms but one cause of action and cannot be divided. If all the items form but one cause of action, it is idle to suggest that a part of it can be barred by limitation, and that the rest may not be so barred. [P *116* C *1*]

(b) Contract-Breach-Damages-Measure.

When the seller clearly shows his intention not to be bound by and to repudiate the contract, the buyer, if he pleases, may treat the notice of intention as inoperative and await the time when the contract is be executed and then hold the seller responsible for all consequences of non-performance, but in that case he keeps the contract alive for the benefit of the seller as well as his own; the buyer remains subject not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstances which would justify him in declining to complete it. On the other hand, the buyer may, if he thinks proper, treat the repudiation of the seller as a wrongful putting an end to the contract, and may at once bring his action as on a breach as would have arisen from non-performance of the contract at the appointed time, subject, however, to abatement in respect of any circumstance which may have afforded him the means of mitigating his damage. [P *116* C *2*]

(c) Civil P C, O 8 R 6-Set off and counter-claim-Distinction-Limitation.

If the defendants' cross-claim against the plaintiffs can be treated partly as a set-off and partly as a counter-claim, the defendants are entitled to ask the Court, even in appeal to treat it as such. The omission to plead part of the cross-claim as a set off amounts merely to a technical defect which can be cured, if necessary, by an amendment of the pleading. The provisions of Order XXI, rule 19, clearly show that an equitable set-off may be allowed

by the Courts of British India. Under Rule 118 of the Bombay High Court Rules (which is taken from R. S. C. Order XIX, rule 3) a defendant may set up by way of set-off or counter-claim, against the claims of the plaintiff, any right or claim whether such set-off or counter-claim sounds in damages or not. But nothing which was not a good set-off before the passing of the said rule can be a good set-off under the said rule; and set-off must still be for an ascertained sum or it must arise out of the same transaction as the plaintiff's claim. A counter claim need not arise out of the same transaction. Set-off is a ground of defence and it should be pleaded in the written statement. Counter-claim does not afford-any defence to the plaintiff's claim; it is a weapon of offence which enables a defendant to enforce a claim against the plaintiff as effectually as in an independent action. If the statute of limitations is pleaded to a defence of set-off, the plaintiff in order to establish his plea, must prove that the set-off was barred when the plaintiff commenced his action; it is not enough to prove that it was barred at the time when it was pleaded. In the case, however, of a counter-claim it is enough for the plaintiff to prove that the counter-claim was barred when it was pleaded. [*P 118 C 2*].

Taraporevala—for the Plaintiffs.

Kania—for the Defendants.

Mulla J..—This is a suit to recover the balance of the price of goods sold and delivered by the plaintiffs to the defendants under several contracts. The defendants counter-claim a larger sum than that claimed by the plaintiffs as damages for failure on the part of the plaintiffs to deliver the balance of the goods.

The plaintiffs deal in lime. The defendants are building contractors. The plaintiffs allege that they sold and delivered to the defendants lime under the following contracts, viz.—

(1) Contract dated April 16, 1916 (Ex. A), for the supply of lime for the Navatia Flour Mills at the rate af Rs. 2-13-3 per candy;

(2) A verbal contract entered into some months after the date of Ex. A, for the supply of lime for the Planet and Indo-China Mills at Rs. 2-11-6 per candy;

(3) Contract dated April 6, 1917 (Ex. B), for the supply of lime between 500 and 700 candies as ordered by the defendants from time to time for the Indo-China Mills at the rate of Rs. 3-6-3 per candy; and.

(4) Contract dated April 6, 1917 (Ex. C), for the supply of lime from time to time amounting to about 1500 candies as ordered by the defendants for the Planet Mills, at the rate of Rs. 3-8-3 per candy.

The contracts, Exs. B and C, superseded the verbal contract referred to above from the date they were entered into.

The plaintiffs allege that they supplied lime to the defendants prior to April 6, 1917, and that from and after that date they supplied to the defendants about 442½ candies for the Planet Mills and 380 candies for the Indo-China Mills under the said contracts, Exs. B and C.

There is no time mentioned for the payment of price under the centract Ex. A. By the contracts, Exs. B and C it was provided that the defendants should pay the price of such quantity as was delivered after retaining 10 per cent. as a deposit, and that the balance of the price should be paid after the building works referred to therein were completed.

It is common ground that deliveries were made under the contracts, Exs. B and C, until June 10, 1917. Disputes had arisen between the parties prior to that date, but they took an acute form after that date, and the plaintiffs ceased to supply lime after June 10, 1917, though the defendants required them to do so.

By their letter of June 23, 1917 (Ex. F), the defendants complained that the plaintiffs had ceased to deliver further lime, and suggested that the reason why the plaintiffs did so was that the rate of lime had gone up considerably since the date of the said contracts. By the said letter the defendants required the plaintiffs to supply 25 carts per day (one cart containing two candies) for the Navatia Flour Mills and 20 to 25 carts per day for the Planet Mills and they gave final notice to the plaintiffs that in default of the plaintiffs' complying with the said requisition by Wednesday next (June 27) they would buy lime against the plaintiffs. To the said letter the plaintiffs replied on June 27th, stating that the amount due to them for the lime already supplied to the defendants was Rs. 1795, that the amount payable to them after deducting 10 per cent was Rs. 1332, and that unless the defendants paid that sum they would not supply further lime. On June 29, the defendants replied to the said letter stating that the

amount due to the plaintiffs after deducting 10 per cent. was Rs. 269 only and they sent a cheque to the plaintiffs for that amount. With the said letter the defendants sent a statement of account from which it appears that they claimed to retain a deposit of 10 P. C. not only in respect of lime supplied under the contracts Exs. B and C but under the earlier contracts. To the said letter the plaintiffs replied on July 3, stating that they had accepted the said cheque under protest. By the said letter the plaintiffs purported to put an end to the said contracts on the ground that the defendants had not paid to them all that was due to them and they threatened to file a suit to recover the balance of the price.

Thereafter the defendants commenced purchasing lime in the market against the plaintiffs, and, according to their case, they bought about 400 candies between July 4 and 13, 1917. In the meantime on July 6 the defendants through their attorneys wrote to the plaintiffs stating that as the plaintiffs had refused to perform their part of the contract and had committed a breach thereof, the defendants had purchased lime in the market on account and at the risk of the plaintiffs at Rs. 4-14-0 per candy, and that the defendants would hold the plaintiffs liable for the consequence.

The plaintiffs did not reply to the said letter, and, as stated above, the defendants went on buying until July 13, 1917. On August 13, the defendants through their attorneys wrote to the plaintiffs stating that they had purchased 400 candies of lime at Rs. 4-14-3 per candy for the Planet Mills, and as the defendants wanted more lime they were advised, without prejudice, to give one more opportunity to the plaintiffs not to further commit breaches of the contracts. By the said letter the defendants called upon the plaintiffs to deliver for the Planet Mills a sufficient quantity of lime, and intimated to the plaintiffs that if they failed to do so within forty-eight hours the defendants would buy the same in the market against the plaintiff's. The plaintiffs did not reply to the said letter. Thereafter the defendants did not issue any orders to the plaintiffs for the supply of lime, and according to their case they purchased several candies of lime between October 3 and 30, 1917.

On March 19, 1918, the defendants sent a solicitors' notice to the plaintiffs demanding Rs. 494 alleged to be damages sustained by them by reason of failure on the part of the plaintiffs to deliver lime for the Planet Mills. The plaintiffs did not reply to the said letter nor to the two reminders sent on April 13, 1918 and on June 6, 1918.

Nothing was done by either party for about two years, and on June 8, 1920, the plaintiffs filed the present suit in the Court of Small Causes at Bombay to recover Rs. 1800 being the balance of the price of the lime sold and delivered to the defendants under all the said contracts. The suit was filed just in time to save it from the bar of limitation, the last delivery of lime having been made, as stated above, on June 10, 1917. The writ of summons was served upon the defendants on August 23, 1920. On August 30, 1920, the defendants obtained an order for transfer of the suit to the High Court. On September 14, 1920, the defendants filed their written statement and counter-claim.

In their written statement the defendants say that the balance due to the plaintiffs for the price of the goods was Rs. 1385 and not Rs. 1800, that out of the said sum the plaintiffs' claim for Rs. 1163 was barred by the law of limitation, and that the balance legally due to the plaintiffs was Rs. 221 only. The defendants further say that as the plaintiffs failed to deliver the balance of lime under the said contracts, they sustained damages to the extent of Rs. 2,716. The defendants gave credit to the plaintiffs for Rs. 221 and they counter-claimed Rs. 2494.

At the hearing of the suit the following questions were raised, viz.—

1. Whether the claims, if any, of the plaintiffs for the price of lime supplied prior to June 7, 1917, was barred by the law of limitation?

2. Whether the plaintiffs were justified in refusing to deliver further lime to the defendants under the [illegible] contracts?

3. If not, whether the [illegible] are entitled to their [illegible] defendants [illegible] counter-claim?

4. Whether the defendants' counter-claim is barred by the law of limitation?

5. What amount, if any, is due from either party to the other?

It was agreed between the parties at the hearing of the suit that the questions of limitation should be disposed of first by the Court. It was also agreed that to determine the question, whether the counter-claim was time-barred, the Court should proceed on the assumption that the plaintiffs were not justified in refusing to deliver further goods, in other words, that the plaintiffs committed a breach of the said contracts.

As regard the question whether the plaintiffs' claim in respect of the items prior to June 7, 1917, is barred by limitation, I have no doubt that it is not. Both the plaintiffs and the defendants kept only one account of the transactions from the date of Ex. A. In *Bonsey* v. *Wordsworth* (1), followed by Jenkins C. J. in *Kedar Nath* v. *Denobandhu* (2), it was said on the strength of the previous authorities that "where a tradesman has a bill against a party for any amount in which the items are so connected together, that it appears that the dealing is not intended to terminate with one contract, but to be continuous, so that one item, if not paid, shall be united with another and form one continuous demand, the whole together forms but one cause of action and cannot be divided. It is clear from the passage cited above that if all the items form but one cause of action, it is idle to suggest that a part of it can be barred by limitation, and that the rest may not be so barred. In fact counsel for the defendants, at a later stage of the proceedings, gave up the contention as to limitation, with the result that the amount admittedly due by the defendants to the plaintiffs is now Rs. 1385 instead of Rs. 221.

In determining the question whether the defendants' counter-claim is barred by limitation, I am asked to assume that the plaintiffs committed a breach of the said contracts in not making further deliveries to the defendants after June 10, 1917. The question is: what is the date of the breach? On behalf of the plaintiffs it is contended that the date of the breach is July 3, 1917, being the date on which the plaintiffs gave notice to the defendants that they would not supply any more lime, or, at the latest, August 15, 1917, being the date within which the defendants required the plaintiffs to supply further lime by their letter of August 13, 1917. On the other hand, it is contended for the defendants that the earliest date of the breach is October 3, 1917, being the date on which the defendants recommenced purchasing in the market against the plaintiffs subsequent to their letter of August 13, 1917.

In dealing with this question it is to be noted that the contracts were for delivery of lime to the defendants from time to time as they required it for their works. In such a case when the seller clearly shows his intention not to be bound by and to repudiate the contract the buyer, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed and then hold the seller responsible for all consequences of non-performance, but in that case he keeps the contract alive for the benefit of the seller as well as his own; the buyer remains subject to all his obligations and liabilities under it, and enables the seller not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstances which would justify him in declining to complete it. On the other hand, the buyer may, if he thinks proper, treat the repudiation of the seller as wrongful putting an end to the contract, and may at once bring his action as on a breach of it, and in such action he will be entitled to such damages as would have arisen from non-performance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of miti-

(1) (1856) 18 C. B. 325, 334.
(2) (1915) 42 Cal. 1043-19 C. W. N. 724-31 I. C. 626.

gating his damage: *Frost* v. *Knight* (3) *Cort* v. *Ambergate &c. Railway Co.* (4) *Braithwaite* v. *Foreign Hardwood Co.* (5) *Melachrino* v. *Nickoll and Knight* (6) Such being the law, it has to be determined whether, when the plaintiffs gave notice to the defendants by their letter of July 3, 1917, that they would not make further deliveries, the defendants treated the repudiation as a wrongful putting an end to the contracts. On behalf of the defendants it is contended that the contracts being for the supply of lime from time to time to the plaintiffs as required by the defendants, the defendants' letter of July 6 amounted to an acceptance of the plaintiffs' refusal as a breach not to the extent of the entire residue of lime to be supplied under the said contracts, but to the extent of such quantity only as they required by their letter of June 23. By that letter the defendants required the plaintiffs to send twenty-five carts per day for the Planet Mills, and threatened that in default they would buy "the lime" in the market on account and at the risk of the plaintiffs. In their letter of June, 29th the defendants' attorneys wrote: "Our clients have waited long enough for the supply of lime, and please note that if your clients do not supply lime to our clients by tomorrow our clients will purchase the same from the market at your clients' risk and on their account. Please treat this notice as final." To the said letter the plaintiffs replied on July 3, stating that as the defendants had not paid the amount due to them they would not make further deliveries. This was a clear and unequivocal expression of intention on the part of the plaintiffs not to supply any further lime. According to the defendants' case, they started buying lime in the market from July 4 1917, and continued to do so until July 13, 1917. To the said letter of July 3, the defendants through their attorneys replied on July 6, as follows:—

"As your clients have declined to carry out their part of contract and have committed a breach thereof our clients have purchased lime from the market on your clients' account and at their risk at Rs. 4-14-0 per candy and they hold your clients liable for the consequences thereof. Our clients hold your clients' deposit for the damages they are likely to suffer."

The impression produced on my mind after perusing that letter was that the defendants treated the plaintiffs' repudiation as an immediate breach putting an end to the said contracts in their entirety. Thereafter the defendants were not bound to accept any lime from the plaintiffs under the said contracts, and they could have at once sued the plaintiffs for damages for failure to deliver the rest of the lime under the said contracts. I therefore, hold that the breach, if any, of the said contracts took place on July 6, 1917. But even if it be not so, I think that the defendants' letter of August 13, is a clear intimation to the plaintiffs that unless the plaintiffs supplied further lime within forty-eight hours, the defendants would treat the plaintiffs' repudiation as a breach of the contracts in their entirety. The defendants in fact did so. They did not order any more lime from the plaintiffs and they started buying against the plaintiffs from October 3, 1917. Therefore, even if the defendants did not, by their letter of July 6, accept the plaintiffs' refusal as a breach of the contracts for the entire residue of the lime to be delivered thereunder, they did so by their letter of August 15, in which case the date of the breach would be August 15, 1917. I prefer to hold that the breach took place on July 6, 1917.

But though the date of the breach be July 6, or August 15, 1917, it does not follow that the whole of the defendants' counter-claim is time-barred, for it is possible to look at the matter from another point of view.

The defendants' cross-claim for damages amounts to Rs. 2716. The plaintiffs' claim is for Rs. 1,800. The defendants in their pleading gave credit to the plaintiffs for Rs. 221 admitted by them to be due to the plaintiffs and they counter-claimed for

(3) [1872] L. R. 7 Ex. 111, 113.
(4) [1851] 17 Q. B. 127.
(5) [1905] 2 K. B. 543.
(6) [1920] 1 K. B. 693.

the balance, viz., Rs. 2,494. Had the defendants' pleading been properly drawn, the defendants would have in their written statement claimed to set off against the amount that might be awarded by the Court to the plaintiffs an equal amount of their claim, and they would have counter-claimed for the balance (See Bullen and Leake's Precedents of Pleadings, 6th Edn. page 775). I do not think that the fact that the defendants have not pleaded a set-off by their written statement precludes them from pleading a set-off now: see *Mc Gowan* v. *Middleton* (7). I think if the defendants' cross-claim against the plaintiffs can be treated partly as a set-off and partly as a counter-claim, the defendants are entitled to ask the Court, even at this stage, to treat it as such. The omission to plead part of the cross claim as a set-off amounts merely to a technical defect which can be cured, if necessary, by an amendment of the pleading.

The defendants having given up their contention as to limitation, the amount now admittedly due by them to the plaintiffs is Rs. 1385. The defendants are therefore entitled to ask the Court to treat their cross-claim to the extent of Rs. 1385 or such larger sum as might be awarded by Court to the plaintiffs as a set-off, and to treat the balance as a counter-claim. It is clear that the defendants cannot claim a set-off in the present case under the Code of Civil Procedure, Order 8 rule 6, because the defendants' claim is not for an 'ascertained' sum within the meaning of that rule, but for unliquidated damages for alleged breaches of the said contracts. But the Code does not exclude what is called an equitable set-off provided the defendants' cross-demand arises out of the same transaction as the plaintiffs' claim: *Clark* v. *Ruthnavaloo*. (8). In the present case it is not denied that the defendants' cross-demand arises out of the same transactions. The defendants, therefore, are entitled to claim an equitable set-off in the present case: *Kishorchand* v. *Madhouji Visram* (9). The provisions of Order 21 rule 19, clearly show that an equitable set-off may be allowed by the Courts in British India see *Narasimha Rao* v. *Zamindar of Tiruvur*. (10).

Under Rule 118 of the Bombay High Court Rules (which is taken from R. S. C., Order 19 rule 3) a defendant may set up by way of set-off or counter-claim against the claims of the plaintiff, any right or claim whether such set-off or counter-claim sounds in damages or not. It must, however, be observed that nothing which was not a good set-off before the passing of the said rule can be a good set-off under the said rule; the set-off must still be for an ascertained sum or it must arise out of the same transaction as the plaintiff's claim. A counter-claim, however, need not arise out of the same transaction. Set-off is a ground of defence and it should be pleaded in the written statement. Counter-claim does not afford any defence to the plaintiff's claim; it is a weapon of offence which enables a defendant to enforce a claim against the plaintiff as effectually as in an independent action. *Stooke* v. *Taylor*. (11).

The above distinction between set-off and counter-claim has an important bearing on the question of limitation, for if the statute of limitations is pleaded to a defence of set-off, the plaintiff, in order to establish his plea, must prove that the set-off was barred when the plaintiff comenced his action; it is not enough ta prove that it was barred at the time when it was pleaded: *Walker* v. *Clements* (12). In the case, however, of a counter-claim, it is enough for the plaintiff to prove that the counter-claim was barred when it was pleaded: *Mc Gowan* v. *Middleton* (13). The case of *Walker* v. *Clements* (12), referred to above, was one of legal set-off. But the same principle has been held to apply to cases of equitable set-off: *Narasimha Rao* v. *Zamindar of Tiruvur* (10); *Pragji Lal* v. *Maxwell* (14).

(7) [1883] 11 Q. B. D. 464, (p. 470).
(8) [1865] 2 M. H. C. R. 296, 303.
(9) [1880] 4 Bom. 407.
(10) [1919] 42 Mad. 873-37 M. L. J. 193-10 L. W. 183-(1919) M. W. N. 628-26 M. L. T. 276-53 I. C. 234.
(11) [1880] 5 Q. B. D. 569, 575,576.
(12) [1850] 15 Q. B. 1046.
(13) [1883] 11 Q. B. D. 464.
(14) [1885] 7 All. 284-(1885) A. W. N. 40.

I have already held, upholding the plaintiffs' contention, that the breach (if any) on the part of the plaintiffs, which gave rise to the defendants' counter-claim for damages, arose on July 6, 1917. The present suit was instituted on June 8, 1920. Therefore, the defendants' cross-claim to the extent of the amount that may be decreed to the plaintiffs in this suit, is not barred by the law of limitation. As regards the balance of the defendants' cross-claim, I hold that it is barred by limitation as the counter-claim was not filed until September 14, 1920. The same view was taken by the High Court of Madras in *Narasimha Rao's* case referred to above.

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MULLA, J.

The National Bank of India—Plaintiffs.

v.

The National Bank of Indore—Defendants.

O. C. J. S. No 2042 of 1920 D. 30th August 1922.

Trade name—Similarity in names—Suit for injunction—Principles.

The fundamental principle is that a person shall not trade under a name so closely resembling that of the plaintiff as to be mistaken for it by the public. The question to be determined in cases of this description is whether there is such a similarity between the two names as that the one is in the ordinary course of human affairs likely to be confounded with the other. It is not necessary to prove that the defendants in taking the name complained of by the plaintiffs had any fraudulent intent. It is enough if the plaintiffs prove that the act of the defendants in assuming the name complained of, is an injury to the plaintiffs' rights. There is no question in such cases of property or monapoly in the name. The principle upon which the cases on this subject proceed is not that there is property in the word, but that it is a fraud on a person who has established a trade and carries it on under a given name, by some other person who assumes the same name or the same name with a slight alteration in such a way as to induce persons to deal with him in the belief that they are dealing with the person who has given reputation to the name. The question in this class of cases is not whether the intelligent section of the public is likely to be deceived but whether the public at large is likely to be deceived. [P. 120 C. 1, 2]

The sole right to restrain anybody from using any name that he likes in the course of any business he chooses to carry on is a right in the nature of a trade mark. [P. 124 C. 1]

Kemp—for the Plaintiffs.

Coltman—for the Defendants.

Mulla J.—This is a suit to restrain the defendants from carrying on business under the name "The National Bank of Indore, Limited" or any other name which is a colorable imitation of the name of the plaintiffs.

The plaintiffs are a limited company incorporated in the United Kingdom and have for the last fifty years and upwards carried on business of banking in India and other parts of the world on a very extensive scale and have during such time obtained a very high reputation and earned the confidence of all classes of the community in India and in other places. The plaintiffs have several branches in India and other places of which a list is given in Ex. G. The plaintiff bank is an Exchange Bank and besides the usual banking business it imports and sells gold bars stamped with the name "National Bank of India" in English as well as in the vernacular of the place where the branches of the plaintiff bank sell bar gold (see Ex. D.). These bars are known as the National Bank bar gold and they are quoted as high as English bar gold and higher than Bombay Mint gold (see Ex. F.)

The defendant bank was registered in Bombay in March 1920 as a private limited company having for its objects, amongst other things, the carrying on of all kinds of banking business in Bombay and such other parts of the world as the Directors may determine including the buying and selling of bullion and specie, and the buying, selling, melting and refining of metals and manufacturing products thereof for commercial purposes (see Ex B.). The office of the defendant bank is within the Fort of Bombay. The defendant bank has not hitherto a single pie in cash by way of capital nor has it commenced its business. The defendants are awaiting the decision of this suit, as stated by Mr. Parekh, one of the Directors of the

the defendant bank, for starting their business.

The plaintiffs' case is that the name of the defendants is a 'colourable imitation of the plaintiffs' name and is calculated to deceive ordinary persons and to induce them to do business with the defendants under the supposition that they were dealing with the plaintiffs and that serious injury will result to the plaintiffs if the defendants are allowed to use the name adopted by them and they claim that the defendants may be restrained by an injunction from carrying on business under the name under which the defendants have been registered or under any other name which is a colourable imitation of the name of the plaintiffs.

The defendants have put in their written statement in which they deny that the name adopted by them is a colorable imitation of the plaintiffs' name or that it is calculated to deceive ordinary persons as alleged in the plaint. They say that there was a large internal trade in cotton seeds, piece-goods and other commodities in Indore, and that the defendant company was formed principally with a view to finance merchants carrying on business in Indore, and that they adopted their name as a descriptive name. They deny that any serious injury or any injury at all will result to the plaintiff bank if they are allowed to use the name adopted by them.

The principles by which this case must be decided are well established. The fundamental principle is that a person shall not trade under a name so closely resembling that of the plaintiff as to be mistaken for it by the public. *Hendriks* v. *Montagu* (1); in other words, that a person shall not carry on his business in such a way as to represent that his business was the business of another person: *Merchant Banking Company of London* v. *Merchants' Joint Stock. Bank* (2). The question to be determined in cases of this description is whether there is such a similarity between the two names as that the one is in the ordinary course of human affairs likely to be confounded with the other: *Hendriks* v. *Montagu* (1)

(1) (1881) 17 Ch. D. 638.
(2) (1878) 9 Ch. D. 560, 563.

It is not necessary to prove that the defendants in taking the name complained of by the plaintiffs had any fraudulent intent. (3) It is enough if the plaintiffs prove that the act of the defendants in assuming the name complained of is an injury to the plaintifs' rights: *North Cheshire and Manchester Brewery Company* v. *Manchester Brewery Company* (4). There is no question in such cases of property or monopoly in the name. The principle upon which the cases on this subject proceed is not that there is property in the word, but that it is a fraud on a person who has established a trade and carries it on under a given name by some other person who assumes the same name or the same name by a slight alteration in such a way as to induce persons to deal with him in the belief that they are dealing with the person who has given a reputation to the name: *Lee* v. *Haley* (5); *Hendriks* v. *Montagu* (1). The principles enunciated by the Earl of Halsbury L. C. in the *North Cheshire Brewery's* case, (4) referred to above, have a material bearing on the present case. In that case the Manchester Brewery Company was the plaintiff. The plaintiff company had carried on business under that name for years. The defendant company bought an old business called "The North Cheshire Brewery Ltd" and then got themselves incorporated and registered under the name of "The North Cheshire and Manchester Brewery Co. Ltd." The plaintiff company complained that the name of the defendant company was calculated to induce the belief that the plaintiff company had ceased to carry on business as a separate company and that the defendant company was an amalgamation of the plaintiff company and the North Cheshire Brewery Limited, and it sued the defendant company for an injunction. Byrne J. refused the injunction, but the Court of Appeal reversed the judgment and granted the injunction. The judgment of the Court of Appeal was upheld by the House of Lords. In the course of his speech the Lord Chancellor said:

(3) (1881) 17 Ch. D. 638 at. 651.
(4) [1899] A. C. 83, 87,
(5) (1869) L. R. 5 Ch. App. 155, 161.

"I have no complaint to make of their (counsel) being too long or too elaborate ; but the truth is, that when one comes to see what the real question is, it is in a single sentence. Is this name so nearly resembling the name of another firm as to be likely to deceive. That is a question upon which evidence of course might be given, as to whether or not there was another brewery either in the one place or in the other, or whether there were several breweries nearly resembling it in name ; what the state of the trade was, and whether there was any trade name ; all those are matters which are proper to be dealt with upon evidence ; but upon the one question which your Lordships have to decide, whether the one name is so nearly resembling another as to be calculated to deceive, I am of opinion that no witness would be entitled to say that, and for this reason that that is the very question which your Lordships have to decide "

Much to the same effect are the observations of Lord Cozens Hardy M. R. in *Ewing* v. *Butter up Margarine Company, Ltd.* (6) In that case the plaintiff carried on business under the name of "The Buttercup Dairy Company." The plaintiffs' business consisted in selling butter, margarine, cream, condensed milk etc. After some years the defendant company, (The Buttercup Margarine Compay Ltd.) was incorporated as a private company. The memorandum of association of the defendant company authorized trade in milk, cream, butter, margarine, etc. In confirming the injunction granted by Astbury J. the Master of the Rolls said (p. 10) :

" In a case like that, where the plaintiff is the owner of a business which has been established since 1904 and has a turnover of half a million a year, and must be regarded as an old-established business, none the less because its actual sphere of operations is mainly in Scotland and the North of England, what should I expect the defendants as honest men or honest representatives of a newly formed company to do ? I should expect them to say : 'We are very sorry; we were not aware of your existence in Scotland, but as you object to our name we will change it so as not in any way to interfere with you.' Instead of doing that they assert their right to use the name and file a mass of affidavits in support of their claim to do what they have threatened and continued to do ; and they seek to justify their name on the ground that the arm of the Court is not long enough to reach a defendant who takes a name similar to that of the plaintiff, unless it can be shown that such name is calculated to deceive, in the sense that a person desiring to be a customer of the plaintiff is induced thereby to become a customer of the defendant. And they say that there can be no deception here because they are wholesale people while the plaintiff is a retailer, that it is true that they have the fullest possible power under the memorandum and articles of association to carry on a retail business, but that at the present moment they have no such intention. I should be very sorry indeed if the jurisdiction of the Court should be regarded as so limited. I know of no authority, and I can see no principle, which withholds us from preventing injury to the plaintiff in his business as a trader by a confusion which will lead people to conclude that the defendants are really connected in some way with the plaintiff or are carrying on a branch of the plaintiff's business."

Having stated the principles by which the decision of this case must be governed, I proceed to ascertain their bearing on the particular facts of this case. The defendant company was registered in March 1920. On June 14, 1920, the plaintiffs wrote to V. I. Parekh, Vasanji Bhagwandas and Abubakar Jusub, the three signatories to the Memorandum of Association of the defendant company, complaining that the name adopted by the defendant company was calculated to deceive, and demanding an immediate undertaking not to do any business in that name. To the said letter Parekh replied on June 19, in which he denied that the two names were similar and said that the bank intended to carry on business in ver-

(6) [1917] 2 Ch. 1, 10-11.

nacular and to locate the head office outside the Fort of Bombay " more especially to avoid the ambiguity erroneously originated and the meaning of which is misconstrued by you." This was followed by another letter from Parekh on June 24, in which he stated that he was prepared to have the head office of the company outside Bombay. It seems that thereafter there was an interview between the plaintiffs' attorneys and Parekh at which the plaintiffs insisted upon the name of the defendant company being changed. On July 10, Parekh wrote to the plaintiffs' attorneys stating that the words " National " and "Indore" were both indispensable and that it was extremely inconvenient to change the name. He stated that the company was primarily floated in the interests of the residents of all classes of the Indore State, and that any change in the name was likely to lessen the importance and usefulness of the concern. The plaintiffs then brought the present suit on August 6.

The following issues were raised at the trial of the suit :—

(1) Whether the defendants's name is a colourable imitation of the plaintiffs' name and is calculated to deceive as alleged in para 3 of the plaint; and

(2) Whether the plaintiffs are entitled to any relief, and, if so, what ?

On behalf of the plaintiffs evidence was given by brokers all in a large way of business. They deposed to the confusion likely to arise from the similarity of the two names, likelihood of the letters meant for one bank being received by the other, and the gold bars of the defendant bank being mistaken for those of the plaintiff bank. They also said that the plaintiff bank was known as National Bank and that the bar gold sold by the plaintiff bank was known as the National Bank bar gold. They all said that the similarity of the two names was so great that the use by the defendants of the name " National Bank of Indore " would have the effect of misleading people into supposing, when they were in truth dealing with the defendants, that they were dealing with the plaintiffs. The plaintiffs also exhibited several letters addressed to them as " National Bank " (Ex. E). Ex. D is a specimen of gold bars sold by the plaintiff bank.

The only witness called for the defendants was Mr. Parekh Assistant Manager of the Bombay branch of the Bank of Morvi, at Pydhowni. In his examination-in-chief he said that he had been to Indore and that he had ascertained that wheat seeds and cotton were exported from Indore, and that the object of assuming the name "National Bank of Indore" was to finance the export trade of Indore. He also said that Vasanji Bhagwandas was doing some work in Bombay for H. H. the Maharajah of Indore, the work being to send articles which His Highness privately wanted, and that he knew some merchants at Indore. He further said that the defendants had no present intention of dealing in gold bars as the capital of the company was rupees five lacs only, but that if the capital increased the defendants would deal in gold bars.

In his cross-examination it turned out that Parekh was in the employ of the Indian Specie Bank as inspector, and that in that capacity he had been to Indore to inspect the work of the branch of that Bank at Indore once in 1911 and again in 1916. He said that those were the only two occasions on which he went to Indore. He also admitted in his cross-examination that Vasanji Bhagwandas had ceased to do any work for H. H. the Maharajah of Indore about a year ago. As regards the similarity of the plaintiffs' name and the defendants' name his evidence is as follows :—

" *Q.*—If your bank's name was written on it (Ex. D) in the same way as the plaintiff bank's name was written, would the two names be like each other ?

(Lalji objects on the ground that they were not concerned with any question of trade mark in this case).

P. C. objection overruled.

A.—Both the names would be similar in appearance; but that would be so only in the case of one who does not know how to read and write.

Q. - Can you think of any name that would be more like the "National Bank of India" than the "National Bank of Indore "?

A.—"National Bank of Idar would

be such e.

Q.—Is Indore a nation ?

A.—Indore is a State.

Q.—Indore not being a nation why did you select the word "National"?

A.—Because the word "National" represents all communities, Hindus, Parsis, Mahomedans etc.

Q.—Would you adopt the word "Cosmopolitan" which also means all communities?

A.—I do not like that word.

Q.-What about the word "Oriental"? Would you accept it?

A.—No. The expression "Oriental" does not include all races Besides, the expression "Oriental" savours of something old. Further, a bank known as the Oriental Bank of India had failed. I used the word "National" in the name of the defendant bank as being representative of the people of Indore.

Q.—You have selected the word "National" because the National Bank is an extremely well known Bank in Bombay.

A.—It is not so. I know that gold bars are sold in small bits by dealers.

Q.—Assume a gold bar bearing the name of National Bank of Indore is sold by the defendant bank. Assume further that a dealer who buys the bar from you cuts off the piece bearing the letters "ore"; there is nothing then to prevent you from showing the rest of the bar and selling it as the bar of the National Bank of India; is there?

A.—No merchant would practise such a fraud. If he wanted to commit a fraud, he could.

A person who buys a piece of gold would get it assayed before it is bought. He would do it if he was not satisfied with the name.

No man would ever buy gold without assaying it.

Q.—Do you mean to say that any man buying gold would get it assayed before buying it?

A.—Not necessarily.

If the words "ore" were cut off and the rest of the piece sold, it is possible that the piece sold might be passed off as a piece of the gold bar of the National Bank of India."

Mr. Parekh also said that the defendant bank had not done any business and the reason which he gave was that as the plaintiffs had taken objection to the defendants' name he thought that the name of the defendant company might have to be altered and he did not therefore get any papers printed and no progress was made.

I was not at all impressed with the demeanour of Mr. Parekh in the witness box. In the course of his cross-examination he fenced with several questions and he did not give direct answers to the questions put to him until pressed by Mr. Binning. I decline to believe that the reason why he selected the name "National Bank of Indore" was to finance the export trade of Indore. I also decline to believe that either he or Vasanji Bhagwandas has any such connection with the merchants of Indore as it was sought to make out. It is significant that Vasanji Bhagwandas was not called as a witness to depose to his alleged connection with the merchants of Indore. Mr. Parekh was long connected with the Indian Specie Bank which dealt in gold bars. He is now connected with the Bank of Morvi which as the successor of the National Financing Corporation deals in bar gold. Abubakar Jusub, another promoter of the defendant bank, deals in bar gold. It seems to me that the defendant company has been formed with the object principally of dealing in gold bars. No doubt its capital is only rupees five lacs and the business may not at first be large, but it may increase with the increase of capital [see *The Standard Bank of South Africa Limited* v. *The Standard Bank, Limited* (7)]. I am also inclined to think that the object of the defendants in selecting the name "National Bank of Indore" was to attract and appropriate as much of the business of the plaintiff company which the defendants could lay hold of. The conclusion to which I have come is that the name adopted by the defendant bank is so similar to that of the plaintiff bank that it is calculated to deceive ordinary persons and to induce them to do business with the defendant company under the supposition that they were dealing with the plaintiffs.

(7) (1909) 25 T. L. R. 420, 421.

It was contended for the defendants that the evidence of the plaintiff's witnesses showed that there was no likelihood of deception as regards intelligent persons and persons who knew how to read and write and that therefore the plaintiffs were not entitled to any relief. But the question in this class of cases is not whether the intelligent section of the public is likely to be deceived but whether the public at large is likely to be deceived. Further, as observed by Sir George Jessele in *The Guardian Fire and Life Assurance Company* v. *The Guardian and General Insurance Company* (8), " the public are careless, and it is no use supposing that if they paid a very moderate attention to names they would see they were not the same, but only similar." The plaintiffs have branches in several parts of India outside the Presidency towns. It may be that the chances of deception in Presidency towns are not great, but this cannot be said of other places. Again, the plaintiffs have no branches in places like Surat, Broach, Ahmedabad etc. If the defendants opened branches in those places, it was, I think, highly probable that the public of those places would be deceived having regard to the close similarity between the two names.

It was also urged for the defendants that the Court had no power in this suit to enquire whether, if the defendant company sold gold bars bearing its name on them, they were likely to be confounded with the gold bars of the plaintiff bank, the reason given being that to allow such enquiry would be to convert the suit into a trade-mark suit. But as stated by Lord Justice James in *Levy* v. *Walker* (9), " the sole right to restrain anybody from using any name that he likes in the course of any business he chooses to carry on is a right in the nature of a trade-mark". Moreover, such an enquiry was deemed to be quite legitimate in the *North Cheshire Brewery's* case referred to above. In fact, Byrne J. who first tried that case based his judgment on the fact that there was no evidence before him that any customer of the plaintiff company had bought beer of the defendant company under the impression that it was beer made by the plaintiff company, and refused to grant the injunction prayed for (10). Dealing with this Lindley M. R. said that that was only one method of deception, and that Byrne J. ought not to have rested his judgment on that aspect of the case alone (3). But it was nowhere suggested that the Court should not in a case of that description deal with the question whether the goods of the defendant company were likely to be passed off as the goods of the plaintiff company. Further, the enquiry held in the present case as to the likelihood of the defendants' gold bars, when put upon the market, being passed off as the National Bank bar gold, was not outside the scope of the issues raised in the case. But even if it was, I have no hesitation in holding that the two names are so similar as to be calculated to deceive the public even as regards the other departments of the business of the plaintiff bank.

Lastly, it was urged that there were several banks in India whose name included the words "National Bank " (Ex. No. 2) and that the plaintiffs had never objected to those names. But none of those banks deal in gold bars; in any event no evidence was given that they do so, though the attention of the defendant's counsel was specifically directed to this point.

I do not entertain any doubt that the names of the plaintiff bank and the defendant bank are so similar as to be calculated to deceive, and I pass judgment for the plaintiffs restraining the defendants from carrying on business under the name, " The National Bank of Indore, Limited " or under any other name which is a colourable imitation of the name of the plaintiffs. The defendants must pay the plaintiffs' costs of this suit.

Suit decreed.

(8) (1880) 50 L. J. Ch. 253, 255.
(9) (1879) 10 Ch. D. 436, 447.
(10) [1898] 1 Ch. 539, 540.

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MULLA, J.

The Ford Automobiles—(India) Ltd.

v.

The Delhi Motor and Engineering Co.

O. C. J. Suit No. 2943 of 1920 D. 14th August 1922.

(a) Contract Act, S. 83—Passing of property to buyer.

The defendants ordered twenty motor cars from the plaintiffs upon terms that the plaintiffs should send them by rail and that the defendants should pay for them to Messrs. King, King & Co., at Delhi against the railway receipt. Messrs King King & Co. at Delhi were the plaintiffs' agents to receive payment of the price from the defendants, and to deliver the railway receipt to them on payment. The railway receipt was made out by the plaintiffs in their name as consignees and endorsed by them in blank. The cars were consigned at owner's risk with the result that the railway could not be held liable for the loss thereof.

Held that the plaintiffs delivered the cars to the railway at owner's risk without the consent express or implied of the defendants, that the plaintiffs' intention was to retain the ownership of the goods until the defendants paid the price. That the plaintiffs having instructed their agents not to deliver the railway receipt till payment, the appropriation was not absolute and final, but conditional on payment by the defendants and that there was therefore no "appropriation" within S. 83 of the Contract Act. That the property in the cars did not pass to the defendants on delivery to the railway company and that the defendants were not liable for the price. [P. 129 C. 2]

S. 83 applies to a case where the seller is authorised to make the appropriation and the buyer has given a previous implied assent to the appropriation.[P. 129 C. 2]

(b) Contract Act S. 91—Scope—English law.

S. 91 does not provide for cases where the seller delivers the goods to a carrier and reserves the right of disposal. Therefore the Courts of British India resort to the rules of English common law so far as they are not inconsistent with the text of the Contract Act. One of those rules is that where in pursuance of the contract, the seller delivers the goods to a carrier, for the purpose of transmission to the buyer, but retains a *jus disponendi* until certain conditions are fulfilled, the property in the goods does not pass to the buyer until the conditions imposed by him are not fulfilled. This rule applies not only to delivery of goods to be carried by sea, but to delivery to carriers by land and to canal-boat companies.

O'Gorman with Coltman — for the Plaintiffs.

Munshi, with Jinnah—for the Defendants.

Mulla J.—This is a suit to recover Rs. 43,125 being the price and other charges of twenty motor cars consigned by the plaintiffs from Bombay to the defendants at Amballa under a contract between the parties and destroyed by fire in transit.

Prior to 1920 there was a firm, named Ford Automobiles, which carried on business in Bombay in Ford cars and accessories. The plaintiffs were registered as a limited company early in 1920 and they purchased the business of the said firm. The plaintiff company is now under liquidation and the present suit is brought by the liquidator of the company in the company's name.

The defendants carry on business as commission agents at Delhi. It seems that there were some dealings between the defendants and the said firm prior to 1920. In March 1920 the plaintiffs employed the defendants as their commission agents for the sale of Ford motors in Delhi and other places. The terms of the agency contract were arranged between the plaintiffs' representative and the defendants' representatives, Dolatram and Sons. On March 1. 1920, the plaintiffs wrote to Doulatram and Sons as follows :—

"In connection with the personal visit of the undersigned a few days ago we have much pleasure in informing you that we have decided to give you the Ford sub-agency on the usual terms as laid out in our Ford Sub-Agents contract (which is at present in the hands of our printers) and which will be forwarded to you for signature as soon as it is ready. Under the new contract discount on cars is as follows irrespective of the number of cars taken :—

Rs. 300 per car on assembled cars.

Rs. 350 per car for unassembled cars.

We understand you are prepared to contract for 150 cars per year."

Counsel for the plaintiffs stated in his opening that some of the terms of the said agency contract were contained in a printed form referred to in the above letter. He produced the printed terms, and when asked whether those terms were shown to the defendants and accepted by them at the interview referred to in the said letter he said that the terms were then under print, but that the plaintiffs' representative had shown to the defendants another

printed form which contained similar terms. He said that the plaintiffs had not got a copy of that form, and after some discussion he gave up the contention that the printed terms referred to in the said letter formed part of the contract especially as they were not signed by the defendants.

On March 2, the plaintiffs sent a telegram to the defendants stating "sending you earliest possible date goods train twenty unassembled cars. Please wire if you do not require." After some correspondence the defendants agreed to accept twenty cars to be sent to them by the plaintiffs by goods train. On March 10, the plaintiffs wrote to the defendants inquiring how they should draw on the defendants for payment of the said cars against delivery. The defendants replied on March 15, asking the plaintiffs to send the railway receipt through the Delhi Branch of Messrs. King King & Co.

On March 27, the plaintiffs delivered twenty cars to the B. B. and C. I. Railway in Bombay for carriage to Ambala and obtained a railway receipt (Ex. A) for the same. The railway receipt was made out in the name of the plaintiffs as consignees and endorsed by them in blank (see plaint, para 4). The cars were delivered to the railway company under a special contract at owner's risk. The risk note is not produced, but it was admitted by Mr. Lellie, a witness for the plaintiffs, that the cars were conveyed at owner's risk. It appears from Ex. No. 1 that the risk note was in Form B.

The plaintiffs advised the defendants of the despatch of the cars, and they sent a bill to the defendants for Rs. 44,700 for the twenty cars, and wrote to the defendants on March 27, asking them to take delivery of the railway receipt from Messrs King, King and Co. at Delhi, on payment to them of the said amount. At the same time the plaintiffs sent the railway receipt to Messrs. King, King and Co. at Delhi with instructions to them to deliver the railway receipt to the defendants on payment of the said amount. It was subsequently found that Rs. 44,700 was a mistake for Rs. 42,700, and the plaintiffs instructed Messrs. King, King and Co. to accept payment of Rs. 42,700 instead of Rs. 44,700. It seems that thereafter the cars were burnt in transit between Ravanji Doonger and Siwai Madhopur stations on that railway. On April 17, the defendants sent a telegram to the plaintiffs stating that all the twenty cars were missing. By their letters of April 17, April 29, and May 4, the defendants requested the plaintiffs to make a claim against the railway company and they complained that the non-delivery of the cars had caused them much prejudice as they were unable to deliver the cars to their customers. On May 7, the plaintiffs wrote to the defendants that they had already instituted enquiries to trace the whereabouts of the cars. In the meantime it seems that Messrs. King, King and Co. demanded payment from the defendants, but the defendants refused to pay. On May 28, the plaintiffs wrote to the defendants stating that the said cars were burnt in transit, and that as the terms of payment were f. o. r. Bombay, the salvage was lying at the Siwai Madhopur Station at the disposal of the defendants. By that letter the plaintiffs demanded immediate payment of Rs. 42,700 from the defendants. Pausing here for a moment it may be observed that the cars were not consigned on f. o. r. terms at all. There is no reference to these terms anywhere in the plaint or correspondence, nor did the plaintiffs contend at the hearing that the cars were consigned on those terms. The plaintiffs were under an entire misapprehension when they wrote stating that the consignment was on f. o. r. terms. The position taken up by them in the plaint is quite different as will be seen presently.

On May 29, Messrs. King, King and Co. wrote to the plaintiffs stating that the defendants had refused payment and they asked for further instructions. On June 21, the plaintiffs through their attorneys wrote another letter to the defendants in which they took up a similar position to that in their letter of May 28.

No evidence was given at the hearing as to whether the plaintiffs made any claim against the railway company. It was, however, admitted on

behalf of the plaintiffs that having regard to the risk note, the railway company was not liable for loss of the cars. It was also admitted that the cars were not insured.

The defendants refused to pay and the plaintiffs brought the present suit on October 19, 1920. Paragraph 3 of the plaint sets out the terms of the contract as understood by the plaintiffs. There is not a word about f. o. r. terms in that paragraph. The only ground on which the plaintiffs seek to hold the defendants liable for the price is that contained in para 6 of the plaint, namely, that the delivery to the railway was equivalent to delivery to the defendants. The case came on for hearing on July 31, 1922, when the plaintiffs applied for leave to amend the plaint by adding a further ground of claim, viz that the plaintiffs had appropriated the twenty cars to the contract, and that the defendants had assented to the appropriation, and that the property in the cars had therefore passed to the defendants. Leave was granted to the plaintiffs to amend the plaint and the hearing of the suit was adjourned. The plaint has since then been amended and the amendment is set out in para 5 A of the plaint. The defendants filed their written statement denying that the terms of the contract were as stated in para 3 of the plaint. They also denied that the property in the goods had passed to them. They alleged that the consigment having been made at owner's risk, they were not liable for the price of the cars.

It is common ground that the contract is contained in the correspondence set out above, and the first question to determine is what were the terms of the contract as regards the said consignment. A careful perusal of the correspondence shows that the defendants ordered the twenty cars from the plaintiffs upon terms that the plaintiffs should send the same by rail and that the defendants should pay for them to Messrs. King King & Co. at Delhi against the railway receipt. It also shows that. Messrs. King, King & Co. at Delhi were the plaintiffs' agents to receive payment of the price from the defendants, and to deliver the railway receipt to them on payment. The railway receipt was made out by the plaintiffs in their name as consignees and endorsed by them in blank. The cars were consigned at owner's risk with the result that the railway could not be held liable for the loss thereof.

The only witness called by the plaintiffs was Mr. Lellie. He was called to prove, first, that, according to the usage of the trade in India, motor cars from one place of India to another were sent at owner's risk and that the defendants had knowledge of the usage; and, secondly, that on previous occasions when the defendants had ordered cars from the said firm of Ford Automobiles the said firm had sent them to the defendants at owner's risk and the defendants had paid for and taken delivery thereof, and it was therefore an implied term of the contract between the plaintiffs and the defendants that the cars should be consigned at owners's risk. As there was not a word about the alleged usage and the implied contract in the plaint, nay, not even a word about the consignment having been made at owner's risk, I disallowed all questions relating thereto. I must, therefore, decide the case on the footing that the plaintiffs delivered the cars to the railway at owner's risk without the consent express or implied of the defendants.

It was argued for the plaintiffs that the property in the cars passed to the defendants under S. 83 of the Indian Contract Act, and that the defendants were, therefore, liable for the price. It was also argued that delivery to the railway had the same effect as delivery to the defendants and that the defendants were, therefore, liable to pay the price under S. 91 of the Act. By S. 83 it is provided that "where the goods are not ascertained at the time of making the agreement for sale but the goods answering the description in the agreement are subsequently appropriated by one party for the purposes of the agreement, and that appropriation is assented to by the other, the goods have been ascertained, and the sale is complete." The commonest form of appropriating goods to a contract for the sale of

unascertained goods is by delivering them to a carrier (See Chalmers' Sale of Goods, 8th Edn., p. 59.) A very common mode of doing business is for one merchant to give an order to another to send him certain goods. Here it becomes the seller's duty to appropriate the goods to the contract. The seller is by the express or implied terms of the contract authorised to select and appropriate the goods, the buyer having given a previous implied assent to the seller's appropriating. The difficulty in such cases is to determine what constitutes the appropriation. (See Benjamin on Sale, 6th Ed. p. 384). The question in all these cases is one of intention but there are some well-established rules, especially those laid down in *Wait* v *Baker* (1) and *Mirabita* v. *Imperial Ottoman Bank* (2) which are constantly referred to by the Courts of England as affording a guide in cases of this kind. Those rules may be stated thus:—

(1)"In the case of such a contract i.e, for the sale of unascertained goods, the delivery by the vendor to a common carrier, or, unless the effect of the shipment is restricted by the terms of the bill of lading, shipment on board a ship of, or chartered for, the purchaser is an appropriation sufficient to pass the property." *Mirabita's case*, (2)

(2) "If, however, the vendor, when shipping the articles which he intends to deliver under the contract, takes the bill of lading to his own order, and does so not as agent, or on behalf of the purchaser, but on his own behalf, it is held that he thereby reserves to himself a power of disposing of the property, and that consequently there is no final appropriation, and the property does not on shipment pass to the purchaser." *Mirabita's case*, (2) at p. 172.

The bill of lading in *Mirabita's case* (2) was made out to the shippers' order. The second rule laid down above deals with the class of cases where the bill of lading is made out to the order of the shipper.

(3) "If the vendor deals with, or claims to retain, the bill of lading, in order to secure the contract price, as when he sends forward the bill of lading with a bill of exchange attached with directions that the bill of lading is not to be delivered to the purchaser till acceptance or payment of the bill of exchange the appropriation is not absolute, but until acceptance of the draft, or payment or tender of the price, is conditional only, and until such acceptance or payment or tender, the property in the goods does not pass to the purchaser:" *Mirabita's case*, (2)

(4) If the seller discounts a draft upon the buyer with a Bank, and authorises the Bank to hand over to the buyer a bill of lading to the order of the seller and endorsed in blank by him upon his acceptance of the draft, the intention to be inferred, according to general mercantile understanding, is that the seller intends to transfer the ownership when the draft is accepted, but intends also to remain the owner until this has been done; *The Prinz Adalbert*.(4)

Turning now to S. 83. the question arises whether the section applies to cases where the seller is authorised to make the appropriation and the buyer has given a previous implied assent to the appropriation. I think the words "and that the appropriation is assented to by the buyer" are wide enough to cover this class of cases.

As to delivery to a carrier and its effect it is provided by S. 91 of the Act that "a delivery to a wharfinger or carrier of goods sold has the same effect as delivery to the buyer, but does not render the buyer liable for the price of the goods which do not reach him, unless the delivery is so made as to enable him to hold the wharfinger or carrier responsible for the safe custody or delivery of the goods." But the section does not provide for cases where the seller delivers the goods to a carrier and reserves the right of disposal. The Act being silent on this

(1) (1848) 2 Ex. 1, 8
(2) (1878) 3 Ex. D. 164, 172.
(3) [1918] P. 154, 163.
(4) [1917] A. C. 586.

point, it is competent to the Courts of British India to resort to the rules of English common law so far as they are not inconsistent with the text of the Contract Act. One of those rules is that where in pursuance of the contract, the seller delivers the goods to a carrier, for the purpose of transmission to the buyer, but retains a *jus disponendi* until certain conditions are fulfilled, the property in the goods does not pass to the buyer until the conditions imposed by him are fulfilled. This rule applies not only to delivery of goods to carriers by sea: see *Mirabita's case* (2) but to delivery to carriers by land: *Dutton* v. *Solomonson*: (5) and to canal-boat companies. (*Fragano* v. *Long*(6); *Bryans* v. *Nix* (7). It was faintly contended for the plaintiffs that the rule contained in the first part of S. 91 was absolute and inflexible, and that it applied to all cases and in all circumstances. If this were so, no seller could reserve a right of disposal of the goods while they are in transit—a result repugnant to common sense and opposed to general mercantile understanding.

The sole question as stated above is one of intention. It is intention that is the determining and decisive factor in these cases. :*The Annie Johnson*; *The Konprinsessan Margaretta*(3), and that is a question of fact (*The Prinz Adalbert*).(4) In the present case, after the terms of the agency contract were settled between the parties, the plaintiffs offered to send twenty cars to the defendants by goods train. The defendants agreeed to accept twenty cars to be sent to them by goods train. The plaintiffs delivered twenty cars to the B. B. & C. I. Railway Company in Bombay for carriage to Amballa. The railway receipt was made out by the plaintiffs in their own name as consignees and it was endorsed by them in blank. The receipt was sent by the plaintiffs to their agents Messrs King, King & Co. at Delhi with instructions to them to hand it over to the defendants on payment of Rs. 42,700. Until payment the receipt was not to be delivered by Messrs King King & Co. to the defendants.

I will assume that S. 83 of the Contract Act does not apply to the present case. The question is, what was the intention of the parties? Was it the plaintiffs' intention to retain the ownership of the goods until the price was paid, or was it their intention to transfer the ownership to the defendants immediately on delivery of the cars to the railway company? I am inclined to think that the plaintiffs' intention was to retain the ownership of the goods until the defendants paid the price :see *Ram Lal* v. *Bhola Nath*(8). If S. 83 of the Indian Contract Act applies to the case, it appears to me that the plaintiffs having instructed their agents not to deliver the railway receipt till payment, the appropriation was not absolute and final, but conditional on payment by the defendants, and that there was therefore no "appropriation" within the meaning of that section. I therefore, hold that the property in the cars did not pass to the defendants on delivery to the railway company and that the defendants are not liable for the price.

It was contended for the plaintiffs that the principles of the English decisions referred to above applied only to bills of lading and they did not apply to railway receipts. I do not think there is any force in this contention. It is true that a railway receipt is not a symbol of goods in the sense in which a bill of lading is, but where, as in the present case, a railway receipt can be transferred by endorsement so as to entitle the holder thereof to transfer the goods thereby represented (see condition 3 endorsed on the receipt), the distinction between the two is a thin one as appears from the observations of the Privy Council in *Ramdas Vithaldas* v. *Amerchand & Co* (9). In *In re Wiltshire Iron Co., Ex parte*

(5) (1803) 3 B. & P. 582.
(6) (1825) 4 B. & C. 219
(7) (1839) 4 M. & W. 775.

(8) (1920) 42 All. 619 (626)-18 A. L. J. 749-2 U. P. L. R. (A) 25-4 59 I. C. 359.
(9) (1916) 40 Bom. 630-43 I. A. 114-20 C. W. N. 1182-(1916) 2 M. W. N. 110-18 Bom. L. R. 670-20 M. L. T. 194-31 M. L. J 541-4 L. W. 342-14 A. L. J. 1045-85 L. J. P C. n14-24 C. L. J. 320-32 T. L. R. 594-35 I. C. 954 (P. C.)

Pearson(10) which was a case of delivery of goods to a railway, the Court of Appeal in Chancery applied the principle of the decision in *Wail* v. *Baker*(1) referred to above where the delivery was to a shipping company.

I now turn to the contention of the defendants that even if delivery of the cars to the railway was tantamount to delivery to the defendants, the defendants were not liable for the price inasmuch as the plaintiffs consigned the cars at owner's risk as distinguished from railway risk, with the result that the defendants could not hold the railway liable for the loss thereof. I think this contention must prevail. *Clarke* v. *Hutchins* (11) was a similar case. In that case the seller in delivering the goods to a trading vessel neglected to inform the carriers that the value of the goods exceeded £5 although the carriers had published that they would not be answerable for any package above that amount unless entered and paid for as such. The package was lost, and the seller sued the buyer for the price. It was held that the buyer was not responsible for the price as the seller had not put the goods into such a course of conveyance as that in case of a loss the buyer might have his indemnity against the carriers. I, therefore, hold that the defendants are not liable for the price under S. 91 of the Indian Contract Act.

The suit is dismissed with costs.

Suit dismissed.

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(10) (1868) 3 Ch. App. 443.
(11) (1811) 14 East 475.

1923 BOMBAY. 130

SHAH, AG. C. J. AND CRUMP, J.

Bai Monghibai--(Defendant) Appellant.

v.

Bai Nagubai-(Plaintiff) Respondent.

O. C. J. App. No. 152 of 1921 D. 11th August 1922.

(a) Words and phrases—Avarudha stree.

Per Shah Ag. C. J.—Women who are prohibited by their master from intercourse with other men with an injunction to stay at home with the object of avoiding any lapse of service, are known as 'Avarudha' or protected slaves. [P. 133 C. 1]

Texts on the point discussed.

Per Crump. J. The word 'Avarudha' appears to mean a woman kept under a man's immediate control as a member of his family. [P. 141]

(b) Words and Phrases—Dasi.

The word 'dasi' under the Hindu law as administered now is not understood literally as meaning a female slave, but a woman who lives as a dependant in the family. [P. 135 C. 1]

(c) Hindu Law—Maintenance — Concubine —Avarudha stree.

The deceased Vasanji had a wife and two sons. He was on bad terms with them and they lived in a house at Mandvi while deceased himself lived in another house at Masjid Bunder. He appears to have formed connection with plaintiff about 1915: sho lived at several different places in the city and the deceased maintained and visited her. But there was no evidence that they ever openly lived together. She appears to have had her own establishment, and to have paid her own rent. He fell ill in her house, and was there for a short time until just before his death. This connection was not precisely secret but on the evidence it could not be said that she lived with him openly as a member of his family.

Held: plaintiff was a "*Bhujishya*" but not "*avarudha*" and therefore was not entitled to claim maintenance from the estate of the deceased.

Munshi with Jinnah—for the Appellant.

Coltman and Setalvad — for the Respondent No. 1—Plaintiff.

Jayakar and Kania—for the Respondent No. 2—Defendant.

Shah Ag. C. J. — This is an appeal from a judgment of Mr. Justice Kanga. It arises out of a suit filed by Bai Nagubai Manglorkar against the executor of the deceased Vasanji Madhavji Thakar, who died on November 21, 1919, possessed of moveable and immoveable property of very large value. The deceased left surviving him a widow and two minor sons. They were also joined as defendants to the suit. It appears that subsequently the sixth defendant who was appointed an administrator *pendente lite* of the estate of the deceased Vasanji in the testamentary proceedings relating to his will was added as a party. The suit was filed on the basis that the plaintiff was in the exclusive keeping of the deceased Vasanji since the year 1913: and that she had a daughter born to her by him. She alleged that the deceased had left his usual residence at Vadgadi and had come to reside with the plaintiff in her house at Girgaum and that he continued to reside there until the day prior to his

death. She claimed maintenance as a Hindu concubine of the deceased who was in his exclusive keeping until his death. She alleged that she used to receive about Rs. 400 per month from the deceased It was also alleged that a sum of Rs. 25,000 was specially promised by the deceased for the benefit of the daughter, but she reserved the claim to that sum to be made in a different suit. Apparently after the death of the deceased the claim for maintenance out of the estate of the deceased was put forward but as no reply was received from the defendants the suit was filed early in 1920 to claim maintenance of Rs. 500 per month or such other sum as the Court may deem just by way of maintenance out of the estate of the deceased. She also claimed Rs. 800 as arrears of maintenance and also certain allowance during the pendency of the suit.

The executors filed a written statement contesting the claim of the plaintiff to maintenance, and alleging that even if she was otherwise entitled to maintenance her claim could not be allowed on account of her not being chaste.

The widow on behalf of herself and her minor sons also filed a written statement, pleading that as a matter of fact the deceased did not reside with the plaintiff, and that she had a separate place of residence. They denied that the plaintiff's relation with the said deceased was such as would entitle her to any maintenance under the Hindu law :—

At the hearing the following issues were raised :—

1. Whether the plaintiff was in the sole keeping of Vasanji Madhavji before his death ?

2. Whether the said Vasanji Madhavji paid the plaintiff a fixed monthly allowance of Rs. 400 per month prior to his death ?

3. Whether the plaintiff has continued to be chaste after the death of the said Vasanji Madhavji ?

4. Whether the plaintiff is entitled to any, and, if so, what maintenance ?

The learned Judge who tried the suit came to the conclusion that the plaintiff was in the sole keeping of Vasanji before his death, and that she had continued to be chaste after the death of the said Vasanji Madhavji. Issue No. 2 was considered to be unnecessary, but the learned Judge expressed the opinion that there was no reason to doubt the statement of the plaintiff that on an average Rs. 400 were paid to her by the deceased per month. The learned Judge held that the plaintiff was entitled to maintenance as the permanent concubine of the deceased from the estate of the deceased. As the parties were not agreed as to the amount of maintenance, there was a reference to the Commissioner to determine what would be suitable maintenance for the plaintiff.

From this decree defendants Nos. 3, 4 and 5, i. e. the widow on behalf of herself and as the guardian of her minor sons, have appealed to this Court, joining the plaintiff and the other defendants as respondents. The respondents Nos. 2 and 3 who are executors under the will support the appeal. Really the contesting respondent is the plaintiff. It is urged on behalf of the appellants that the lower Court has not correctly appreciated the rule of Hindu law under which a concubine is entitled to be maintained out of the estate of her deceased paramour. It is urged, first, that the rule applies to those cases only where the estate is inherited by heirs other than sons, secondly, that the rule applies not to every kept woman, but to a woman who is in the position of a '*dasi*, as known to Hindu law, and, thirdly, that the woman should really have been kept as an '*avaruddha* stree' (अवरुद्ध स्त्री). Reliance is placed upon certain passages from the Mitakshara and the Vyavahara Mayukha to which I shall refer later. Several cases bearing on this question have been referred to in the argument on behalf of the appellants to show that in all those cases the kept woman was more or less in the position of an "*avaruddha*" woman and that there has been no decision of this Court which has carried this rule so far as to apply it to any kept woman, who cannot be said to satisfy the description of an '*avaruddha stree*.' Further it is urged that the evidence in the case, taking

it at its best in favour of the plaintiff, does not establish that the plaintiff stood in the relation of an '*avaruddha*' woman to the deceased Vasanji, that the lower Court has misappreciated the evidence, and that the evidence if properly appreciated does not establish the plaintiff's claim even taking the rule as to the right of a kept woman to maintenance in the broader sense in which the lower Court has understood it.

On behalf of the respondents it is contended that the rule of Hindu law is not by any means so narrow as suggested by the other side; that maintenance can be allowed against the heirs of the person who kept the woman during his life-time as his mistress and that there is no reason why any exception should be made to the general rule when the estate devolves on the sons instead of on other heirs. Further it is contended that the word '*dasi*', which means 'a female slave,' cannot be understood in its literal sense in these days, and has not been so understood in any of the reported cases on the point. It is also contended that there is practically no difference between an '*avaruddha*' woman and a woman kept as a mistress, exclusively by a man. On the evidence it is contended that the lower Court has appreciated the evidence correctly, that the plaintiff was in the exclusive keeping of the deceased Vasanji, and that she was entitled to an adequate maintenance from the estate of the deceased.

The will of the deceased, which formed the subject-matter of dispute between the executors on the one hand and the widow and the sons of the deceased on the other in the testamentary proceedings, has not been put in.

I think that the first contention, that when the property devolves on the sons, the rule as to maintenance does not apply, must be rejected. There is nothing in the Hindu law to support it; and the decided cases, to which I shall refer later, show that decrees have been passed against the sons without any such objection having been raised.

As regards the contention as to '*avaruddha stree*', I think, it is desirable to refer to the texts at the outset.

The text which relates to the right to maintenance is to be found in paragraphs 27 and 28 of the Mitakshara, Ch. II, S. 1:—

"27. It is said by Katyayana: 'Heirless property goes to the king, deducting however a subsistence for the females as well as the funeral charges.....' (The expression) 'deducting however a subsistence for the females as well as the funeral charges', is (explained as) excluding or setting apart a sufficiency for the food and raiment of the women, and as much as may be requisite for the funeral repasts and other obsequies in honour of the late owner, the residue goes to the king."

"28. This relates to women kept in concubinage: for the term employed is 'females' (*yoshid*). The text of Narada likewise relates to concubines; since the word there used is 'woman' (*stri*). But a king, who is attentive to the obligations of duty, should give a maintenance to the women of such persons." Stokes' Hindu Law Books, p. 435.

The words used for "women kept in concubinage" and "concubines" in the original are "*avaruddha stree.*" Vijnanesvara there clearly explains the meaninig of the word '*stree*' in Narada's text, and the word '*yoshid*' used in Katyayana's text as including "*avaruddha stree.*" The text of Narada in para 7 of the same section of the Mitakshara runs as follows:—

"Thus Narada has stated the succession of brothers, though a wife be living; and has directed the assignment of a maintenance only to widows. 'Among brothers, if any one die without issue, or enter a religious order, let the rest of the brethren divide his wealth, except the wife's separate property. Let them allow a maintenance to his women for life, provided these preserve unsullied the bed of their lord' (Stokes' Hindu Law Books, p. 429).

It may also be mentioned that in Chapter I, section 4, relating to 'Effects not liable to Partition" in the Mitakshara, para 22 runs as follows:—

"The women or female slaves, be-

ing unequal (in number, to the shares,) must not be divided by the value, but should be employed in labour [for the co-heirs] alternately. But women (adulteresses or others) kept in concubinage by the father, must not be shared by the sons, though equal in number: for the text of Gautama forbids it." Stokes' Hindu Law-Books, p. 389.

Here also referring to 'women kept in concubinage by the father' Vijnanesvara has used the word '*avaruddha*.' The meaning of the word '*avaruddha*' is explained by Vijnanesvara in his commentary on Yajnavalkya's verse No. 290 in the Vyavahara Adhyaya. At page 406 of Gharpure's translation of the Vyavahara Adhyaya of the Mitakshara the expression '*avaruddha dasi*' used in the verse has been rendered into English as "women who are protected slaves of another" and in the commentary the word '*avaruddha*' is thus explained:

"These very women are prohibited by the master from intercourse with other men with an injunction to stay at home with the object of avoiding any lapse of service, these are known as '*Avaruddha*' or protected slaves."

The Vyavahara Mayukha on this point is in agreement with the Mitakshara. For instance, in dealing with "impartible things" Nilkantha refers to "*avaruddha stree*" In Mandlik's Hindu Law at page 70, the passage is translated as follows:

"*Striyah* are female slaves. (When) uneven in number, they are to be made to work by turns as may be found workable; when even in number, they are to be divided. The kept mistresses of the father, however, though even in number, should not be divided. as directed by (the following text of) Gautama:—There is no division of women appointed (by the father) for enjoyment."

The expression which has been rendered into English as 'kept mistress' in Mandlik's translation has been rendered in Borrodaile's translation as "set apart by the father."

In Chapter VIII, section 4. the same texts of Katyayana and Narada, to which Vijnanesvara has referred in the Mitakshara, are referred to and explained by Nilkantha as having reference to concubines because the term used is not '*patni*'. For the word 'concubine' the word used in the original is '*avaruddha*' (See Mandlik's Hindu Law, p. 78).

In dealing with the meaning of the word '*avaruddha*' in Chapter XIX, which relates to "adultery" (*Stree Sangrahana*) after referring to the text of Yajnavalkya, to which I have already referred, the word '*avaruddha*' is rendered as meaning "female slaves forbidden by their master to have intercorse with other men." It is quite true that Nilkantha does not give the same amplified rendering of the word "*avaruddha*" as has been adopted by Vijnanesvara, but it seems to me that Nilkantha in effect means the same thing as Vijnanevara. I may refer also to the explanation of the word '*avaruddha*' given in the Vyavahara Adhyaya of Virmitrodaya (Calcutta Ed. of the year 1875 at page 510). Mitramisra entirely accepts 'Vijnanesvara's explanation of the word '*avaruddha*.' In fact the very words used by Vijnanesvara are quoted by him to explain the meaning of the word.

I have referred to these texts at some length to show that the obligation of the heirs to maintain women extends to the case of a woman who is in the position of an '*avuarddha stree*' and not beyond, and also with a view to explain the meaning of the word '*avaruddha*' as understood in this connection by Vijnanesvara, Nilkantha and Mitramisra. It is quite true that these texts of Katyayana and Narada are quoted in the portion of the Mitakshara where the right of the widow to inherit the property of her husband is discussed and dealt with. They are referred to really to establish the one point which Vijnanesvara was concerned to establish, namely that '*patni*', i. e., the wife, was outside the scope of the texts which merely provided for the maintenance of women and that she was competent to inherit. But that fact by itself has not deterred the Courts so far from enforcing the rule as regards the women of the family including '*avaruddha stree* in the sense understood by the commentators; and I do not think it is open now to the appellants to raise any such contentions. I think,

however, that the appellants are right in their contention that the obligation to maintain extends only to such women as could properly be described as '*avaruddha stree.*' So far as the texts are concerned there cannot be any doubt on that point.

I think that the decided cases which have been referred to in the argument are not only consistent with that view, but tend to support that view. The decisions which Mr. Munshi referred to are *Khemkor* v. *Umashankar* (1); *Vrandavandas* v. *Yamunabai* (2); *Yashvantrav* v. *Kashibai* (3) and *Ningareddi* v. *Lakshmawa* (4); and I may also refer to an old decision in *Salu* v. *Hari*. (5). All these cases were from the mofussil and the facts in each case show that there was no dispute then that the relation in which the woman concerned stood to the person keeping her was that of an '*avaruddha stree.*'

In the case of *Khemkor* v. *Umashankar*, (1) the woman concerned had contracted a marriage with the man, and though that marriage was not valid, the connection was evidently of an open character where the woman lived with the man, and in that case the claim was allowed as against the son of the man after the death of the so-called husband.

In the case of *Vrandavandas* v. *Yamunadai* (2) the facts make it quite clear that there the concubine Yamunabai lived with Gokaldas at Khed; and one of the nephews of Gokaldas also lived with him, and after the death of Gokaldas that nephew had conveyed the whole of the moveable and immoveable property to Yamunabai because she had been his uncle's concubine for a very long time and the right to this property was contested by another nephew of Gokaldas. Sir Michael Westropp C. J. there has dealt with the question of the right of a concubine to maintenance and has referred to some of the texts to which I have already referred. But what I feel concerned to point out is that in that case there could be no doubt that the woman lived with the man openly and practically as a member of the family.

The judgment of Mr. Justice Nanabhai Haridas in *Yashvantrav* v. *Kashibai* (3) where the question as to whether a concubine entitled to maintenance was under an obligation to lead a chaste life after the death of the man had to be decided, is instructive; and in the foot-note Yajnavalkya's verse No. 290 in the Vyavahara Adhyaya has been referred to. It was held there that she was under the same obligation to lead a chaste life as a wife or any other widow of the family would be. It appears that the question arose there in execution, because Kashibai, the woman concerned, was alleged to have left the family house and lived as a prostitute. Though the facts on which the decree was passed in her favour are not to be found in that report it would appear from the allegation as to her having left the family house, which is referred to at page 29 of the report, that until then she must have been living in the family house and practically as a member of the family. At any rate the report is silent as to the nature of the connection between the woman and her paramour, and does not in any sense conflict with the view as to the scope of the rule relating to the maintenance of concubines.

In the case of *Ningareddi* v. *Lakshmawa* (4) it appears from the statement of facts that Govindreddi, the plaintiff's father in that case, had a wife Venkawa who had left owing to ill-health and had gone to reside with her parents. Govindreddi then took the defendant Lakshmawa to his house and she lived with him as his mistress for several years. He executed a deed of gift in her favour in respect of certain lands for her life by way of maintenance. This state of things had continued for nearly thirteen years when Venkawa returned to her husband's house and thereafter Govindreddi continued to visit Laxmawa.

So also in *Salu* v. *Hari*, (5) it appears from the judgment that Salu

(1) (1873) 10 Bom. A. C. R. 387.
(2) (1875) 12. Bom. H. C. R. (A. C. J.) 229.
(3) 1887) 12 Bom. 26.
(4) (1901) 26 Bom. 163; 3 Bom. L. R. 647.
(5) (1877) P. J. p. 34.

was either the 'pat' wife or continuous concubine of Jaysingrao the father of Hari by 'Lagna' wife, and Salu had two sons by Jaysingrao and two daughters; on a reference to the judgment of the lower Court in that case, it is clear that Salu lived with Jaysingrao practically as his wife.

These cases to my mind clearly show that the woman concerned in each case had practically led the life of an 'avaruddha stree' I do not lay any emphasis upon the use of the word 'dasi' in Yajnavalky's text No. 290. The words 'stree' and 'yoshid' used in the texts bearing on this point may not necessarily mean a 'dasi'; and apart from that the word 'dasi' under the Hindu law as administered now is not understood literally as meaning a 'female slave' but a woman who lives as a dependent in the family. But the life which the woman in each of these cases led with her so-called husband or paramour was the life of an 'avaruddha stree,' as she practically lived as a wife and as a member of the family in the house of the man. I think, therefore, that there is nothing in the cases which need deter us from considering the scope of this rule which has been somewhat loosely stated as applicable to a 'kept mistress.' The learned Judge has referred to the passage in Mr. (now Mr. Justice) Mulla's Hindu Law at p. 430, and so far as it goes it represents the effect of the decisions to which I have referred. But there was no occasion in any of those cases to consider whether any woman with whom the man had connection for a long time up to the time of his death would be within the scope of the rule or whether the rule was so restricted as to exclude some of these women from the benefit of the rule. The very fact that she is by law under an obligation to lead a chaste life, as a widow is, shows to my mind that the rule was really restricted to the case of a woman, with whom the connection was perfectly open and recognised, and who was kept practically as a member of the family, though no marriage with her could be, or was in fact, effected.

I may refer to Mayne's Hindu Law and Usage at page 620 (8th Ed.), where the rule is stated thus:—"But this liability only exists where the connection was of a permanent nature, analogous to that of the female slaves who in former times were recognised members of a man's family." In Golap. Chandra Sarkar Sastri's Hindu Law (4th Ed.) at page 195 I find the following observation on the point:—"But although there cannot, at the present day, be a female slave in law, there are instances of such in fact, called concubines and living as members of the family of the men keeping them." I have referred to these opinions only as showing that the rule as understood by them is not different in substance from what I have stated to be the effect of the texts.

I think, therefore, that the evidence in this case must be considered with a view to see how far the plaintiff satisfied the requirements of this rule. From that point of view the first issue as framed does not appear to me to adequately represent the requirements of law. Taking the case at its best in favour of the plaintiff, the evidence in the present case establishes that the plaintiff used to live in a house near the Kennedy Bridge at Girgaon where the deceased Vasanji used to visit her regularly during the last four or five years prior to his death and used to pay her some monthly allowance, the exact amount of which is not material. I am willing to accept the further facts deposed to by the plaintiff in her favour that his connection with her was of a very close character; that he passed a good deal of his time with her; that she occasionally moved out with him at Nasik and other places; that he provided her with all the comforts that he might have provided for a kept mistress. But I do not think that even taking the most favourable view of the evidence for the plaintiff in this case, it could be said that the woman was practically openly kept by Vasanji in his own family and as a member of the family. I think the evidence falls far short of that requirement. It is not suggested in the present case, for instance, that the plaintiff ever went to the family house which was occupied by the wife and the sons of the deceased Vasanji at Vadgadi. All that is

stated by the plaintiff is that she went occasionally to the house where the deceased resided on the third or fourth floor near *Lakdi* pool at Musjid Bunder. When she was recalled she said as follows :—

"I used to go there occasionally when deceased was not well. Deceased's wife or sons were not residing there." Though it is said in this case that the plaintiff's son who was born when she had connection with another man used to go occasionally to the deceased's residence or to the family house of the deceased, and that the sons of the deceased occasionally used to visit her house, speaking for myself, I very much doubt whether the sons of the deceased ever visited the plaintiff's house. But assuming in favour of the plaintiff that occasionally the sons, who were minors, visited this house, and that Bhalchandra her son who has been examined in this case occasionally visited the house of the deceased which was used for residential purposes or his family house, I do not think that that really can advance the case of the plaintiff. Without knowing the nature of these visits, which may have been of quite a casual character, it is impossible to treat the connection which Vasanji had with this woman as anything more than the connection which a man may have with a woman who is his kept mistress living outside and at least apparently unknown to the family.

In the present case we have the fact that though Vasanji used to pay, according to the plaintiff, substantial sums of money from time to time for her maintenance, there is not a single entry in the accounts of the deceased Vasanji. This is an admitted fact. The inference which it suggests to my mind is that Vasanji never intended that his connection with this woman should be known generally to the persons immediately surrounding him, including the members of his family. If she was really in the position of an '*avaruddha stree*' probably the plaintiff would have been kept by the deceased in his own house and the expenses incurred in connection with her would have been treated as regular items of expenditure and duly entered in the accounts.

It is common ground now that no provision has been made for the plaintiff by him in his will. That also suggests to my mind that the deceased did not wish his connection with this woman to be publicly known as a provision for her in his last will was likely to do. I am not concerned here with the question as to whether the omission on his part to make any provision in the will has any effect as a matter of law upon the right of maintenance, assuming it to exist otherwise. In connection with this point certain observations in *Ramanarasu* v. *Buchamma* (6) are relevant: It is pointed out at page 290 of the report as follows:—

"On the authority of certain texts of Hindu law, the Courts have no doubt allowed this claim in the case of concubines continuously kept by the deceased up to the time of his death. Whether the foundation of this rule was the notion that the man was under a moral obligation to take care that his concubine should not be left destitute after his death and therefore saddled the succession to his property with the liability to maintain her, or whether it was with reference to his probable wishes and intention with regard to her, it is not necessary to determine."

So far as the omission in the will to provide for her can afford any indication of his probable wishes and intentions with regard to her it would be against the plaintiff. I do not, however, quote these observations as indicating that that is really the basis of the rule. It may be open to doubt whether the original texts of Katyayana and Narada which have been interpreted as referring to '*avaruddha stree*' by commentators like Vijnaneswara and Nilkantha, were originally intended to cover the case of an '*avaruddha stree*.' But, as observed by Mr. Justice Nanabhai Haridas in *Yasvantrav* v. *Kashibai*, (3) as the commentators whose opinion is part of Hindu law which the Courts have to administer have accepted that view there is no going behind it; and if an

(6) [1899] 23 Mad, 282, 290.-10 M. L. J. 62.

attempt is to be made to discover the reason of this rule, it seems to me to rest on the consideration that if the woman lives practically as a dependant member of the family and accepts all the limitations though unmarried, of a married life openly and avowedly, she gets the benefit of the rule which makes it obligatory upon the heirs of a Hindu house holder to maintain the women of the family. In the present case, the plaintiff was in the sole keeping of the deceased Vasanji as she says, in the sense that she did not receive any other visitors. But that in my opinion is not sufficient. It must be indicated by the very mode of living adopted by both the parties that she was his dependant and known as such to all concerned and that she had accepted practically the obligations of a family life.

This being my view of the case generally, I do not consider it necessary to examine at length the evidence which has been examined in great detail by the trial Court. As my outlook on the case, however, is somewhat different I desire to state briefly the conclusions to which I have come on the evidence in the case. The plaintiff admits that she has three sisters who are all in the keeping of different Sheths; and she also says that her sister Sunderabai is a singing girl (a *naikin*). I think that gives a sufficient indication of the class to which the plaintiff, apart from the kind of connection which she had during the last few years of the deceased's life, belongs.

It is also an admitted fact that from her twelth or thirteenth year she had been in the keeping of one Gopalji, and she says that she was in his keeping for fourteen or fifteen years. When the differences between her and Gopalji arose, apparently according to her account, she took to the deceased Vasanji.

I accept on the evidence the conclusion that she had connection with the deceased Vasanji for the last four or five years previous to his death which took place in November 1919. I am not prepared on the evidence to take the connection to have commenced earlier than that. My reasons for that are that her son Bhalchandra deposes that he had known the deceased for three years prior to his death. The plaintiff in her evidence takes the connection so far back as 1913 or earlier. It may or may not be so. But in view of the fact that her son came to know the deceased three years prior to his death, I do not think that it would be fair to take the connection as having commenced much earlier. I base this inference also upon the fact that among the letters which have been produced in this case by the plaintiff as having been written by and received from the deceased Vasanji the earliest one is of July 1915.

I do not desire to express, and should not be understood as expressing, any opinion with regard to the right of the daughter to be maintained out of the estate of the deceased. That matter is not before us. I have stated my conclusion as to the length of the period of the plaintiff's connection with Vasanji so far as it relates to the present claim.

As regards the manner in which the plaintiff says that Vasanji came to know her and practically took her under his protection after Gopalji had deserted her is a matter upon which I feel doubtful. The plaintiff has given an account of it in detail that she was prevented from going to Nasik, and that she was kept by Vasanji at different places and was ultimately accommodated in the house near the Kennedy Bridge where she has been living for some years now. I cannot forget the fact that the plaintiff is after all an interested witness, and there is no independent evidence on this point. After the death of Vasanji it is extremely difficult to test this part of the story, and if the evidence as to the time when her connection with Vasanji commenced, to which I have already referred, is to have its due weight, it seems to me that when he commenced his connection with her probably she was already living in the house near the Kennedy Bridge. It appears from the evidence of Mr. Wamanrao that for many years she has been a tenant in that house which originally belonged to his mother and which his mother sold in the year 1916; and the

plaintiff herself says that she has been there for the last seven years, i.e. taking it back from the date when the evidence was given, it would be somewhere in the year 1914.

As regards the nature of the residence of Vasanji with her in this house I am satisfied, as is stated by the plaintiff, that he used to visit her regularly. I also accept the fact that Vasanji occasionally received his visitors at this house, but I cannot ignore the fact that after all the house was tenanted by her i. e., the tenancy was in her name; and there is nothing to show, apart from the statement of the plaintiff and the payments which the deceased Vasanji may have made to her, that he had anything to do with the arranging of this tenancy or with the running of the plaintiff's house-hold. It is likely that Vasanji may have expressed a desire to her to buy the house for her as she says, but the fact remains that he never put himself in communication with the landlord for that purpose, and that he never in fact bought it for her. The evidence of Mr. Wamanrao on this point shows that a broker once asked him as to whether his mother would sell the house for a particular sum, and as his mother asked for a larger sum, it was not sold; but apparently in 1916 his mother sold the house to somebody else. The statement that the broker told him that he was sent by Vasanji is not, in my opinion, sufficient to establish the fact that Vasanji ever went beyond expressing his own desire to the plaintiff in this matter, which may have been with a view to keep her pleased or with a view to carry it out in future. In any case, if Waman rao's evidence be accepted, the inquiry by the broker must have been before 1916, as the house was sold by Waman rao's mother in that year: and there is nothing to show that the deceased did anything thereafter in the way of purchasing this or any other house for her.

On the evidence taken as a whole' I am satisfied that the deceased Vasanji had left his family house at Vadgadi in the occupation of his wife and his sons and taken up his residence at a house near the Lakdipool at Musjid Bunder on account of his differences with his wife. He had his pedhi,' i, e. firm, on one floor of that house and he had occupied another floor of that house for his residence. While living there, as I have said, he used to vist the plaintiff at her house near the Kennedy Bridge, but I do not think that his ostensible residence and ostensible messing arrangements at the house near the Lakdipool were ever given up. In fact it appears that when during his last illness he was removed a day previous to his death, he was removed to this residence of his. Further it is not suggested that any of the effects of the deceased, except his clothes which remained there when he got his last illness, were in this house. If his real residence was with the plaintiff, and his residence at the Lakdipool house was merely nominal that would not have been the case. I am, therefore, unable to accept the allegation that the deceased had made the house of the plaintiff as practically his residence. I accept that some of his acquaintances may have known the fact that he passed his time and even occasionally resided at the house of the plaintiff. I accept the fact that along with the other comforts which he provided for the plaintiff, he allowed her the use of his motor car, and it is possible that he may have kept it there though there is no evidence as to there being a motor garage attached to the house or as to one having been rented in that locality. I do not attach much importance to the fact that the driver's license which was in the name of the deceased has been produced by the plaintiff, because as he got ill in this house near the Kennedy Bridge and admittedly passed a few days of his illness in this house his clothes and along with his clothes the license would be left there. I accept the evidence as to a governess having been engaged by him for the plaintiff for some time; and on the whole I am satisfied that both of them were devoted to each other.

As regards the letters which have been produced in the case, it seems to me to be a matter of no moment as to whether these letters were written by him or got written by him. From the

subject matter of these letters it would appear that they were either written by him or by somebody else at his instance. Letters written during the years 1915-16-17 are few. There are some more letters in 1918 but the letters written in the year 1919 were the largest in number. I do not attach much importance to the effusive language used by passionate persons to each other, but I am willing to accept the inference which these letters suggest that his connection with her was growing from year to year and that he had developed a regard and love for her. I also accept the fact that the plaintiff on her part responded equally and was probably equally devoted to him. Undoubtedly when he got ill before his death he was treated and nursed in this house by her. All this is true, but that in my opinion is not sufficient to establish anything more than this that the plaintiff was a kept mistress of the deceased.

Taking the connection between the deceased and the plaintiff at its highest, I am unable to treat that connection as anything more than the connection of a kept mistress with her paramour which is distinct from the connection of an '*avaruddha stree*' The deceased was a Lohana by caste, and though he was prepared to associate with this woman, apparently he was not prepared, and ordinarily he would not be prepared, to have such an open connection as would invite the odium and other difficulties arising out of such a connection being known to his people generally. He had, therefore, it seems to me deliberately refrained from keeping her in the manner in which an '*avaruddha stree*' would be kept. He resorted to a method of carrying on connection with her, which is neither rare nor difficult in a large city like Bombay, by visiting her at her residence, which was separate and far apart from his immediate surroundings, according to his convenience.

Taking a broad view of the case, as I have stated already, I am satisfied that the plaintiff was in the exclusive keeping of the deceased Vasanji during the last four or five years prior to his death, in the sense that she consorted with him alone during that time. But that connection is not, in my opinion, sufficient to bring the case within the scope of the rule which entitles a continuously kept concubine to maintenance. I may mention that the English expsession 'continuously kept concubine' is the nearest approach to the meaning of '*avaruddha stree*'. It connotes an open residence and avowed connection with the man, both of which I think can be fairly said to be absent in the present case.

I do not desire to lay down any hard and fast rule as to what mode of life and character of the connection between the kept woman and her paramour would be sufficient to constitute her an '*avaruddha stree*'; that must depend upon the facts and circumstances of each case and must be decided as a question of fact on the evidence. It may be difficult to draw the dividing line in some cases. But in the present case I think that the facts are quite clear to take it out of the scope of the rule. I should have been glad to see my way to allow the plaintiff's claim: but it cannot be done without unduly enlarging the scope of the rule of Hindu law, which we have no right to do.

I would, therefore, allow this appeal, set aside the decree of the trial Court and dismiss the suit.

We have heard the parties as to costs in this case. Having regard to the peculiar circumstances of the case we think that the plaintiff should not be made to pay the costs of this litigation. At the same time we cannot allow her to recover her costs from the estate of the deceased Vasanji. We direct, therefore, that the plaintiff-respondent will bear her own costs throughout. The plaintiff do refund any payments received by her in pursuance of the decree of the trial Court which is now discharged. The appellants, *i.e.*, the widow for herself and for her minor sons and other defendants, also to get their costs throughout from the estate of the deceased as between attorney and client. As regards the costs of any proceedings reserved, we make the same order.

Crump J.—There is only one ques-

tion of fact in this case and that is "what were the relations between plaintiff and the deceased Vasanji up to the date of the latter's death ?" This question forms the subject of issue No 1 but it is better to state it in somewhat more general terms than is done in that issue, for it is doubtful whether an affirmative finding on the issue as framed necessarily leads to the conclusion that plaintiff is entitled to maintenance from the estate of the deceased. That seems to have been assumed in the trial Court without any examination of the question of law.

So far as the facts go, I find no reason to differ substantially from the learned trial Judge. I see no reason for refusing to believe the evidence of the plaintiff in view of the statement in the judgment. "The plaintiff in my opinion gave her evidence in a very straightforward manner and I believe her evidence." That evidence derives substantial support from the evidence of Wamanrao Babaji, Sawlaram Ramchandra and Dr. Parulekar. These witnesses have been believed and the arguments advanced before us fail to convince me that the trial Judge was wrong. I am also satisfied that the letters produced by plaintiff are genuine letters, and that they were written by the deceased or by his directions. As compared with this positive testimony the evidence for the defendants is inconclusive; it is also poor in quality.

What is that is established? That the deceased for some years before his death kept the plaintiff as his mistress in a separate house. Necessarily he visited her constantly and probably spent much time in that house. So far as the evidence goes she was exclusively in his keeping up to the time of his death. The facts present no difficulty but does it follow that the connection was such as to entitle her to maintenance from his estate under Hindu law?

This question has been dealt with somewhat summarily by the trial Judge. probably because the matter was not argued before him as fully as before us. His reasons are contained in the following paragraph :

"According to the authorities a Hindu is not bound to maintain his kept mistress in his lifetime. He can discard her at any moment and she cannot compel him to continue her in his keeping or to provide for her future maintenance. But where a Hindu woman has been kept by a Hindu until his death his estate is liable for her maintenance in the hands of those who take it even though the connection with her was an adulterous one. Her right to maintenance is conditional upon her continued chastity."

As a general statement of the law no exception can be taken to this provided it is remembered that the connection denoted by the words" kept mistress" must be of the nature which the Hindu law demands. The rights of a concubine-I use the word concubine as I think it conveys the notion more correctly-depend upon the following passage in the Mitakshara:

"Even as to what has been said by Katyayana 'Heirless property goes to the king, deducting however a subsistence for the females as well as for the funeral charges; i. e., heirless property or whealth which is without an heir to succeed to goes to the king', that is becomes the property of the sovereign deducting, however a subsistence for the females as well as for the funeral charges'. It means that after excluding or setting apart a sufficiency for the food and raiment of the women, and as much as may be requisite for the funeral charges such as the funeral repasts and other obsequies in honour of the (deceased) owner, the residue goes to the king. Such is the construction of the text. An exception is added: 'but the goods belonging to a venerable priest,' deducting, however, a subsistence for the females as well as the charges of obsequies, 'let him bestow on a venerable priest.' But even this relates to women kept in concubinage, for the term employed is females.' The text of Narada likewise relates to women of the harem, since the word used is women." (Gharpure's "Hindu Law Texts, Mitakshara. p 239.)

For the purposes of the present question the important words are 'women kept in concubinage." In what sense are they used by Vijnaneshvara? The Sanskrit words are "*Avaruddha stree*,"

The word "Avaruddha', means "subject to control or restraint." There are other passages in Vijnaneshvara's commentary which further explain the meaning.

In the commentary on Yajnavalkya, verses 118, 119, as to things liable to partition we find the following :—

"Women, that is, female slaves being uneven, must not be divided by (regard to) the value, but should be made to work by turns. But women kept in concubinage (Avaruddha stree) (by the father), such as adulteresses and others, although even in number, must not be shared by the sons". (Gharpure, p. 195; Colebrooke, I, iv. 22.)

This passage certainly suggests that these women are completely under the dominion of the family. It would otherwise be impossible to regard them as being in any sense liable to partition.

Another and more significant passage is found in Vijnaneshvara's commentary on Yajnavalkya verse 290. (Gharpur's translation, p. 407; the passage is not in that portion translated by Colebrooke). The chapter deals with criminal offences in connection with women, and the penalties thereof, and verse 290 runs as follows :—

"In (the case of) women who are protected slaves of another, and likewise (of) kept mistresses, even though intercourse with them is permissible, a man shall be compelled to pay a fine of fifty *panas*."

Upon this the commentator says :—

"The women of the *varnas* already described are (considered as) slaves ; these very women are prohibited by the master from intercourse with other men with an injunction to stay at home with the object of avoiding any lapse of service, these are known as *Avaruddha* or protected slaves. Women restricted in the matter of sexual intercourse to certain persons are known as *Bhujishyah* or kept mistresses. When female slaves are *Avaruddha Bhujishya* then in their case--likewise by use of the particle *cha* 'and,' harlots, wanton women, common women and *Bhujishya* are also included, in their case also—although intercourse with them is permissible,, (*gamyaswapi*) as they are equally available to all males, one having connexion with them shall be fined fifty *panas* since they are as good as other's wives, as they have been patronised by another. (Gharpure, P. 406.)

Now as I understand this passage a clear distinction is made between a mistress (*Bhujishyah*) and a concubine (*Avaruddha Bhujishya*). The word 'Avarudda' appears to mean a woman kept under a man's immediate control as a member of his family. An examination of the reported cases shows that where a claim for maintenance has been allowed on the ground of concubinage the connexion has been of the nature suggested by the word "avaruddha" as explained above.

In *Khemkor* v. *Umiashankar* (1) the claim was on behalf of a woman who had lived with a man as his wife. The marriage proved to be invalid, and it was held that she was entitled to maintenance as a concubine. This appears to be the earliest case in Bombay. In Madras the matter appears to have been first discussed in *Sikki* v. *Vencatasamy* (7). The District Judge in setting out the facts of that case remarks that the Hindu law texts appear to have in mind women having recognised positions in the house as concubines or female slaves and that a concubine in this sense is something more than a kept woman. The actual decision was on another point but it is interesting to note that the distinction was recognized so long ago. The next case in Bombay was *Vrandavandas* v. *Yamunabai*. (2) There the woman had lived with the deceased as his wife for forty years. In a later case, *Ningareddi* v. *Lakshmawa* (4) the woman had lived in the man's house as his concubine for a long period. It is not, I think, necessary to deal at any length with these or other reported cases, for it must be conceded that the precise point now before us has not been decided. They are only instructive as showing the nature of the connection which has hitherto been held a sufficient ground for allowing maintenance from the estate of a deceased man. In all those cases the woman was living openly with the man as his concubine under his

(7) (1875) 8 M. H. C. R. 144.

immediate protection and control. As I have already said the texts appear to indicate a connection of that nature where the term "*avaruddha stree*" is used.

Now what are the facts here? The deceased Vasanji had a wife and two sons. He was on bad terms with them and they lived in a house at Mandvi while deceased himself lived in another house at Masjid Bunder. He appears to have formed this connection with plaintiff about 1915 which is the date of the earliest letter. According to her story she lived at serveral different places in the city and the deceased maintained and visited her. But there is no evidence that they ever openly lived together. She appears to have had her own establishment, and to have paid her own rent. He fell ill in her house, and was there for a short time until just before his death, but that is an accidental circumstance. It is true that plaintiff says he lived there continuously for three years, but she also says that he lived in his own house at Masjid Bunder. The case seems to be a common one—a rich man on bad terms with his family who has a kept mistress whom he visits from time to time. The connection was not precisely secret, but on the evidence it cannot be said that she lived with him openly as a member of his family. In the words of Vijnanesvara plaintiff is a "*Bhulishyah*" but not (in my opinion) "*avaruddha*." Therefore she is not, I think, entitled to claim maintenance from the estate of the deceased.

Motichand and Devidas.—Attorneys for appellant.

Ardeshir, Hormasji, Dinshaw and Co.—Attorneys for respondent No. 1.

Tyabji, Dayabhai and Co.—Attorneys for respondent No. 2.

Decree reversed.

1923 **BOMBAY** 142

SHAH, C. J. AND CRUMP, J.

Tricambji Dambji and Co.,

v.

Verji Kanji.

O. C. J. App. No. 2 of 1922, Suit No. 3685 of 1919 D. 12th June 1922.

(a) Stamp Act S. 2 (20) Art 47—Policy of sea-insurance—Protection note—Difference.

The plaintiffs sued the defendants in this case on what was described in the plaint as a protection note. The defendants contested their liability under this document, and among the various defences the preliminary defence raised was that the document upon which the plaintiffs sued, being unstamped, the suit was not maintainable. Upon the preliminary issue the trial Court decided in favour of the defendants, and dismisssd the suit.

On construction of document, it was held that assuming, without deciding, that the contract in question was entered into in consideration of a premium, it would be a policy of sea insurance within S. 2 (20).

The case was remanded for decision on the remaining issues subject to the plaintiffs paying the necessary stamp and penalty in respect of this document. For the purpose of this judgment it was assumed that there was a payment of premium by the plaintiffs as alleged by them. That was a point in dispute between the parties and hence the trial Court was directed to consider this question of fact as also its effect upon the contract in question. [P. 143 C. 1 & 2].

2. Stamp Act (1879) S. 7 (3)—Mere Initials.

Initialling is sufficient to indicate the names within the meaning of Section 7 (3). [p. 144 C. 2.]

3. Civil P. C. O. 41 R. 23—Remand on assumption.

A case decided only on a preliminary issue as to stamp was remanded and the decision on the preliminary issue reversed, on the assumption of proof of a certain question of fact which was necessary for that decision. The trial Court was directed to try the question of fact first and to consider its effect on the contract in question.

Kanga (Advocate General,) and Ghaswalla.—for the Appellants.

Desai, Campbell and Setalvad.—for the Respondents.

Shah Ag. C. J.—The plaintiffs sued the defendants in this case on what was described in the plaint as a protection note Ex. X1 in the case. The defendants contested their liability under this document, and among the various defences the preliminary defence raised was that the document upon which the plaintiffs sued being unstamped, the suit was not maintainable. Upon the preliminary issue the

trial Court decided in favour of the defendants, and dismissed the suit.

The question in this appeal from the judgment of Mr. Justice Marten is whether the document in question is a 'policy of sea insurance' within the meaning of the Indian Stamp Act (II of 1899) or it is merely a "letter of cover or engagement to issue a policy of insurance" within the meaning of the "General Exemptions" relating to policies of insurance in Article 47 of Schedule I of the Indian Stamp Act. The learned trial Judge is of opinion that the unstamped memorandum Ex. X 1 falls within the exemption; and if that view is right, it is clear that, as it is not stamped, and as no stamp can be now received in respect of it, the suit will be unmaintainable.

The whole question is whether the document in question satisfies the requirements of the definition of "policy of sea insurance" within the meaning of the Indian Stamp Act. The document is worded thus:—

"Given in writing by the undersigned persons. To wit:—That we accept the liability on goods shipped from the port of Muscat in the boat Jeramprasad Tandel Ibram for Bombay Bunder. That liability is to exist up to the time the said goods have been discharged on the Bombay Bunder having passed any intermediate ports. The insurance is accepted in accordance with the usage of English Policies without damage. The amount is to be paid within six months from the date of the loss deducting therefrom discount at the rate of 20 per cent. Through broker Tha: Dewkaran. The signatures are to be duly affixed to the stamped *pakka* (formal) policy."

The risk undertaken by each of the executants is stated to be Rs. 3750. The document is initialled by defendant No. 1 and another person whose legal representatives are on the record as defendants Nos. 2 to 4. This document definitely renders the executants liable for a certain sum for the insurance of the goods shipped by a particular boat and the period is definitely stated

Under S. 2. clause (20) of the Indian Stamp Act, a policy of sea insurance means "any insurance made..upon any goods, merchandise or property of any description whatever on board of any ship or vessel..." The expression "policy of insurance" in the preceding clause is defined as including "any instrument by which one person in consideration of a premium engages to indemnify another against loss, damages or liability arising from an unknown or contingent event." Assuming, without deciding, that the contract in question was entered into in consideration of a premium, it would be a policy of sea insurance within the meaning of S. 2 (20).

It is urged, however, on behalf of the respondents that in form it is only a protection note or a letter of cover and that the executants contemplated a formal policy to be drawn up later. It is no doubt true that the document does refer to a formal policy duly stamped to be prepared; and it may be said that in form it is not a policy of sea insurance. But these considerations, in my opinion, are not decisive of the question as to whether the document in substance can be treated as a 'policy of sea insurance' within the meaning of the Indian Stamp Act. It may be that some protection notes may in terms cover a period only up to a time when the formal policy should be drawn and in some cases it may be open to an insurer to refuse to issue the policy according to the terms of the note. Such protection notes would clearly be within the scope of the General Exemption under Article 47. It may also be that a document such as we have in the present case may be in form a letter of that nature; but if in substance and in term it satisfies all the essential conditions of a 'policy of sea insurance,' I do not see any reason why the plaintiffs should not get the benefit of that view of the document. If it is a policy of sea insurance, it is open to the plaintiffs under S. 35 (*a*) of the Indian Stamp Act to pay the necessary stamp with the prescribed penalty and to ask the Court to admit the document in evidence. If it is merely a letter of cover or engagement to issue a policy of insurance within the meaning of the exemption, he cannot do so, and the suit must undobtedly fail. The nature

of the document must really be determined with reference to the terms of a particular document without attempting to lay down any general test for distinguishing a protection note from a formal policy. It may be that the document may in form appear to be a protection note; still, if in terms it satisfies the requirements of the definition of " policy of sea insurance " within the meaning of the Indian Stamp Act, for the purpose of the Stamp Act it would be open to the party to contend that it is a policy of sea insurance, and as such, capable of being received in evidence subject to the payment of the stamp with the necessary panalty.

It is urged on behalf of the respondents that this document is merely a "contract for sea insurance", and that under S 7, sub-section (1), it cannot be valid unless it is expressed in a sea policy. But the "sea policy" or policy of sea insurance is defined under S. 2 (2)), and if this document satisfies the requirements of that definition, I do not see why it should not be so treated. The essentials of a 'sea-policy as indicated in S. 7, sub-section (3), are present in this case. That being my view of the particular document I think that it is admissible in evidence on payment of the necessary stamp and penalty.

I may refer to the case of *In re Marine Insurance Certificate* (1). It was a decision under the Stamp Act of 1879. The provisions of that Act were different from those of the Act of 1899 bearing on this point. It is, however, an instance, in which the certificate of insurance, which contemplated in terms an exchange for a duly stamped policy was treated as a policy of insurance within the meaning of the Indian Stamp Act of 1879.

On behalf of the respondents reliance is placed upon the decision in *Home Marine Insurance Co.* v. *Smith* (2). That case went up in appeal and the judgment of the Court of Appeal is reported in [1898] 2 Q. B. 351. It would appear that in that particular case the document was held to be invalid as a policy not because, a letter of cover could never be a policy, but that the particular document lacked one of the essentials mentioned in S. 95 (3) of the Statute of 1891 (54 & 55 Vic. 39). It is true that no opinion was expressed that, but for that defect, it would be a policy of sea insurance. But the *ratio decidendi* in that case suggests that if it otherwise satisfied the requirements of sub-section (3) of S. 95 of that Statute, to which S. 7, sub-section (3), of the Indian Stamp Act of 1879 corresponds, it might have been held to be a sea policy. At any rate, the weight to be attached to the judgment of Mathew J. in that case is very much reduced by the line of reasoning adopted by the Court of Appeal.

The document before us is not subject to any such infirmity. I think that initialling is sufficient to indicate the names within the meaning of S. 7 (3). At any rate it is not suggested in this case that the initialling is not sufficient. In the case of *Home Marine Insurance Company* v *Smith* (2) the document was merely initialled, and though in the arguments in the Appeal Court this circumstance was mentioned, there is no reference to it in the judgments. Personally I see no reason in this case why it should not be held to satisfy the requirements of S. 7 (3). The document in question, it seems to me, satisfies, though not in form but in substance the requirements of the definition of the policy of sea insurance. Therefore, it is open to the plaintiffs, on payment of the necessary penalty, to tender the document in evidence. I may add that the scheme of the provisions on this point in the Indian Stamp Act appears to correspond to a large extent to the scheme in the English Statute of 1891; and it may be that the intention of the Legislature was to render such documents inadmissible unless expressed in the form of a regular policy except for the limited purpose of obtaining a proper policy. But, in my opinion, definition in the Act leaves room for the view which I have taken; and unless the definition of S 7 is amended, I do not see how such a document could be excluded from its scope.

In this view of the matter, I would allow the appeal, reverse the decree of the trial Court and remand the case

(1) [1894] 19 Bom. 130 (F. B.)
(2) [1898] 1 Q. B. 829.

for decision on the remaining issues subject to the plaintiffs' paying the necessary stamp and penalty in respect of this document. I may add that for the purpose of this judgment we have assumed that there was a payment of premium by the plaintiffs as alleged by them. That is a point in dispute between the parties. It will be open to the trial Court to consider this question of fact as also to consider its effect upon the contract in question.

Respondents to pay the costs of this appeal.

Costs in the trial Court to be costs in the suit.

CRUMP J.—I concur.

Appeal allowed.

1923 BOMBAY. 145

SHAH, AG. C. J. AND CRUMP, J.

Fatmabai—Plaintiff.

v.

Framroz Ardeshir Banaji — Defendant.

O. C. J. Ref. No. 5 of 1922 D. 4th September 1922, in C. C. Suit No. 205/2584 of 1922 made by C. J. of Bombay of Small Causes.

Civil P. C. S. 11—Might and ought—Claim omitted.

The present defendant had made a counter-claim in the suit in the High Court in which he prayed that "it may be declared that the defendant is a monthly tenant of the plaintiff at a monthly rental of Rs. 185." In this suit he contended that he was liable to pay only Rs. 150 and not Rs. 185, per month under the Bombay Rent Act (1918).

Held: It was not only relevant but necessary for the defendant to plead in the first suit that he was liable to pay not Rs. 185 but only Rs. 150 as a standard rent, under the Rent Act. It does not appear to be open now to the defendant, after having obtained a declaration and the further relief by way of injunction on a certain footing, to say that it is still open to him to claim the benefit of the Rent Act after having by necessary implication given up what he might have been entitled otherwise to claim in this Court when he made his counter-claim.

Taraporevalla—for the Plaintiff.

Billimoria—for the Defendant.

Shah, Ag. C. J.—The question referred to us is as follows :—

"Whether in spite of the decree of the High Court, declaring defendant to be a tenant of the plaintiffs at Rs. 185 per month, it is open to him to contend that he is liable to pay only the standard rent under the Bombay Rent Act."

We are of opinion that this question should be answered in the negative. The reference has been fully argued by Mr. Billimoria on behalf of the defendant and both the judgments of the lower Court clearly set out the facts which have given rise to this reference, as also the two views which were respectively contended for by the plaintiffs on the one hand and the defendant on the other in that Court. It is enough for the purposes of this reference to point out that the present defendant made a counter-claim in the suit in the High Court in which among other things, he prayed that "it may be declared that the defendant is a monthly tenant of the plaintiff at a monthly rental of Rs. 185." It was open to him then if he was so minded, to plead that he was liable to pay only Rs. 150 and not Rs. 185 per month. Instead of doing so, he asked for a declaration in the terms which we have just mentioned. It is urged on his behalf that it was not obligatory upon him then to claim the benefit of the provisions of the Bombay Rent (War Restrictions) Act (II of 1918) and that in that suit it was necessary for him to seek merely a declaration as to his status as tenant as an answer to the plaintiffs' claim which was that the defendant was not a tenant but a rent farmer. Having regard, however, to the nature of the counter-claim made, we are unable to accept the contention, which has been urged on behalf of the defendant with clearness before us, that S. 11 of the Code of Civil Procedure does not create any bar in the way of the defendant now pleading in the suit in the Court of Small Causes that he is liable only to pay Rs. 150 as standard rent and not Rs. 185 as stated in the declaration sought by him and decreed by this Court at his instance. We are of opinion that it was not only relevant but necessary for the defendant to plead if he wanted to take the benefit of the provisions of the Rent Act that he was liable to pay not Rs. 185 but only Rs. 150 as standard rent. It does not appear to us to be open now to the defendant, after having obtained a declaration and the further relief by

way of injunction on a certain footing, to say that it is still open to him te claim the benefit of the Rent Act after having by necessary implication given up what he might have been entitled otherwise to claim in this Court when he made his counter-claim. It is neither illegal nor improper for any tenant of the premises such as we are concerned with here to choose to give up the benefit of the provisions of the Rent Act. It is entirely his look-out and when he puts forward any claim in the Court which has relation to the amount of the rent, it is obligatory upon him to make up his mind whether he will claim the benefit of that Act or not. If, in a claim which is made by him, he chooses not to do so, he cannot afterwards claim to be relieved from the consequences of having failed to make that claim which, under the circumstances, he must be deemed to have given up. The declaration made by this Court is binding upon the parties. The position would have been quite different if the declaration had been made prior to the Rent Act.

Costs to be costs in the suit. Costs to be taxed on the Original Side scale.

1923 BOMBAY. 146

SHAH, C. J. AND CRUMP, J.

Chaturbhai Lallubhai Patel. v. *Motibhai Bapuji Patel.*

L. P. A. No. 6 of 1922 D. 12th September 1922 from the decision of Coyajee, J. in Appeal from order No. 77 of 1922.

(a) Bombay Bhagdari Act (Bom. Act V of 1862) S. 3—Lease for a long period of time-Adverse possession by alienee.

The plaintiffs' predecessors-in-title conveyed in 1892 to defendants the right to hold certain land for a period of 500 years. The plaintiffs sued in 1918 for accounts on the footing that the transaction of 1892 was a mortgage. The defendants contended that the alienation of 1892 was void under the Bombay Bhagdari Act and that they held the lands adversely to the rightful owners for upwards of twelve years:—

Held: (1) That the defendants were entitled to such rights as they had acquired by the document of 1892 by adverse possession. (33 B. 116 Foll.) (2) that the transaction of 1892 was an alienation by way of a lease for a long term and not an out and out sale.

[*P 147 C 1, 2.*]

(b) Deccan Agriculturists Relief Act S. 10 A.—Scope.

Lease of land for 500 years under Bombay Bhagdari Act is not within the scope of S. 10 A. (38 B. 18 Foll.) [*P 107 C 1.*]

N. M. Desai.—for the Appellant.

R. J. Thakor.—for the Respondents.

Shah, Ag. C. J.—The plaintiffs filed the present suit as the assignees of the original owners of the land in suit to recover possession of the property, and for accounts on the footing that the transaction of April 22, 1892, was a mortgage. The original owners passed a document in 1892 in favour of the father of the present defendant No. 1 and the husband of the present defendant No. 2 whereby they purported to convey to these persons the right to hold the land for 500 years in consideration of their having received at the time a sum of Rs. 180 (Babashahi coins). The defendants contended that the plaintiffs had no right to the land, and that in any case the plaintiffs were not entitled to recover possession before the expiry of the period mentioned in the document. Various issues were raised in the trial Court, one of which was, whether the plaintiffs' claim was time-barred. The trial Court held that the alienation evidenced by this document of 1892 was void in consequence of the provisions of the Bhagdari Act (Bombay Act V of 1862), and that from the date of the document the defendants had held possession of this land adversely to the rightful owners. It accordingly dismissed the plaintiffs' suit. On issue No. 3, which related to the assignment in favour of the plaintiffs, it was found that the assignment was proved. No findings on the second part of Issue No. 3 and other issues were recorded.

The plaintiffs appealed to the District Court, and the only point before the learned Judge was whether the lower Court had erred in holding that the plaintiffs' claim was barred by limitation. It found that the lower Court had erred in doing so. The learned Assistant Judge was of opinion that the defendants acquired title by adverse possession only to the limited interest evidenced by the document of 1892, and that as it was not a sale, it was necessary to determine whether it was a lease or a mortgage. The learned Judge on that

footing reversed the decree of the trial Court and remanded the suit for decision on all the issues.

From that order of remand the present appeal is preferred to this Court, and it is urged in support of the appeal that by adverse possession the defendants have acquired such right as is conveyed by the document of 1892, and further that Sec. 10A of the Dekkhan Agriculturists' Relief Act would not apply to this transaction, and that, therefore, the document must be read according to its terms, and the transaction evidenced by it must be taken to be what it purports to be, namely, an alienation of the right to hold the land for 500 years. It is not disputed before us, and cannot be disputed, that the defendants are entitled to such rights as they have acquired by the document of 1892 by adverse possession. The principle of the decision in *Adam Umar* v. *Bapu Bawaji*(1) applies, whether the document is a sale or purports to convey a limited interest. It cannot be disputed, and it has not been disputed, that S. 10A of the Dekkhan Agriculturists' Relief Act cannot apply to this transaction having regard to the decision in *Sawantrava* v. *Giriappa Fakirappa* (2) When these two propositions are accepted, it is difficult to understand why the case should have been remanded. The learned Judge appears to have remanded the case to the trial Court possibly on the understanding that in virtue of the provisions of Sec. 10A the plaintiffs may be able to establish that the transaction was intended to be a mortgage by means of extraneous evidence. But no such evidence would be admissible as Sec. 10 A of the Dekkhan Agriculturists' Relief Act does not apply; and the document on its face does not purport to be a mortgage. Whether it may be called a sale of a limited interest or a lease of 500 years, it undoubtedly gives the defendants a right to hold the land for 500 years for a certain consideration and that is the right which they have acquired by adverse possession, and that is the right to the enjoyment of which they are entitled as against the plaintiffs. Apart from the provisions of Sec. 10 A, the contention of the plaintiffs that the transaction was a mortgage and not a lease does not present any difficulty. The *patta* in this case has no resemblance to the *patta* which the Court had to consider in *Mahmud* v. *Bagas*(3); and it must be taken to be an alienation by way of a lease for a long term, though not an out and out sale.

It is hardly necessary to point out that we are not concerned in this case with any action that the Collector may deem it right to take, if at all, under the Bhagdari Act. In connection with this aspect of the case it is significant to note that we do not know whether the assignment in favour of the plaintiffs is subject to the same infirmity as the transaction of 1892 under the Bhagdari Act. This point was raised as part of Issue No. 3 but there is no finding upon it. It is an essential point as affecting the title of the plaintiffs to maintain this suit.

It is clear, however, that the decree of the trial Court dismissing the suit on the ground of limitation was right. No doubt after the lapse of 500 years from the date of the document the original owners or their representatives-in-title would be entitled to get possession of this land. It is hardly necessary to make any provision for it in the decree. The document makes that position clear. The dismissal of the suit involves the result that the plaintiffs are not entitled to any immediate relief on the footing of its being a mortgage. We, therefore, reverse the order of the lower appellate Court and restore the decree of the trial Court. The plaintiffs to pay the costs here and in the lower appel late Court.

Appeal allowed, suit dismissed.

(1) (1908) 33 Bom. 116; 10 Bom. L. R. 1128.

(2) (1913) 38 Bom. 18; 15 Bom. L. R. 778; 21 I. C. 4 (F. B.)

(3) (1908) 32 Bom. 569; 10 Bom. L. R. 742.

1923 BOMBAY 148

SHAH, C. J. AND PRATT, J.

Haji Oosman Haji Ismail.

v.

Harroon Saleh Mahomed.

O. C. J. App. No. 17 of 1922 ; D. 27th July 1922.

(a) Khojas and Cutchi Memons--Ancestral property-Son's vested interest.

The application of the rules of Hindu law of custom to the Cutchi Memons is limited to rules of inheritance and succession and does not extend to the rules relating to the joint family property as applicable to Hindus. A son of a Cutchi Memon has no vested interest by birth in the ancestral property of his father· (1914) I0 Bom. L. R. 224 and (1915) 41 Bom. 181 Rel. [P. 151 C. 1]

(b) Specific Relief Act S. 25 (c)—Free from reasonable doubt,

To determine whether the plaintiff can give the defendant purchaser a title free from reasonable doubt the general test is whether there is a reasonable and decent probability of litigation on that point against the purchaser or whether it is of such a remote character that it should not be considered to create any reasonable doubt,]P, 152 C. 1]

(c) Succession Act (1865)--Applicability--Cutchi Memons.

The Succession Act does not apply to Cutchi Memons.

Coltman, with Setalvad—for the Appellant.

Munshi, with Kanga, — for the Respondents.

Shah Ag. C. J.—This is an appeal from a judgment of Mr. Justice Crump. The suit out of which the appeal arises was filed by the plaintiffs to enforce an agreement to sell certain immoveable properties to the defendant for Rs. 1,55,000. The defendant agreed to buy the properties in suit and paid Rs. 5,000 as earnest money to the plaintiffs. The vendors had agreed to make out a marketable title. It is not necessary to refer to other terms of the agreement. Two of these properties had been previously purchased by the plaintiffs from the defendant, and there was no difficulty as to the title to those properties. The third property had been bought by the plaintiffs from one Fakir Mahomed, a Cutchi Memon, who conveyed the property to them on April 29, 1920, on behalf of himself and his minor brother. That conveyance is Ex. E. The property belonged to the father of Fakir Mahomed who had bought it in 1884 from one Hajee Adam Oosman Nurrani. That conveyance is Ex. B.

It appears from the correspondence that there was some difficulty felt by the purchaser with regard to this property. By the letter of October 9,1920, the defendant called upon the vendors to obtain letters of administration to the estate of the deceased Joosab Hajee Cassum Pirmahomed on the ground that the recitals in the conveyance were not sufficient evidence of the fact that Joosab Hajee Cassum Pirmahomed had died intestate in 1911 and had left only two sons. The vendors did not accept the position taken by the defendant that letters of administration to the estate of the deceased father of their vendors were necessary. Subsequently in the requisitions for title an inquiry was made as to whether Fakir Mahomed had any male issue. It appeared that Fakir Mahomed had two sons, and in the letter of December 7,1920, the defendant raised the objection that as the sons of Fakir Mahomed would have a vested interest in the property according to the law applicable to them the title was defective. The vendors did not accept the correctness of this position. In the letter of December 15 objections to the title were categorically stated on behalf of the purchaser, namely, first, that the objection as to the want of satisfactory proof of the fact that Joosub Hajee Cassum Pirmahomed had died intestate and had left only two sons Fakir Mahomed and Mahomed Saleh as his heirs was not removed, and that in order to meet that difficulty they insisted upon letters of administration being taken out to the estate of the deceased Joosub Hajee Cassum Pirmahomed, and, secondly, that the sons of Fakir Mahomed had a vested interest in the property in question, and that as their interest was not conveyed to the plaintiffs the title was defective. The plaintiffs offered by their letter of December 18 to give further proof by way of a declaration from two respectable members of the Jamat to the effect that Joosub Pirmahomed had died intestate and had left

only two sons as his heirs according to the rules of the Hindu law as to succession applicable to Cutchi Memons; and as regards the second objection, they contended that according to the law applicable to Cutchi Memons the sons had no vested interest in the property of their father. The purchaser replied by his letter of December 22 that he was not prepared to accept a declaration of two respectable members of the *Jamat* as proposed.

In the end, on account of the difference between the parties on these two points, the present suit was filed by the vendors to enforce the agreement between the parties. The defendant in his written statement pleaded that he was right in insisting that letters of administration should be obtained to the estate of Joosub Pirmahomed, that the two sons of Fakir Mahomed had a vested interest in the property and, as their interests had not been conveyed to the plaintiffs, the title was not marketable. The defendant counter-claimed the earnest money paid by him and Rs. 15,000 by way of damages for failure on the part of the plaintiffs to make out a marketable title. Parties gave no evidence beyond the documents which have been put in, and which are printed in Part III of the Paper Book, subject to this that the proceedings in a certain suit were sought to be put in by the defendant but rejected by the Court as irrelevant. The notes of the trial Judge indicating that fact should have been printed: but they are not to be found in the Paper book. The issues raised were:-(1) whether the plaintiffs deduced a marketable title to the property thirdly described in Sch. B of the plaint; and (2) whether the defendant should be entitled to his counter-claim. The learned trial Judge came to the conclusion that the plaintiffs had deduced a marketable title, and accordingly decreed the plaintiffs' claim for specific performance of the agreement. The prayer for damages in the plaint was not pressed and a decree was passed on that basis, the defendant's counter-claim being rejected with costs.

In the appeal before us the questions raised relate to the marketable nature of the title of the plaintiffs with reference to the property in question. It has been contended on behalf of the appellant that the sons of Fakir Mahomed would have a vested interest in the property in question according to the Hindu law applicable to the Cutchi Memons. It is pointed out that the decisions on the point, that the Hindu law applies to Cutchi Memons so far as it relates to succession and inheritance and no further, are conflicting and that there is no decision of the Court of Appeal on the point. It is contended that under the circumstances in spite of the later decisions limiting the application of Hindu law to the Cutchi Memons only to questions of succession and inheritance, the question may be raised by any son in this community that he has a vested interest in his father's ancestral estate, and that the title which the plaintiffs are in a position to make out is not free from reasonable doubt and not marketable on that ground. It is further urged that there is no satisfactory evidence in this case to show that Joosuf who died in 1911 had only two sons, and further that he died intestate. It is pointed out that, though as a matter of law it may not be obligatory upon the sons to take out letters of administration, it is still open to the sons of Joosub to do so, and to place the fact of representation to the estate of Joosub beyond all doubt and dispute, and that as the plaintiffs have refused to adopt that course, the evidence on the record should not be accepted as sufficient to establish the two facts mentioned above beyond all doubt, and that in that state of things the title such as it is should not be forced upon the defendant.

Before dealing with these two points, I may mention that several English decisions were cited to us in the course of the argument on the question as to what is a marketable title which the Courts would force upon an unwilling purchaser. I do not propose to examine those decisions in detail. It is enough to refer to the summary as given in Fry on Specific Performance, paragraphs 890 and 891, indicating the result of the decisions on the point.

On the other hand for the respondents it is contended that the "marketable title" means "a title free from reasonable doubt," and for this purpose reliance is placed upon the provisions of S. 25 (*b*) of the Specific Relief Act where the expression "free from reasonable doubt" is used. In support of this view reliance is placed upon the view taken by Mr. Justice Farran in *Haji Mahomed Mitha* v. *Musaji Ksaji*(1) where "a good title" is treated as meaning "a title free from reasonable doubt" and also upon the observations of Lord Eldon in *Lord Braybroke* v. *Inskip*-(2) where the question for the Court was stated to be "whether the doubt is so reasonable and fair, that the property is left in his (purchase'r) hands not marketable." It seems to me that it would serve no useful purpose to attempt to define the exact meaning of the expression "marketable title, ' or in other words to lay down what should constitute under the circumstances of a particular case a marketable title. If there is to be any general test it must be accepted as laid down in the Specific Relief Act that it should be "free from reasonable doubt." Whether the doubt under the facts and circumstances of a particular case is reasonable or not must necessarily depend upon the nature of the objections and the facts of that case It is clear that so far as the objections to the title in the present case are concerned they are of such a nature that they must be examined on their own merits. English decisions cited to us do not throw any light on those objections. The question whether among Cutchi Memons the position that a son has a vested interest in the ancestral property of his father, just as a Hindu son in this Presidency would have, is a point which must be examined with reference to the law applicable to the Cutchi Memons and the decisions bearing on that point. The other objection raised is purely one of fact and must be decided with reference to the evidence in the case.

As regards the first point, it is a matter of great practical importance to the Cutchi Memons to know as to how they stand with reference to this point. Is the question, whether the rules of Hindu law applicable to Cutchi Memons are strictly limited to matters of inheritance and succession, settled beyond reasonable doubt or not ? If not, the appellant must succeed ; if it is, his contention on this point must fail. On behalf of the appellant reliance is placed upon the decisions in *Ashabai* v. *Haji Tyeb Haji Rahimtulla* (3) and *Mahomed Sidick* v. *Haji Ahmed* (4) and it is pointed out that the later decisions in *Mangaldas* v. *Abdul Razak* (5) and *Advocate General of Bombay* v. *Jimbabai* (6) conflict with the earlier decisions, and that there is no decision of the Court of appeal. Reference was also made in the course of the argument to the two cases relating to Khoja Mahomedans, viz. *Ahmedbhoy Hubibbhoy* v. *Cassumbhoy Ahmedbhoy* (7) and *Jan Mahomed* v. *Datu Jaffar*. (8) I have examined these decisions in detail. In *Ashabai* v. *Haji Tyeb Haji Rahimtulla* (3) there was no decision on the question as to whether the application of the rules of Hindu law to Cutchi Memons extended beyond the rules of inheritance and succession. The point decided there was that the Hindu law applied to them as to inheritance and succession. In *Mahomed Sidick* v. *Haji Ahmed* (4) the point is dealt with, and it was found that the custom of not recognising any distinction between the ancestral and self-acquired property among the Cutchi Memons was not proved. The decision assumes that a Cutchi Memon cannot deal with his ancestral property and the custom alleged to the contrary was held not proved. As there is a certain degree of similarity in the extension of the rules of Hindu law by custom to Khoja Mahomedans as well as to Cutchi Memons, it is relevant to point out

(1) (1821) 15 Bom. 657,-(666.)
(2) (1803) 8 Ves. 417, 418.
(3) (1882) 9 Bom. 115.
(4) (1885) 10 Bom. 1.
(5) (1914) 16 Bom. L. R. 224-23 I. C. 565.
(6) (1915) 41 Bom. 181;-17 Bom. L. R. 799-31 I. C. 106.
(7) (1889) 13 Bom. 534.
(8) (1913) 38 Bom. 449-15 Bom. L. R. 1044-22 I. C. 195.

that in *Ahmedbhoy Hubibbhoy* v. *Cassumbhoy Ahmedbhoy*(7), which related to Khoja Mahomedans, it was held that the rule, that the Hindu law as administered in this Presidency, in the absence of proof of custom to the contrary is the law applicable to Khoja Mahomedans, is not to be understood in its widest sense, but is confined to simple questions of inheritance and succession; and in that case the question as to the right of a son to claim partition of the ancestral property was held not to be within the scope of rules of Hindu law applicable to Khoja Mahomedans by custom. The observations which have been relied upon by Mr. Coltman in connection with this point from the judgment of the Court of Appeal do not, in my opinion, affect the main question which they decided, namely, that a son was not entitled to claim partition during his father's life-time, which would be possible only if the application of the rules of Hindu law was limited by custom only to rules of inheritance and succession. This, however, was a decision relating to the Khoja Mahomedans and would not directly apply to the case of the Cutchi Memons. The point was considered by Mr. Justice Beaman in *Jan Mahomed* v. *Datu Jafar* (8) generally with reference to the question as to how far Hindu law applied to Khoja Mahomedans and Cutchi Memons by custom But it was a case of Khojas and not of Cutchi Memons. The point arose directly later on with reference to Cutchi Memons and in the two decisions which I have referred to: *Mangaldas* v. *Abdul Razak* (5) and *Advocate General of Bombay* v. *Jimbabai* (6) this point was fully examined by Mr. Justice Macleod and by Mr. Justice Beaman. It is true that those are decisions by single Judges on the Original Side, and those particular cases were not taken to the Court of Appeal. But, after a close examination of the law relating to Cutchi Memons on this point, the decisions distinctly lay down that the application of the rules of Hindu law by custom to the Cutchi Memons is limited to rules of inheritance and succession and does not extend to the rules relating to the joint family property as applicable to Hindus. They negative the view that a son has any vested interest by birth in the ancestral property of his father The decision in *Mahomed Sidick* v. *Haji Mohomed* (5) has been considered and explained.

After those decisions it appears that in response to a demand of the community the Legislature passed Act XLVI of 1920 with a view to enable those members of the community who so desired to get rid of the application of Hindu law as regards succession and inheritance. In the preamble of that Act the Hindu law as applicable to Cutchi Memons is referred to as relating to succession and inheritance. This Act received the assent of the Governor—General on September 17,th 1920, shortly before the correspondence between the parties to the agreement in this case commenced. I refer to this Act only for the purpose of showing that the view taken in the later decisions has so far been accepted by tho Legislature; and indeed if the rules of Hindu law relating to joint family property, and in particular that relating to the vesting of property in a son by birth were believed to be applicable to Cutchi Memons, it is reasonable to infer that the Legislature would have made provision for that in the Act to which I have referred. It is, therefore, really a serious matter at this stage, in the absence of any evidence on the point, to hold that still it is a matter open to reasonable doubt whether the son of a Cutchi Memon has a vested interest in the ancestral property of his father according to the rule of Hindu law. It is no doubt theoretically open to the defendant to urge that any such son may seek to establish such a custom at any time in spite of the decisions to the contrary of a single Judge and that he may take such a case to the Court of Appeal and then to the Highest Court of Appeal and that he may be able to establish a special custom to the effect that a son has a vested interest in the ancestral property of his father. But the test in all these matters is, as pointed out in Fry on Specific Performance, whether the probability of litigation ensuing against the purchaser in respect of the matter in doubt is considerable or, as it was put by

Alderson B. in *Catell* v. *Corrall* (9), whether there is" a reasonable, decent probability of litigation. The question is whether there is a reasonable and decent probability of litigation on that point against the purchaser or whether it is of such a remote character that it should not be considered to create any reasonable doubt. While I concede that it is possible that the son of a Cutchi Memon may hereafter seek to establish such a custom as would give him a vested interest by birth in the property of his father, I am not prepared to hold that there is any decent and reasonable probability of such a claim being made; and speaking particularly with reference to the sons of Fakir Mahomed, there is no indication whatever on the facts of this case that it is anything more than a remote possibility which ought not to be allowed to weigh against the effect of the later decisions as now understood and accepted by the Legislature. I may further point out that in the decision in *Ahmedbhoy Hubibbhoy* v. *Cassumbhoy* (7) which was a case of Khoja Mahomedans, the Court of Appeal did not apply the Hindu law to the extent of giving a son a vested interest by birth in the ancestral property of his father, and so far as it suggests an inference as regards Cutchi Memons it is against the possible view that a son of a Cutchi Memon has a vested interest in the ancestral property of his father.

It may be relevant to point out in connection with this point that when Fakir Mahomed entered into this agreement on behalf of himself and his minor brother, Mahomed Saleh, he agreed to give a marketable title free from all reasonable doubts as would appear from clause 3 of Ex. 1 at p. 21 of the Paper Book, Part III, and the present plaintiffs accepted that title as conveyed to them by Fakir Mahomed on behalf of his minor brother and himself. I do not say that circumstance is in any sense binding upon the defendant; but so far as it is an indication, it is in favour of the view that in dealing with the property belonging to the Cutchi Memons, it is not considered necessary now to treat the sons of the owner as having any interest in the property by birth.

The second question is one of fact. It appears that when Fakir Mahomed agreed to sell this house to the present plaintiffs it was agreed, as would appear from clause 4 of the agreement between them, that the vendor would obtain the necessary order from the Court sanctioning the sale by him of premises, including the interest of his minor brother at his own costs. The property was described as having belonged to the estate of Joosub Hajee Cassum Pirmahomed who died on October 17, 1911, leaving Fakir Mohamed and his brother Mahomed Saleh as his heirs according to the Hindu law applicable to Cutchi Memons. After this Fakir Mahomed made an application to the Court for his appointment as guardian of the property of his minor brother and for leave to sell the property in question on behalf of the minor. That application was granted by the Court, and he was authorized to complete the conveyance. In that application he stated that Joosub Haji his father died on October 17, 1911, leaving behind him his only heirs and next of kin according to Hindu law applicable to Cutchi Memons, two sons, namely, a minor Mahomed Saleh Joosub and himself. He also made a declaration on the date of the conveyance in favour of the plaintiffs, i.e., on April 29, 1920, that Joosub Haji died on October 17, 1911, leaving only two sons who were his only heirs according to Hindu law as applicable to Cutchi Memons, namely, Mahomed Saleh and himself. This was accepted by the plaintiffs, and they now maintain that what was accepted by them as sufficient proof of the title of Fakir Mahomed and his minor brother is really sufficient to establish their title to the property and leaves no reasonable doubt as to that fact.

The defendant, however, insists upon the letters of administration being taken out to the estate of the deceased Joosub Hajee, because he contends that there is no satisfactory evidence, first, that Joosub died intestate, and, secondly, that he had only two sons and no more. On both these points it seems to me that the position

(9) [1840] 4 Y. and C. 228, 237

of the defendant is not reasonable and the facts are not open to any reasonable doubt. It is quite true that in the present case beyond putting in the documents to which I have referred, the parties have adduced no evidence. But beyond the suggestion that letters of administration are necessary to establish the fact of the representation beyond doubt, the defendant does not suggest any good reason to doubt the truth of the two statements which have been made by Fakir Mahomed in his petition to the Court and in the declaration to which I have referred. It is clear that the Indian Succession Act does not apply to Cutchi Memons who are Mahomedans and the Probate and Administration Act V of 1881, which would apply to them, does not contain any section corresponding to S. 190 of the Indian Succession Act. It was not obligatory, therefore, upon Fakir Mahomed when he executed his conveyance in favour of the plaintiffs to have taken out letters of administration. The whole question to my mind is whether the two facts, namely, that Joosub Hajee died intestate, and that according to the Hindu Law applicable to him his heirs were only Fakir Mahomed and his brother Mahomed Saleh were satisfactorily established when the plaintiffs accepted them and whether on the same materials they can be said to be satisfactorily established in the absence of the letters of administration. I do not say that in no case in which it is not obligatory upon a vendor to take out letters of administration to establish his title to the property according to law, could the purchaser require such letters of administration to be taken out to put an end to the doubts as to any disputed questions of fact. The simple question of fact in this case is whether in the absence of such letters, the facts in question are proved beyond reasonable doubt. Both these are facts about which ordinarily there should not be any doubt ; for instance, whether Joosub died intestate is a fact which would be within the special knowledge of Fakir Mahomed. He has stated so in terms on oath, and in a manner which makes him responsible for the statement. There is no indication whatever on the present record to the contrary, and the mere suggestion that sometimes wills of deceased persons are put forward many years after their death, is not sufficient, in my opinion, to justify any reasonable doubt as to the fact that Joosub, who died so far back as 1911, died intestate, particularly when we have the fact that during this interval nobody is shown to have ever suggested or come forward to say that he left a will.

As regards the question whether he had two sons or more, ordinarily I should say that the statement of the son would be accepted as sufficient, and unless there is any real ground for doubting that statement a mere suggestion of any doubt on that point would be considered either fanciful or unreasonable. In the present case there is no such ground. On the contrary we have the order of the Court appointing Fakir Mahomed as guardian of his minor brother on the footing that Joosub had only two sons and that the property belonged to the minor as an heir to his father along with Fakir Mahomed. On that point it appears that the plaintiffs offered to give further assurance to the defendant in the shape of a declaration from two respectable members of the Jamat. If there was any real doubt in the mind of the defendant, I think that that kind of assurance would be considered sufficient under the circumstances to satisfy any reasonable person. The plain fact seems to me to be that on these grounds of fact, which are not really open to any reasonable doubt, and which it is just possible may be even within the knowledge of the defendant, as he belongs to the same community and lives in the same locality, he wants to get out of the agreement.

I am, therefore, satisfied that in the present case a marketable title free from reasonable doubt has been made out ; and I think that the conclusion reached by the trial Judge on this point is right.

I may refer to the decision in *Shrinivasdas Bavri* v. *Meher*.

bai (10), which has been relied upon by refendant. As I have said the question whether a marketable title free from reasonable doubt has been made out or not must be answered with reference to the facts of each case. In that case the release relied upon was in terms only by one of the two brothers, and beyond the recital in that release, there was nothing to show that the other brother was dead or that the nearest heir to the deceased brother was the surviving brother who executed that release. That was held to be not sufficient to make out a title free from reasonable doubt. Here, however, the facts are different. In that case the test adopted with reference to the question whether the title was marketable or not was whether it was free from reasonable doubt. It appears that in the agreement preliminary to the conveyance sometimes the expression used is "marketable title free from reasonable doubt" or sometimes, as in the present case, "marketable title". But as I have said both practically mean one and the same thing; and I do not think that in that case any other test was adopted. It is difficult to apply the decision on the facts of that case to the facts of the present case. I would, therefore, affirm the decree appealed from, and dismiss the appeal with costs.

Pratt J.—The plaintiffs, on April 29, 1920, purchased the property in this suit from Fakir Mahomed and Mahomed Saleh Joosub and the conveyance recited that these two had inherited the property from their father Joosub Pirmahomed as his only heirs.

On July 30, 1920, the defendant agreed to purchase this property from the plaintiffs who consented to give a marketable title.

The phrase "marketable title" is equivalent to the phrase "a title free from reasonable doubt" in S. 25 of the Specific Relief Act. This simpler definition practically embodies the English law. Many English cases have been cited to us but it is safer to rest upon the plain words of the Indian section; for most of the English cases turn upon the difficulties of the complex English Property Law; difficulties which do not appear in the simpler system of the Transfer of Property Act.

The sole question then is whether the doubts raised by the defendan as to plaintiffs' title are reasonable. The doubts are doubts of law and of fact.

The doubt of law is whether the vendors, Fakir Mahomed and his brother, being Cutchi Memons took a vested interest at birth in their father's property. There was a time when it was assumed that the Hindu law of joint property applied to Cutchi Memons: *Ashabai* v. *Haji Tyeb Haji Rahimtulla* (3) and *Mahomed Sidick* v. *Haji Ahmed*. (4) But these decisions are now obsolete and the application of Hindu Law is mow restricted to cases of succession and inheritance as it would apply in the case of an intestate separated Hindu possessed of self-acquired property: *Mangaldas* v. *Abdul Razak* (5) and *Advocate General of Bombay* v. *Jimtabai*. (6) This statement of the law has received legislative recognition in the Cutchi Memons Act XLVI of 1920. I do not think the law on the point is now doubtful, and indeed it would be disastrous if it were, for many titles must have been taken on the faith of these decisions.

The doubts of fact are: (1) whether Fakir Mahomed and Mahomed Saleh Joosub are the only sons of Joosub Pirmahomed; (2) whether Joosub Pirmahomed left a will.

On the first point much reliance is placed on the Privy Council case of *Shrinivasdas* v. *Meherbai*. (10) In that case there was an incumbrance to Damodardas and a release by Gordhandas. The question then arose whether Damodardas was dead, and, if so., whether Gordhandas was his sole heir. When the purchaser asked for these doubts to be cleared, the vendor refused to do so and took his stand solely on the recitals. The Privy Council held that was not sufficient as the recitals would not bind Damodardas if he was proved to be alive or a third person claimed to be his heir. Here then the purchaser raised the question of another possible son of Joosub Pirmahomed, he was

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given a declaration of Fakir Mahomed and offered a declaration of two members of the Jamat. The purchaser replied that he did not consider the first sufficient and he would not accept the latter. I think this refusal was unreasonable. The vendor offered the only possible evidence and the purchaser refused even to consider it. This fact differentiates the case from *Shrinivasdas* v. *Meherbai*. (10) The vendor did not rest solely on recitals but offered evidence. The purchaser refused even to consider the evidence but insisted on letters of administration to Joosab Pirmahomed's estate. It is not clear how the purchaser could have procured such letters of administration and the purchaser's conduct shows that he in fact had no doubt but was only seeking for an excuse to avoid performance.

The second point of fact is whether Joosub Pirmahomed left a will. This is possible of course but it is extremely improbable, for ten years had elapsed since his death. I do not think this bare possibility can be said to introduce a reasonable doubt in the title. I agree that the appeal should be dismissed and the decree of the lower Court confirmed.

Appeal dismissed.

1923, BOMBAY. 157

MACLEOD, C. J. AND SHAH, J.

Bank of Bombay—Appellant.

v.

Fazulbhoy Ebrahim—Respondents.

O. C. J. A. No. 127 of 1921. D.

(a) Will-Legatee-Right of.

A minor legatee takes a vested interest in the legacy and though under the will it is not payable until he became twenty-one he is entitled in law to demand it when he attains the age of majority. [P. 160 Col. 1]

(b) Contract Act—Ss. 173, and 166—Pawn of another's property.

The case of *Attenborough* v. *Soloman* is only an authority for this proposition, that if a pawn-broker takes in pledge from A an article which belongs in fact to B, he must return it on demand to B free of the amount advanced. What is his liability if he has already sold the article at the request of A and repaid himself his advance is an entirely different question. [P. 162 Col. 1]

(c) Limitation Act, Arts. 48 and 64—Suit against Bank for sale of Govt. paper, held in trust.

Where the complaint is that the Bank holding Government Paper held it in trust for the plaintiff of which trust it had constructive notice, sold it, and parted with the sale proceeds.

Held, assuming everything against the Bank, it would appear that the suit is either one for conversion (Art. 48), or for money had and received to the plaintiff's use (Art 62) [P. 162 C. 1]

(d) Evidence—Witness available not called.

When a fact can be proved by a witness who can be called and is not called, a party is not entitled to rely on an inference which, however plausible and probable is, not the only possible inference. [P. 162 C. 2]

(e) Trusts Act, Ss. 66 and 67—Suit for conversion against Bank by beneficiary.

The question of notice of the Bank becomes relevant and certainly of the very greatest importance in a suit, not to recover the trust property kept with the Bank but for damages for conversion or for money had and received to the plaintiff's use; for the trustees would not be bound to keep the trust property, with the Bank and even if the Bank had notice of the trust, it would not be liable if the trust property were afterwards misappropriated unless it could be proved that the Bank was privy to the breach of trust. [P. 162 C. 1]

(f) Executors-Trusts-Duty of Bank.

If a Bank was bound to take notice of the number of accounts an executor opened and the length of time such account was continued, so that in self protection it would be necessary to send for him and ask him to explain his dealings with the estate in his charge as executor, it would result in Banks refusing to have any dealings with constituents as executors. The liability of a Bank to honour a customer's cheque appears to be absolute unless it can be shown that the Bank is privy to an intent to misapply trust funds. On the face of it the Bank is entitled to advance money to an executor on securities deposited with them by him as executor, and there would be nothing wrong in their acting on his instructions as executor to sell the securities and credit the loan account with a sum sufficient to square it. If the Bank had

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A minor legatee takes a vested interest in the legacy and though under the will it is not payable until he became twenty-one he is entitled in law to demand it when he attains the age of majority. [P. 160 Col. 1]

(b) Contract Act—Ss. 173, and 166—Pawn of another's property.

The case of *Attenborough* v. *Soloman* is only an authority for this proposition, that if a pawn-broker takes in pledge from A an article which belongs in fact to B, he must return it on demand to B free of the amount advanced. What is his liability if he has already sold the article at the request of A and repaid himself his advance is an entirely different question. [P. 162 Col. 1]

(c) Limitation Act, Arts. 48 and 64—Suit against Bank for sale of Govt. paper, held in trust.

Where the complaint is that the Bank holding Government Paper held it in trust for the plaintiff of which trust it had constructive notice, sold it, and parted with the sale proceeds.

Held, assuming everything against the Bank, it would appear that the suit is either one for conversion (Art. 48), or for money had and received to the plaintiff's use (Art 62) [P. 162 C. 1]

(d) Evidence—Witness available not called.

When a fact can be proved by a witness who can be called and is not called, a party is not entitled to rely on an inference which, however plausible and probable is, not the only possible inference. [P. 162 C. 2]

(e) Trusts Act, Ss. 66 and 67—Suit for conversion against Bank by beneficiary.

The question of notice of the Bank becomes relevant and certainly of the very greatest importance in a suit, not to recover the trust property kept with the Bank but for damages for conversion or for money had and received to the plaintiff's use; for the trustees would not be bound to keep the trust property, with the Bank and even if the Bank had notice of the trust, it would not be liable if the trust property were afterwards misappropriated unless it could be proved that the Bank was privy to the breach of trust. [P. 162 C. 1]

(f) Executors-Trusts-Duty of Bank.

If a Bank was bound to take notice of the number of accounts an executor opened and the length of time such account was continued, so that in self protection it would be necessary to send for him and ask him to explain his dealings with the estate in his charge as executor, it would result in Banks refusing to have any dealings with constituents as executors. The liability of a Bank to honour a customer's cheque appears to be absolute unless it can be shown that the Bank is privy to an intent to misapply trust funds. On the face of it the Bank is entitled to advance money to an executor on securities deposited with them by him as executor, and there would be nothing wrong in their acting on his instructions as executor to sell the securities and credit the loan account with a sum sufficient to square it. If the Bank had

advanced money personally to executor and repaid themselves by the sale proceeds of Government Paper lodged with it by the executor, or if the advance had been made to the executor, as executor and was repaid by the sale of Government Paper which the Bank knew was *held* by him in trust, then it might be said that the Bank was privy to the breach which was intended to be committed.

(g) Limitation Act Art. 134—Purchase does not include mortgage.

A purchase would not include a mortgage.

3 I. A. 148, 11 Bom. L. R. 1234 Foll.

Strangman, Inverarity, Coltman and Campbell,—for the Appellant.

Desai and Taraporevalla,—for the Respondent.

Macleod C. J.--One Khakibhai Hemani, a Khoja Mahomedan of Bombay died on or about the 4th October 1900 leaving a will dated the 26th September 1900. He appointed as executors and trustees thereof Currimbhoy Ebrahim, Labai his wife, and Joosab Peerbhoy his son-in-law. Probate was granted to Labai and Joosab on the 4th December 1901. By clause 4, the testator directed that Rs. 50,000 should be expended in such manner as his trustees might consider proper for such purposes as might perpetuate his name.

By clause 5 he bequeathed various legacies.

To Fazulbhai, the son of his daughter Fatmabai, he bequeathed Rs. 50,000 to be invested in Government Promissory Notes. Port Trust Bonds or other Government Security Debentures. The income was to be accumulated for Fazalbhai's benefit, the principal and income to be made over to him on his attaining the age of twenty-one; If Fazalbhai died before attaining the age of twenty one the moneys were to be handed over to his issue, but if there was no issue then over.

There were five other legacies of Rs. 30,000 each, Rs. 5,000 were to be set apart for the expenses of a Dharamsála, two houses were given to Labai on certain conditions, and the residue of the estate was also left to her.

On the 30th January 1902, the executor and executrix deposited with the Bank of Bombay Government Promissory Notes of the face value of Rs. 52,000, which were credided to their account No. 1 as executor and executrix of Khakibhai Hemani. On the same day account No. 2 was opened with a deposit of Government Promissory Notes of the face value of Rs. 32,000 and thereafter seven other accounts were opened with deposits of Government Promissory Notes of the face value of Rs. 31,000. 31,200, 31,200, 31,200 31,200, 15,000 and 4,000 respectively. With each deposit account there was a corresponding current account to which the interest was credited. We are only concerned with the deposit account No. 1 and the current account No. 1, but the other accounts have been exhibited so that the Court might be asked to draw the inferenee that Labai and Joosab opened all these accounts in order to carry out the wishes of the testator with regard to the payment of the legacies.

On the 1st of February 1902, Labai and Joosab executed a general power of attorney in favour of the Bank.

On the 24th July 1902, probate of the will was registered with the Bank. In the register under the heading "Executors and Administrators" there is the following entry. "Labai the widow and Joosab Peerbhai the son-in-law of the deceased, two of the executors named in the will reserving the right of Currimbhoy Ebrahim the other executor named in the said will to come in and apply for probate."

In 1905, Labai died and all the various accounts were transferred to the name of Joosab as surviving executor, while he executed a power of attorney in favour of the Bank in the same capacity. Until May 1911, the interest on the Notes for Rs. 52 000 was re-invested so that the total of the Notes to credit of account No. 1 was Rs 67,000.

On 17th May, Joosab appears to have asked for a loan of Rs. 45,000 on the security of Notes for Rs.52,000 out of account No. 1. Accordingly a loan account to Joosab as surviving executor was opened while Notes for Rs. 52,000 were debited to account No 1 and credited to "advance account to Joosab Peerbhoy as surviving executor."

On the 16th August 1912, Joosab wrote to the Bank a letter (Exh. Q) which has been put in in a mutilated condition, but it is a request to sell the notes for Rs. 52,000 against which Rs. 45,000 had been advanced at the bazzar rate.

Accordingly, on the 17th August 1912 the Bank sold the Notes, closed the loan account and transferred the balance of Rs. 45I8--10—7 to No. 1 current account By. the 30th January 1913 the remaining notes for Rs. 15, 000 in account No. 1 had been sold and the proceeds credited to the current account. That account was drawn upon by Joosab until on the 3rd November 1913 it was exhausted. Fazalbhai attained majority (eighteen years) on the 25th October 1913. He filed this suit on 18th October 1919 against the Bank praying that the Bank might be ordered to make good to him the sale proceeds of the Government Paper standing to the credit of the said account No 1 together with interest. He submitted that the Bank had notice, actual or constructive, of the trust on which the Government Promissory Notes and moneys which stood from time to time to the credit of the account No. 1 were held by Joosab. As the loan account was commenced in 1911 after a laps of nine years from the date of the deposit, the Bank must have known that the loan was required by Joosab for his own purposes. That from the laps of time and other circumstances the Bank was put on inquiry which would have disclosed to them the fact that Joosab was repaying to the Bank moneys which he drew for himself out of the trust fund, and that the Bank had either knowledge or reasonable suspicion that the said Promissory Notes were being applied by Joosab in breach of trust and that the Bank derived benefit from the breach of trust.

The defendant Bank in its written statement denied that the securities for Rs. 52,000 were deposited in trust for the plaintiff or that they represented the investment of his legacy. The current account was opened on the depositor's agreeing to comply with the Bank rules and by rule 14 of which they had notice, the Bank did not recognise trusts. If the Bank had had notice that the securities were held in trust the Bank would not have received the same. The Bank denied that it had notice of the actual trust and submitted that in law it had no constructive notice. It denied that it must have been put on inquiry for the reasons alleged by the plaintiff and it was under no obligation to inquire and see to the application of the said moneys by Joosab. It had no knowledge or reasonable suspicion that the Promissory Notes were being applied as alleged, and it derived no benefit from the alleged breach of trust. Lastly, it was submitted that the claim was barred by limitation.

On these pleadings the parties went to trial. Out of the many issues raised the most important were :—

(1) Whether the Government Promissory Notes of Rs. 50,000 (*sic*) represented the investment of the plaintiff's legacy and were deposited in trust for the plaintiff ?

(2) Whether the Bank had actual or constructive notice of the alleged trust ?

(5) Whether the loan for Rs. 45,000 was required and taken by Joosab for his own purposes and not for the purposes of the legacy or the estate ?

(8) Whether there were sufficient circumstances to put the Bank on inquiry ?

(9) If so, whether such inquiry would have disclosed that Joosab was as alleged repaying to the Bank money which he drew for himself out of the trust funds and in breach of trust ?

(10) Whether the Bank were guilty of such negligence as to impute to them constructive notice of the alleged breach of trust and misapplication?

(13) Whether any personal benefit to the defendant Bank was designed or stipulated for when such moneys were taken by Joosab ?

(14) Whether the claim was barred by limitation ?

The evidence called by the plaintiff to prove his claim was extremely meagre.

His father proved his age.

The plaintiff himself said :

"I am now aware that my grand-

father left a legacy. I know Joosab Peerbhoy. He was my mother's sister's husband. I demanded my legacy from Joosab. He has not given it to me. He led me to understand that he was not in a position to pay. He is more or less an insolvent"

In cross-examination he said ;

"I demanded the legacy in 1917 or 1918, probably at the end of 1917 or in the beginning of 1918. I had no suspicion then that he was not in a position to pay. About the end of 1918 or beginning of 1919 I came to know he was not in a position to pay."

The rest of the plaintiff's evidence consisted of the various accounts opened with the Bank, certain correspondence, the petition for probate, the probate itself, powers of attorney given to the Bank by Labai and Joosab, and by Joosab, and the Register of Probate in the Bank's Books.

The Bank called an Accountant to prove the rules of the Bank for current accounts. The most important witness in the case would have been Joosab but he was not called. There was no evidence that he was not in a position to pay the legacy except the plaintiff's statement that he had been given to understand by Joosab that it could not be paid. There was no evidence to explain the opening of the various accounts in the Bank, or to show what became of the moneys which were withdrawn, although it may be presumed that Joosab kept accounts as executor. The members of the family must have been perfectly well aware of the contents of Khakibhai's will. The plaintiff took a vested interest in the legacy and though under the will it was not payable until he became twenty-one he was entitled in law to demand it when he attained the age of majority. If Joosab has misappropriated the legacy it is not unfair to assume that the family knew what he was doing. But without putting the necessary facts before the Court, the plaintiff asked the Court to draw every inference against the Bank from the accounts opened by Joosab with the Bank, and so make the Bank liable for the defalcations of his uncle. The learned trial Judge came to the conclusion that Labai and Joosab had divested themselves of their office as executor and executrix and continued to be trustees from 1902. Then no notice was required to be given to the Bank that they had deposited those moneys as trustees. The Bank dealt with Joosab and in dealing with him the Bank took those moneys subject to all the infirmities Joosab had in them. When the Bank made the loan of Rs. 45,000 and took as security the pledge of Government Paper for Rs. 52,000 the Bank was taking such ownership as Joosab could give. As he had no power to deal with the Government Paper, the plaintiff was entitled to recover it. But with regard to the Government Paper for Rs. 15,000 the learned Judge thought that as it was not pledged, the Bank was not aware that Joosab was committing a breach of trust and so was not responsible for it. The inconsistency in the argument is obvious, for if the Bank had notice that the 52,000 Government Paper was held in trust, they also had notice that the accretions thereto were held in trust, but the whole basis of the judgment rests on the loan of Rs. 45,000 to Joosab. If he had asked the Bank to sell the Government Paper and pay in the proceeds into current account No. 1 and even if he had then withdrawn the proceeds it would appear that the Bank would not have been held liable.

The very important question of limitation has hardly been considered. No doubt if Art. 120 of the Second Schedule of the Indian Limitation Act was applicable, the suit was filed in time but no reason is given for the decision that Art. 120 was applicable.

Without any finding on the issues a decree was passed for the plaintiff for 3½ per cent. Government Paper for Rs. 52,000 face value with interest at 3½ per cent, from the date of deposit with six monthly rests. The learned Judge evidently thought that the case of *Attenborough v. Solomon* (1) was absolutely on all fours with the present case and failed to realise that the two cases were entirly different. The result is that we have no findings on some of the most import-

(1) 1913 A. C. 76.

tant issues.

In *Attenborough* v. *Solomon*(1) a testator by his will after appointing two persons executors and trustees and giving pecuniary legacies gave his residuary estate to his trustees upon trust for sale and distribution as therein mentioned. Fourteen years after the testators's death one of the executors without the knowledge of his co-executor pledged certain plate forming part of the residuary estate with a firm of pawn-brokers who had no notice that he was not the absolute owner thereof, and misapplied the money so raised. All the debts and legacies had been paid and the residuary account had been passed within one year of the testator's death, but the residuary estate had not been completely distributed. On the death of the pledgor the transaction was discovered and an action was brought by the co-executor and a new trustee against the pawn-broker to recover the pledge. It was held that from the residuary account, Mr. J. B. Solomon, the surviving executor, regarded the debts as having been all paid and the estate as ready to be held upon the trusts of the will which affected it in the hands of the trustees. The true inference from the facts was that the executors considered that they had done all that was due from them as executors and were content when the residuary account was passed that the dispositions of the will should take effect. The residuary estate including the chattels in question thus became vested in them as trustees. Their title to the chattels pledged as executors had ceased to exist. By the contract of pawn the property remained in the bailor, and the bailee simply took at the utmost a right to the possession dependent on the validity of the title of the bailee. Then the pawn-brokers got no title to the plate, since the executor when he bailed it over had no property to pass as executor, and they got no contractual rights which could prevail over the trustees who were the true owners and in a position to maintain the action which under the old form would have been an action of trover or detinue to recover possession of the chattel free from the restrictions on the right to reclaim possession which were sought to be imposed by the contract petween the pledging executor and the pawn-brokers.

If Joosab holding Government Paper as one of several trustees had pledged it with the Bank in his own name to secure an advance to him personally and the Bank still retained the Paper, then the property in the Paper remaining with the trustees, they might be able to recover it from the Bank free of the advance, but if the Bank had sold the Paper to repay the advance, then the question of notice of the trust would become of the utmost importance.

By S. 63 of the Indian Trusts Act "where trust-property comes into the hands of a third person inconsistently with the trust, the beneficiary may require him to admit formally, or may institute a suit for a declaration, that the property is comprised in the trust. Where the trustee has disposed of trust-property and the money or other property which he has received therefor can be traced in his hands, or the hands of his legal representative or legatee, the beneficiary has, in respect thereof, rights as nearly as may be the same as his rights in respact of the original trust property."

By S. 64 "nothing in S 63 entitles the beneficiary to any right in respect of property in the hands of (*a*) a transferee in good faith for consideration without having notice of the trust, either when the purchase-money was paid, or when the conveyance was executed, or (*b*) a transferee for consideration from such a transferee." These sections would only apply if the Government Paper was transferred to the Bank, but there is no evidence with regard to this, and from the fact that Joosab asked the Bank to sell, it may be inferred that the Paper remained in his name. If there was merely a pledge of the Government paper then if Joosab had no title to it as executor, and the Bank in good faith delivered it back to him, or according to his directions, under S 166 of the Indian Contract Act, the Bank would not be responsible to the owners in respect of such delivery.

The case of *Attenborough* v. *Solomon* (1) is only an authority for this proposition, that if a pawn-broker takes in pledge from A an article which belongs in fact to B, he must return it on demand to B free of the amount advanced. What is his liability if he has already sold the article at the request of A and repaid himself his advance is an entirely different question. This brings me to the question what is the plaintiff's cause of action and on the answer depends the period of limitation for the plaintiff's suit. Assuming everything against the Bank, it would appear that the suit is either one for conversi on (Art. 48), or for money had and received to the plaintiff's use (Art. 62).

The complaint is that the Bank holding Government Paper for Rs. 52,000 held in trust for the plaintiff of which trust it had constructive notice, sold it, and parted with the sale proceeds. In either case the period of limitation would be three years, and the plaintiff's suit is barred, for he made no attempt to prove that time did not begin to run against him until within three years of the suit. But apart from the question of limitation there are many other difficulties in the way of the plaintiff.

The Court was asked to infer that Labai and Joosab had assented to all the legacies mentioned in the will when they opened the various accounts with deposits of Government Paper approximating to the amounts of the legacies' Against this the Advocate General argued that under clause 4 of the will the executors were to spend Rs. 50,000 in such manner as they might think in perpetuating the name of the testator, and there was nothing to show that the 52,000 Government Paper deposited in account No. 1 was not intended to meet that request of the testator. It may be very fairly argued on the other side that the probabilities are vastly in favour of their cotention that account No. 1 was opened for the appropriation of the plaintiff's legacy, but the person who could have set all doubts at rest was Joosab, and when a fact can be proved by a witness who can be called and is not called, is the plaintiff entitled to rely on an inference which however plausible and probable is not the only possible inference? If Joosab were dead it would be a different matter, and it came as a surprise to me when I ascertained towards the end of the argument that he was still alive, as it never occurred to me, if he was alive, that his evidence would not be on the record. Strictly speaking if the Government Paper was held in trust, the trustee or trustees would still be the true owners and the proper persons to sue for its recovery.

However that may be, it is necessary to deal with the case on the footing that Labai and Joosab deposited the Rs. 52,000 Government Paper to meet the plaintiff's legacy and so became trustees thereof. The learned Judge seemed to think that if they were trustees the question of notice to the Bank became irrelevant. But it is certainly of the very greatest importance in a suit, not to recover the trust property, but for damages for conversion or for money had and received to the plaintiff's use. For the trustees would not be bound to keep the trust property with the Bank and even if the Bank had notice of the trust, it would not be liable if the trust property were afterwards misappropriated unless it could be proved that the Bank was privy to the breach of trust.

Now it cannot be said that assuming there was a trust the Bank had actual notice of it. It accepted the various accounts in the names of Labai and Joosab as executor and executrix, and as such Labai and Joosab had absolute power to deal with the accounts and the Bank would not be liable if they dealt with them against their duties as executor and executrix. But it is said the Bank was put on inquiry. The opening of nine accounts by the executor and executrix was most unusual. the Bank should have called for a copy of the will, and then it would have ascertained that various legacies had been bequeathed therein, that these various accounts must have bee opened in respect of those legacies and consequently Labai and Joosab were no longer executor and executrix and had become trustees, so that the Bank would become liable for any wrong dealing by them with tho e

accounts. That even if the Bank was not put on inquiry at once, the facts that the accounts were continued, that each deposit investment account had a corresponding current account to which the interest was credited, and that this continued for nine years in any event put the Bank on inquiry to ascertain the reason for their client's conduct. No authority for such an extension of the doctrine of constructive notice has been cited, and it seems to me that if a Bank was bound to take notice of the number of accounts an executor opened and the length of time such account was continued, so that in self protection it would be necessary to send for him and ask him to explain his dealings with the estate in his charge as executor, it would result in Bank's refusing to have any dealings with constituents as executors. But with regard to the advance of Rs. 45,000 it has been argued that at any rate, considering that Rs.52,000 Government Paper had been in deposit with it for nine years with the interest being accumulated and re-invested, the Bank should have asked Joosab why he wanted the advance; he would then have said the account was in his name as executor and he was entitled to deal with it as he pleased. Even if the Bank had not been satisfied and had called for a copy of the will, it could not have forced Joosab to say that account No. 1 was appropriated to the plaintiff's legacy. At the same time I know of no authority which would justify such inquisitorial proceedings by a Bank.

The liability of a Bank to honour a customer's cheque appears to be absolute unless it can be shown that the Bank is privy to an intent to misapply trust funds.

In *Gray* v. *Johnstone* (2) a banker had acted as such to T. J., who carried on business with his son-in-law under the style of J and M, but his accounts with them were kept in the name of T. J; T. J. died leaving a will by which he bequeathed all his property to the use of his wife for life and after her death to be divided amongst their children as she might think fit. Part of this property consisted of Life Policies which were put in the hands of the banker together with probate of the will. They recovered the amount of the Policies, made up their accounts and after deducting their unsettled claim declared a certain sum to remain due from themselves to the executrix. She continued her husband's business with his late partner and a new account was opened with the bankers in the name of the new firm and she as executrix drew a cheque for the amount stated to be due to her and paid it in to her banker to be credited to the firm, and it was so credited and paid out by means of cheques drawn by the new firm. It was held that these circumstances were not in themselves sufficient to show that a breach of trust had been committed and that the banker knew of the intention to commit the breach so as to render them liable on a suit by the children of the testator to replac the money. Lord Cairns said at p. 11:

"I say that the result of those authorities is clearly this: in order to hold a banker justified in refusing to pay a demand of his customer, the customer being an executor, and drawing a cheque as an executor, there must, in the first place, be some misapplication, some breach of trust, intended by the executor, and there must be in the second place, as was said by Sir John Leach, in the well known case of *Keane* v. *Roberts* (3), proof that the bankers are privy to the intent to make this misapplication of the trust funds. And to that I think I may safely add, that if it be shown that any personal benefit to the bankers themselves is designed or stipulated for that circumstance, above all others, will most readily establish the fact that the bankers are in privity with the breach of trust which is about to be committed."

The learned Judge seems to have thought that the Bank derived personal benefit by repaying the loan account out of the sale proceeds of the Government Paper. On the face of it the Bank was entitled to advance money to Joosab as executor on securities deposited with them by him as executor, and there would be nothing wrong in their acting on his instructions as executor

(2) [1863] L. R. 3 H. L. 1, 11.

(3) [1812] 4 Madd. 332, 357.

to sell the securities and credit the loan account with a sum sufficient to square it. It the Bank had advanced money personally to Joosab and repaid themselves by the sale proceeds of Government Paper lodged with it by Joosab as executor, or it the advance had been made to Joosab as executor and was repaid by the sale of Government Paper which the Bank knew was held by him in trust, then it might be said that the Bank derived personal benefit from the same, and that would certainly go a considerable way to establish the fact that the Bank was privy with the breach which was intended to be committed. But in my opinion, the plaintiff has not proved any of the facts which he was bound to prove before he could succeed against the Bank; Joosab, the person alleged to be guilty of the actual breach of trust, ought to have been a defendant in the suit, or at least, if he was not made a party, he should have been called as a witness. We are asked to infer, though we do not know for certain, that the Bank held the plaintiff's legacy. No attempt has been made to prove that Joosab held as trustee the plaintiff's legacy or that if so, the trust property could not be followed. It has not even been proved that Joosab cannot pay the legacy, or that even if he cannot pay now, he could not have paid it in 1913. It is not sufficient for the plaintiff to say "Joosab led me to understand that he could not pay; he is more or less insolvent," in order to found a claim against the Bank six years after the legacy was payable.

On the issues I have set out above I would hold as follows:—

1 There are facts from which the Court might infer that the Notes for Rs. 52,000 represented the investment of the plaintiff's legacy, but the witness who could have proved this positively has not been called, and such being the case the Court is not bound to draw the inference suggested by the plaintiff.

2. The Bank has neither actual nor constructive notice of any trust, if there was a trust.

5. No answer in the absence of Joosab's evidence.

8. In the negative.

9. Unnecessary.

10. In the negative.

13. In the negative.

14. In the affirmative.

I think the appeal should be allowed and the plaintiff's suit dismissed with costs thoughout.

SHAH J.—I entirely agree. I desire to add a few words with reference to two points.

First, as regards limitation, it is clear that the point was not properly argued by the parties before the trial Court. Before us the appellants have relied upon Articles 48 and 62 and the plaintiff has relied upon Art. 133 as being applicable to the facts of the case. Article 120, which has been held by the trial Court to apply, has not been seriously relied upon by the plaintiff's counsel. Article 133 clearly has no application, as the suit is against the Bank holding the Government Paper as security for the loan to Joosab as the surviving executor. It is not suggested that the Bank bought the Government Paper and in the course of the argument it was admitted that the Bank did not buy the Government Paper in question. On the strength of certain decisions bearing on Art. 134 it has been argued by Mr. Desai that a purchase would include a mortgage and that the article would apply to the Bank as pledgees from a trustee. The contention is opposed to the decision in *Abhiram Goswami* v. *Shyana Charan Nandi* (1) and there was no change in the wording of Art. 133 as there was in Art. 134 when the Indian Limitation Act of 1908 was passed, to indicate any change in the scope of Art. 133. It seems to me that in view of the relief claimed by the plaintiff Art. 48 would apply. But if it is to be treated as a suit for money received by the defendants as sale proceeds and properly payable to the plaintiff Art. 62 would apply. In either case the claim is clearly time-barred. It was argued with reference to Art. 48 that there was nothing to show that the plaintiff had the necessary knowledge more than three years prior to the date of the suit. The defendants pleaded limitation and it was for the plaintiff

(1) (1909) L. R. 36 I. A. 148-11 Bom. L. R. 1234.

to prove the facts which would bring the claim within time. The plaintiff has not stated anywhere that he had not the necessary knowledge as to the possession of the property. Having regard to the circumstances of the case it is quite a fair inference, in the absence of any statement to the contrary, that the plaintiff knew on his attaining majority that the Government Paper had been with the Bank and had been sold by the Bank at the instance of Joosab. It is significant that the learned counsel for the plaintiff has not asked for any opportunity now to show that on the footing of Art. 48 being applicable, the plaintiff acquired the necessary knowledge within three years of the suit, on the ground that for want of a specific plea as to Art. 48 he omitted to adduce the necessary evidence on that point.

The second point relates to the merits of the case. Mr. Desai relied upon the following observations of Lord Westbury in *Gray* v. *Johnstone* (2):-

"But then it has been very well settled that if an executor or a trustee who is indebted to a banker, or to another person, having the legal custody of the assets of a trust estate, applies a portion of them in the payment of his own debt to the individual having that custody, the individual receiving that debt has at once not only abundant proof of the breach of trust, but participates in it for his own personal benefit."

It has been urged that these observations apply to the facts of this case. In the first place there is nothing on the record of this case to show that Joosab applied the assets of the trust estate in the payment of his own debt at the time. The loan account of Joosab was in his capacity as an executor: and the account No. 1, from which the security was taken, was also in his name in that capacity. In the absence of the accounts of the estate of the deceased Khakibhai kept, or rather presumed to have been kept, by the executors and in the absence of any evidence of the surviving executor, it could not be assumed that he applied a part of the trust estate in the payment of his own debt. Secondly, there is nothing to show that the Bank had actual notice of the trust or of the misapplication of the funds. Even assuming in favour of the plaintiff that the Bank knew or ought to have known that the surviving executor was a trustee and that account No. 1 related to a trust estate, there is nothing in the nature of his dealings with the Bank to show that he was using the trust assets for any improper purpose at the time. It is difficult to understand on what principle the Bank could be expected to know the dealings of Joosab with the estate of the deceased and to realise that the loan account in his name as an executor was his own personal debt. Even now we have no means of ascertaining it: and it is hardly possible to accept the contention that the Bank must be deemed to have constructive notice of what is not clear even on the present record. I do not think that the observations in *Gray* v. *Johnstone* (2) can help the plaintiff in this case. The plain position, so far as the Bank is concerned, seems to be that Joosab dealt with them as an executor throughout and that they had no means of knowing and in view of the nature of the dealings with them were under no obligation to inquire, as to whether Joosab was acting properly as an executor or a trustee at the time he withdrew the trust funds from the Bank in his capacity as an executor. The subsequent dealings by Joosab with the trust fund after he withdrew it from the Bank, however improper, cannot affect the Bank in any way. *Appeal allowed.*

1923 BOMBAY 163

SHAH AND CRUMP. J.J.

Gopal Bhimji Avte—Original Plaintiff—Appellant.

v.

Manaji Ganuji Padwal and others—Plaintiff and Defendants Respondents.

S. A. No. 856 of 1920 D. 9th October 1922 against the decision in Appeal No. 328 of 1919.

Evidence Act S. 108 Fact of death-Date of death-Burden of proof.

As regards the presumption under section 108, it seems that it relates to a presumption as to the fact of death, and has no reference whatever to the date of the death.[P. 165 C. 1]

That fact must be proved like any other fact by the party who is interested in

establishing that he died on or before a particular date. The onus of proving that the death took place on or before a particular date would lie upon that party who has to establish it in order to succeed. [*P*, *165 C*. *2*]

There are certain observations in *Jayawant v. Ramchandra 1916 40 B. 239.* at p. 247 which may appear to show at first sight that the presumption was not confined merely to the fact of death, but extended to the date of the death after the expiry of the 7 years. It seems howver, that the observations in that case must be read with reference to the facts of that case (English Law on the point discussed.) [*P*. *165 C*. *2*]

G. S. Rao—for the Appellant.

K. V. Joshi—for the Respondent.

SHAH J:—The facts relating to this second Appeal are these: One Rakhma was the owner of the property in suit. He is said to have disappeared about the year 1898 or 1899 and has not been heard of since then. In 1908 the step-grandmother of Rakhma sold the property to one Ramji, who in his turn sold it in 1914 to the present plaintiff No 1. The plaintiffs filed this suit against the defendants alleging that they were dispossessed by them sometime after they had obtained possession of the land, and that though they had succeeded in obtaining possession under the decree in a suit under section 9 of the Specific Relief Act, as that decree was ultimately reversed, the defendants got back the possession in April 1917. The defendant 1 appeared. The other defendants did not appear. The contention raised by him was that the property belonged really to his nephew, Rakhma; that he was last heard of in 1906; that the property had come into his possession from Rakhma; that Ahilau, the step-grandmother of Rakhma who had sold the property to Ramji had no right to do so, and that the claim was barred by limitation. Various issues were raised, and the trial Court found that the plaintiff had purchased the land from Ramji, that Ramji had purchased from Ahilau, and that Ahilau was competent to convey the property to Ramji in 1908. In the result a decree was passed against defendant No. 1 for possession of the property.

The defendant No. 1 appealed, and the appellate Court held that it was not shown by the plaintiff that Rakhma was dead before the year 1908, that no presumption under section 108 of the Evidence Act could be made in favour of the plaintiff that Rakhma died at the end of the first 7 years after he was last heard of, but that he must prove the date of his death in order to eatablish affirmatively that at the date of the conveyance by Ahilau in favour of Ramji in 1908 Rakhma was dead. In declining to draw the presumption in favour of the death of Rakhma having taken place at the end of the seven years after Rakhma was last heard of, the lower appellate Court relied upon certain decisions; and as there was no other proof of Rakhma having died before 1908 the lower appellate Court reversed the decree and dismissed the plaintiff's suit.

The plaintiff No. 1 has now appealed to this Court; it is urged on his behalf that the lower appellate Court has not properly applied the provisions of section 108 of the Evidence Act, and has erred in not drawing the presumption that Rakhma died 7 years after he was last heard of i. e; sometime before 1908, and that it ought to have thrown upon the defendants the burden of proving that he was alive at that date. In support of this contention Diwan Bahadur Rao has relied upon the rule of English law as stated in Halsbury's Laws of England Vol. XIII p. 500, Taylor on Evidence page 192, 10th Ed. and also upon certain English decisions, of which *In re Phenc's Trust*: (1) may be mentioned as a type. He also relies upon the decision in *Jayawant Jivanrao* v. *Ramchandra Narayan.* (2).

It is urged on the other hand, that the lower appellate Court was wrong in assuming that Rakhma was last heard of in 1898 or thereabout, and that there was evidence to show that he was last heard of somewhere in 1905. It is further urged that the decision in *Jayawant* v. *Ramchandra* (2) does not conflict with the other Indian decisions which are all in favour of the view that section 108 of the evidence Act enables a Court to

(1) [1870] L. R. 5 Ch. p. 139.
(2) [1916] 40 Bom. 239 18 Bom. L. R. 14-33 I. C. 484.

presume that a particular man who has not been heard of for more than 7 years is dead unless the contrary is proved, that it justifies no presumption at all as to the date of his death. Reliance is placed on behalf of the respondents on the decisions in *Narki* v. *Lal Sahu*; (3) *Muhammad Sharif* v. *Bande Ali* (4) *Narayan* v. *Shriniwas*(5) *Jeshankar* v. *Bai Diwali*. (6)

It may be mentioned at once that the trial Court found as a fact on a consideration of the evidence in the case that Rakhma disappeared in or about 1898, and has not been heard of since then by any of the persons who would hear of him if he were alive. The appellate Court has accepted that fact. It says that according to the plaintiffs he disappeared about 20 years ago and was unheard of during the interval by his relatives. It is not open to the respondents now to contend that he was last heard of somewhere in 1905 as it is entirely a matter of evidence. The contentions of the parties must be considered on the footing that Rakhma was last heard of in 1898 or thereabout. I may also mention that Ahilau died about the year 1915, though the exact date of her death has not been stated, and is not material.

As regards the presumption under section 108 of the Evidence Act, it seems to me that it relates to a presumption as to the fact of death, and has no reference whatever to the date of the death. When the present suit was filed in 1917, it was open to the Court on proof of the fact that Rakhma had not been heard of for more than 7 years, to presume, unless the contrary was shown by the other side, that Rakhma was dead. But section 108 does not justify any presumption as to the date of that person's death That fact must be proved like any other fact by the party who is interested in establishing that he died on or before a particular date. The onus of proving that the death took place on or before a particular date would lie upon that party who has to establish it in order to succeed. That is the view which is taken in all the Indian decisions upon which reliance is placed on behalf of the respondents. The decision in *Jayawant* v. *Ramchandra* (2) does not help the appellant. It is there pointed out that the plaintiff reversioner, who had filed a suit long after the expiry of the 7 years, after the person concerned was last heard of, was required to establish affirmatively that the estate had fallen into possession within 12 years prior to the date of the suit. If any presumption had been made in that case that Rangubai was dead 7 years after the expiry of her having been last heard of, she would have been presumed to have been dead more than 12 years before the suit unless the plaintiff could establish that she was alive upto sometime within twelve years prior to the suit: and in any case the burden of proving that he had filed his suit within 12 years from the date of the widow's death would be upon him. The decision in that case, therefore, does not in any way conflict with the view taken in *Muhammad Sharif* v. *Bande Ali* (4) *Narayan* v. *Shriniwas* (5) and *Jeshankar* v. *Bai Diwali* (6). It is true that there are certain observations in *Jayawant* v. *Ramchandra* (2) at p. 247 which may appear to show at first sight that the presumption was not confined merely to the fact of death, but extended to the date of the death after the expiry of the 7 years. It seems to me, however, that the observations in that case which have been relied upon by Diwan Bahadur Rao must be read with reference to the facts of that case; and it is pointed out that in holding that the plaintiff had to prove affirmatively that he had brought his suit within 12 years from the actual death of the widow, the decision did not run counter to any Indian decision upon section 108 of the Evidence Act. It was not intended to lay down any rule in conflict with the decisions which were referred to in the course of the arguments in that case; and I may add as a party to that decision that in my opinion it does not lay down any rule which con-

(3) (1910) 37 Cal. 103;—11 C. L. J. 138-14-C. W. N. 341-5 I. C. 709.
(4) (1912) 34 All. 36-8 A.L. J. 34 All; 36 1052—11 I.C. 474.
(5) (1906) 8 Bom. L. R. 226.
(6) (1920) 22 Bom. L. R. 771—57 I. C. 525.

flicts with the other decisions of the Indian Courts.

As regards the English rule which has been referred to in the course of the arguments as justifying a presumption at the end of seven years after the person is last heard of, as to the fact of his death, no decision has been cited by Mr. Rao, in which the material date, at which it was necessary to know whether a particular person was dead or not, fell after the expiry of the period of 7 years. In most of the decisions cited by the learned pleader, and in some others which I have seen, the material date happened to be covered by the period of seven years and the Courts held that there was no presumption that the death took place either at the beginning or at the end of that period, but that it must be proved affirmatively like any other fact as to when a person died during that period. It is quite true that the rule as stated in the texts referred to apparently lends support to the contention of the appellant to a certain extent that after the expiry of 7 years the presumption should be made in favour of the death. If that presumption is made in this particular case, Rakhma must be presumed to have been dead before 1908, unless the contrary is established by the defendants. In the absene, however, of any express decision, I am not clear that even according to the English rule as to the burden of proof on this point, apart from any statutory provision, as for example as regards the offence of bigamy, on the facts of the present case the Court would assume that Rakhma was dead before 1908. If the observations in *In re Phene's Trusts* and in *Nepean* v. *Doe d. Knight* (7) are read without relation to the facts of the case, they may apparently support the contention ; but in both these cases, as in several other cases, the material date was covered by the period of seven years, and, therefore, they do not necessarily help the appellant in establishing that the presumption should be made as to the date of Rakhma's death as suggested on his behalf.

As regards the Indian decisions I have already stated that they are uniformly against the appellant's contention, and even the decision in *Jayawant* v. *Ramchandra* (2) does not help him. The decision in *Moola Cassim* v. *Moola Abdul Rahim* (8) does not appear to me to be decisive of the present question having regard to the facts of the case though so far as it goes, it is consistent with the view taken by the Indian Courts.

Assuming that the English rule on this point would support the appellant's contention having regard to the wording of section 108, as also to the current of Indian decisions, I am statisfied that in the present case the only presumption that the plaintiff could invite the Court to make in his favour is that Rakhma was dead. It is for him to establish his title, and for that purpose it is essential for him to establish that before 1908 Rakhma was dead, and that the grandmother Ahilau was entitled to sell the property as the heir of Rakhma at that date. There is no evidence on that point, and I do not think that the appellant could ask the Court to presume under section 108 that because the period of seven years had expired before 1908, Rakhma could be presumed to have been dead by that time. The fact must be proved by evidence; and as the plaintiff has not adduced any evidence on the point, it seems to me that he must he held to have failed to establish his title derived through Ahilau. The lower appellate Court was right in declining to presume that Rakhma was dead before 1908. I would, therefore, dismiss the appeal and confirm the decree of the lower appellate Court with costs.

Crump J.—The facts of this case as found by the Courts below are shortly as follows.—

The property in suit belonged to one Rakhma. This Rakhma disappeared twenty years before the filing of the suit (December 5th 1917). In 1908 Ahilau, the next heir to Rakhma, sold the property to Ramji-Ramji in turn sold it to plaintiff-Ahilau was in possession in 1908-Defendants are now in possession, admittedly without title. Ahilau died four years before the suit.

The question is whether Ahilau

(7) [1837] 11 M. & W. p. 894.

(8) [1904) 32 I. A. 177.

could give a good title, and that depends on whether Rakhma predeceased Ahilau. I put the question in that form having regard to the possible applicability of the principle contained in section 43 of the Transfer of Property Act The Courts have plainly negatived the contention that the entry in the Records of Rights in 1905 establishes that Rakhma was then alive. It has been pointed out that section 135 J. of the Land Revenue Code has no application and in any case there are no grounds for questioning this finding of fact.

The case thus presented turns entirely on the point whether the burden of proof that Rakhama was dead in 1908 lies upon plaintiff or upon defendant. Plaintiff sues in ejectment and must make out his title. Therefore the burden is on him, But here we have to consider the special rules contained in sections 107 and 108 of the Indian Evidence Act where it is shown that if a man was alive within 30 years the burden of proving his death lies on the person who affirms it. Therefore as Rakhama was admittedly alive within 20 years of this date; the burden of proving that he is dead, lies on plaintiff. That is the effect of section 107. The proviso to this rule is contained in section 108 which runs as follows " Provided that when the question is whether a man is alive or dead and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive the burden of proving that he is alive is shifted to the person who affirms it."

If these words are read apart from any preconceived notions of what the law is, or should be, the meaning is plain and it is that when the question before the Court is whether the man is alive or dead at the present time and it is proved that he has not been heard of for seven years before the suit by those who would naturally have heard of him if he had been alive the burden of proving that he is alive at the present time is shifted to the person who affirms it. The rule as to the burden of proof operates only when the question arises that is to say, at the date of the suit. The result in the present suit would be that the burden of proving that Rakhma was dead at the date of the suit would lie upon the defendants. Therefore in the absence of evidence, the Court would hold that Rakhma was dead at that date. This result does not assist in any way the determination of the question whether Rakhama predeceased Ahilau who died four years before that date. This is the reasoning of the lower appellate Court, and it is supported by authority apart from the apparent meaning of the section itself. Assuming that this is the correct view, the result is that section 108 is inapplicable and the question must be considered apart from it. In that case there is no special rule in the Indian Evidence Act and the burden of proof would lie on plaintiff though it is proved that Rakhama disappeared 20 years ago; there is another to authorize the presumption that she was dead at the end of the first seven years of that period.

The point has been before this Court more than once. In *Narayan* v. *Shriniwas* (5) the suit was filed in 1903 and the facts were that one Trimbak disappeared in 1868 and one Appa died in 1880. It was necessary to decide whether Trimbak predeceased Appa. Jenkins C. J. comments thus on section 108 of the Evidence Act.

" That section according to its terms does not require that the Court should hold the person dead at the expiration of the seven years therein indicated but merely provides that the burden of proving that he is alive at the time of the suit is shifted to the person who affirms it."

Again in *Jeshankar Rewashankar* V. *Bai Diwali* (6) the matter arose as follows.--One Lallu disappeard in 1903 and in a suit filed in 1915 the question arose whether Lallu was alive or dead in 1913. It was held by Macleod C. J. and Heaton J. that the earliest date at which death could be presumed was the date when the suit was filed.

These decisions are binding on us and were it not for the decision of this Court next cited it would have been unnecessary perhaps to discuss the point at any length. In *Jayawant* V. *Ramchandra* (2) plaintiff sued to redeem and recover possession of

mortgaged property. Plaintiff sued as the reversioner of one Shamrao admittedly the owner of the property. This Shamrao left him surviving a widowed daughter-in-law Rangubai who dealt with the property. It was alleged that the suit was barred by limitation and the burden being on plaintiff it was incumbent on him to prove that his suit which was filed in 1911 was within 12 years of Rangubai's death. In other words plaintiff had to prove that Rangubai was alive in 1899. Rangubai disappeared in 1870, and Scott C. J. appears to have held that there was a presumption that Rangubai was dead in 1877. But it must be remembered that the finding was that the suit was barred, and that the result would have been the same had the presumption been that Rangubai was dead at the date of the suit, for "it lay on the plaintiff to show affirmatively that he brought the suit within 12 years of the death of Rangubai." The presumption that she was dead at the date of the suit is quite consistent with her death more than twelve years before the suit. Upon either view of law plaintiff would have failed. The remarks in question are therefore not authoritative upon the point now before us.

The decisions of the Calcutta High Court are clear upon this point. See *Fani Bhushan Banerji* v. *Surjya Kant Roy* (8) and the Allahabad High Court have adopted the same view in a Full Bench decision (*Muhamma* V. *Bande Ali* (4). In view of this consensus of authorities the law in India must be taken to be settled upon this point. It may be remarked that the decision of the Privy Council in *Mulla Casim* V. *Mulla Abdul* (9) hardly touches the matter. It is clear on the judgment of the original Court and the appellate Court that the finding of fact would have been the same whichever view of section 108 had been adopted, and their Lordships of the Privy Council merely accept that finding.

It has however been argued that in England when a man has disappeared for more than seven years at the date of a suit, a presumption will be made that he was dead at the expiry of the first seven years. If that were so, it would not alone be a sufficient reason for refusing to interpret section 108 of the Indian Evidence Act according to its plain meaning. It will however be seen that the Allahabad High Court in the case already cited have expressed the view that the English law is the same as the law in India upon this point. There is a contrary opinion expressed by the Calcutta High Court in *Narki* v. *Lal Sahu* (3). The leading English case upon the point is in *re-Phene's Trusts* (4). The rule to be discovered from that case is as follows: "The presumption of law relates only to the fact of death and the time of death whenever material must be the subject of distinct proof.' This rule does not differ from section' 108 of the Indian Evidence Act and that is the general rule where no special statutory provision exists such as that contained in section 494 of the Indian Penal Code or in the corresponding English Statute on the offence of bigamy.

The result in the present case must be that there is a presumption that Rakhama was dead at the date of the suit but that the party who wishes the Court to hold that he died before Ahilau must establish the fact by affirmative evidence. In other words we are satisfied that Rakhama is now dead but we do not know when he died.

SHAH AND CRUMP, J.:—After we delivered the judgments in this case on Thursday last Diwan Bahadur Rao has brought to our notice point No 3 in the memorandum of appeal, which should have been mentioned before the judgments had been delivered, but which, for the reasons stated orally by Mr. Rao to us, was not mentioned then. We have considered the point, and we think that there is no sufficient reason to allow the plaintiff a fresh opportunity to prove that which it was his duty to prove in the trial Court by means of such evidence on the point as he could have put before the Court with due diligence. We, therefore, see no reason to remand the case and to allow the plaintiff a further opportunity to adduce evidence on the point.

(8) (1908) 35 Cal 25: 11 C. W. N. 883-5 C. L. J. 649.

) 1906) 33 Cal. 173.

1923 BOMBAY. 169

MACLEOD, C. J. AND SHAH, J.

Jasraj Bastimal—Plaintiff-Applicant.

v.

Sadashiv Mahadev Walekar—Defendant-Opp. Party.

Civ. Extr. Application No. 328 of 1920, D. 1st July 1921, against a decree passed by the Small Cause Court Judge of Poona in Suit No. 2470 of 1918.

Evidence Act S. 115-Minor-Pronote-Misrepresentation.

If it is proved that the defendant represented to the plaintiff that he was a major, and the plaintiff acting on that representation lent money on the promissory note, then the Court is entitled to consider the question whether in a suit on the promissory note the defendant is estopped from pleading his minority. That, of course, would depend upon the evidence and facts of the case.

M. B. Dave—for the Applicant.

B. G. Rao—for the Opponent.

Judgment—The plaintiffs sued to recover the principal and interest due on a promissory note dated the 17th March 1918 for Rs. 784. The defendant's Pleader said that the defendant was a minor, having been born on the 4th January 1899, his mother having been appointed his certificated guardian. The following issues were raised: (1) Whether the defendant was a minor; (2) Whether the promissory note was passed during his minority; (3) If so, can it be enforced. The plaintiff swore that the defendant, when the promissory note was passed, told him that he was 21 or 21½ years old. He was conducting a shop and filed suits in his own name. In cross-examination he said: "The defendant has a mother. I did not inquire if his mother had obtained a certificate. I did not consult his mother for this debt." On that evidence the Judge came to the conclusion that the defendant was a minor at the date of the suit, and that, therefore, the promissory note could not be enforced The question whether the defendant was estopped from raising the defence of minority was considered, and the learned Judge came to the conclusion that the cases cited with regard to transfers of immoveable property by minors representing that they were majors would not apply, but that this case was governed by the cases quoted on pages 418 and 419 of Gour's Hindu Code. Relying on them the Judge held that the Court could not order recovery of the money lent, even on the ground of fraud practised by the minor by misrepresenting that he was a major. It seems doubtful whether the Judge considered the question whether section 115 of the Indian Evidence Act applied, and whether the defendant was estopped from proving the truth that he was a minor.

But it was held in *Dadasaheb* v. *Bai Nahani* (1) that section 115 of the Indian Evidence Act was applicable to the case of a minor and that the defendant having by direct declaration intentionally caused the plaintiff to believe that he was a major, was precluded absolutely from denying the truth of that assertion. No doubt that was a case relating to immoveable property. But the rules of evidence are exactly the same with regard to suits relating to promissory notes. If it is proved that the defendant represented to the plaintiff that he was a major, and the plaintiff acting on that representation lent money on the promissory note, then the Court is entitled to consider the question whether in a suit on the promissory note the defendant is estopped from pleading his minority. That, of course, would depend upon the evidence and facts of the case, so that the decree dismissing the suit must be set aside. The case must go back to the Judge to find (1) whether the defendant represented to the plaintiff at the time the promissory note was executed that he was a major, (2) whether the plaintiff lent money on the promissory nete relying on that represention, and (3) whether the plaintiff had any means of knowing that that representation was false.

We may refer to the case of *Gurushiddeswami* v. *Parawa Dundaya Narendra* (2) in which reference was made to *Dadasaheb* v. *Bai Nahani* (1). We held that as there was evidence that the defendant was not deceived by

(1) [1917] 41 Bom 480-19 Bom. L. R. 561-41 I. C. 180.

(2) [1920] 44 Bom. 175-22 Bom. L. R. 49-55 I. C. 271.

what the plaintiff had told him, the plaintiff was not estopped from pleading minority. It may be deduced from that decision that the Court approved of the decision in *Dadasaheb* v. *Bai Nahani* (1) and that if the defendant had been deceived by what the plaintiff had told him, there would have been an estoppel.

Costs, costs in the cause.

1923 BOMBAY. 170

SHAH, AND CRUMP, JJ.

Yinayak Shivrao Aras, Manager of the temple of Shri Narayan Dev of Ankola (Original Plaintiff) } Appellant.

v.

Atmaram Rayaji Netramali and others —(Original Defendants) Respondents.

S. A. No 616 of 1921 D. 18th September 1922, against the decision of D. J. Kanara in Appeal No 83, of 1920.

(a) Hindu Law–Religious Endowment- -Manager can sue--

Where the plaintiff sued in terms as manager of the temple and also stated in the plaint that the members of his family have been managers of the said temple from times immemorial,

Held, plaintiff could sue to enforce mortgage bonds in favour of temple though the plaintiff did put forward a certain claim against the temple; that, however, was a matter which was foreign to the scope of the suit, and was really outside the controversy between the plaintiff as representing the temple and the defendants who had to satisfy the claim under the mortgages. [P 171 C 1]

(b) Evidence Act, S. 65--Secondary evidence--

Where a certified copy was produced without any objection in the trial Court of which the original was once with the opponent who probably did not take it from another proceeding. [P 171 C 2]

Held the co-deft. of the opponent could not in appeal object to the certified copy.

Nilkant Atmaram—for the Appellant.

Murdeshwar–for the Respondent. No.4

Judgment.— The plaintiff in this case sued as the manager of the temple of Shri Narayan Dev of Ankola to recover certain amounts due on three mortgage bonds mentioned in the plaint. The claim was to enforce the mortgage bonds by sale of the mortgaged property. Defendants 1 and 2 at the date of the suit were purchasers of the equity of redemption in some of these lands, and defendant 4 was the Court purchaser of the interest of the original mortgagor in some lands, which need not be detailed. Defendant 3 was joined. as he was said to be the Muktesar of this temple appointed by the Temple Committee. The plaintiff stated in the plaint that the members of his family had been managers of the said temple from times immemorial and that the money was advanced in that capacity to the original mortgagor by his grandfather Shrinivas Sajroba. The defendant 3, the Muktesar, did not appear. Defendants 1 and 2 and defendant 4 raised several contentions. They contended that the plaintiff had not the right to maintain the suit. They also contended that the claim on the mortgage-bond was time-barred, and that the suit lands were not the lands originally mortgaged by the owner.

The trial Court found that the three mortgages in suit, one of 1869 and two of 1870, were proved. It also held that the plaintiff's claim was in time, that the lands in suit were the lands mortgaged; and that defendants 1, and 2 were agriculturists. As there was some doubt in the course of the suit as to whether the plaintiff claimed money for his own benefit or for the benefit of the temple, a purshis was taken from him whereby he made his position clear. In the result the Court passed a decree against defendants 1, 2 and 4 and in favour of the plaintiff as Vahivatdar of the temple of Shri Narayan Dev of Ankola for payment of Rs. 433-5-O, and interest on Rs. 318 at 10 per cent from the date of suit by yearly instalments of Rs. 75 payable every year in December beginning from 1920.

Defendants 1 and 2 did not appeal from this decree, but defendant 4 appealed to the District Court. The learned District Judge, without going into the question relating to the merits of the claim, has dismissed the plaintiff's suit on the ground that the plaintiff claimed the money for his own benefit, and that the present claim was in effect adverse to the temple.

The learned Judge was of opinion that the plaintiff could not maintain the suit as he was not a trustee, and as he was suing avowedly on his own account.

The plaintiff has appealed to this Court, and the first question that arises in appeal is whether the view of the lower appellate Court is right on the question as to whether the plaintiff was entitled to maintain the suit. It seems to us that the view of the lower appellate Court is not right. The plaintiff has sued in terms as manager of the temple of Shri Narayan Dev of Ankola and he has also stated in the plaint that the members of his family have been managers of the said temple from times immemorial. The plaintiff's grandfather has been described in the plaint as manager of the temple. Defendant 1 admits that the plaintiff is the manager of the temple, and against this there is no evidence in the case to show that the plaintiff is not the manager of the temple.

The whole difficulty has arisen in consequence of the plaintiff having stated in the plaint that in fact he had spent certain moneys on the temple, and that he would be entitled to recover from the temple those sums. He also stated in the plaint that defendant 3 had no connection whatever with the management, and that he was appointed Muktesar for the purpose of recovering the cash amount due to the idol from the Government. It is true, as pointed out by the District Judge, that the plaintiff does put forward a certain claim against the temple. That however, is a matter which is foreign to the scope of this suit, and is really outside the controversy between the plaintiff as respresenting the temple and the defendants who have to satisfy the claim under the mortgages. We think, therefore, that there is no reason to defeat the plaintiff's claim on this technical ground, particularly when trial Court has made it clear in the decree that the plaintiff is to recover the amount as Vahivatdar of Shri Narayan Temple of Ankola.

The next question is whether we should remand the case for findings on the other issues, or we should decide those issues under section 103, Civil Procedure Code here. We have heard Mr. Murdeshwar on behalf of defendant 4, who alone has appeared before us, and we think that it is really unnecessary to remand the case; Defendants 1 and 2 did not appeal to the District Court and they have not appeared before us. Having regard to the statements of defendant 1, it is clear that defendants 1 and 2 did not mean to contest the decree of the trial Court. We have to consider the contention raised on behalf of defendant 4. The trial Court found clearly that the plaintiff had received rent in respect of this claim in lieu of interest up to the year 1907-08; The last payment of rent is evidenced by a receipt, a certified copy of which has been put in as Exhibit 32 in the case. There is really no answer to this on the part of defendant 4 except this, that a certified copy is not admissible in evidence because the original is not proved to have been lost. It must be remembered, however, that this certified copy was put in by the plaintiff who was not expected to have, and who had not, the custody of the original document. Defendants 1 and 2 could have, if they had the receipt in their custody, produced it, as it was produced by them in the suit against their tenant. But they did not do so, and it appears from defendant. 1's statement that he does not remember whether he took it back from the Court. The defendant 4's objection that this certified copy is not admissible, seems to us untenable; and if that certified copy is looked at, it is quite clear that the rent was received within 12 years prior to the date of the suit. The claim is therefore, in time.

The only other objection which was taken in the trial Court, and which has been mentioned before us, is that the lands in suit are not the lands which were originally mortgaged. The Record of Rights has been relied upon by the trial Court as indicating that the lands are sufficiently identified, and they are the same lands as were originally mortgaged. It is quite true that when the mortgages were effected only the *muli* numbers were given, and after the Survey Set-

tlement, survey numbers were given to the land. Defendant 4 has adduced no evidence whatever on this point, and there is nothing really in the case to throw any doubt on the finding of the trial Court.

We must, therefore, find in favour of the plaintiff on those points which are covered by issues 3 and 4 in the trial Court. There is no other objection taken to the claim of the plaintiff on behalf of the temple which seems to be perfectly just, and there is really no defence which defendant 4 could reasonably urge against his claim. We, therefore, reverse the decree of the lower appellate Court and restore that of the trial Court with costs here and in the lower appellate Court to be added to the mortgage claim.

1923 BOMBAY. 172

MACLEOD AND CRUMP. C. JJ.

Kasturibai Bhratar Onkardas Marwadi—Appellant.

v.

G. I. P. Railway Company and others—Respondents.

Appeal No. 314 of 1922 D. 13th December 1922 against the decision of Sub-Judge at Jalgaon in Suit No. 430 of 1920.

Tort-Damages-Measure-Wrongful detention.

For wrongful detention and insult of the plft, and her servants by the Rly. servants, vindictive damages cannot be awarded. However the sum awarded should be substantial. In the particular case a sum of Rs. 1200, as against plaintiff's demand of Rs, 2 5,000, was awarded.

Coyajee with D C. Virkar—for the Appellant.

Judgment:—The plaintiff filed this suit against the G. I. P. Railway Co., and various officials of the Rly. Co., at Bhusawal claiming Rs. 25000 damages on the ground that she was detained at Bhusawal wrongfully by the Railway Co., and its servants, for refusing to pay excess fares on account of her having travelled in a First Class compartment with second class tickets. The facts are practically admitted. There was a mistake made owing to certain circumstances. The ladies were put into a First Class compartment by the officials of the Railway Co., at the Shegaon station between Nagpur and Bhusawal. That fact was not sufficiently recognised when the party arrived at Bhusawal. The Judge has found in favour of the plaintiff. He has considered the question of damages, and has allowed the plaintiff Rs. 1200 damages from defendants 1, 2, 4 and 7, that is to say the Railway Co.' the Railway Guard and the Station Master and the Ticket Collector at Bhusawal, and Rs. 100 from the Ticket Collector on the ground the he had annoyed and insulted the plaintiff and used improper language. Undoubtedly the whole case was very unfortunate for all parties. But it is not one of those cases in which vindictive damages could possibly be claimed from the Railway Co., or their servants and on the face of it a demand for Rs. 25,000 even if everything the plaintiff set out to prove had been proved, would be absurd. All that was required was for the Court to show by the amount awarded that it considered that the action of the Railway Co., and their servants could not be justified, and therefore, it was necessary that a substantial sum should be awarded, and not a nominal sum. We think the amount awarded, was a substantial sum, and that the claim as originally made was extravagant. The result would be that the plaintiff would have to pay so much of the costs which were incurred by the defendants owing to the extravagance of her claim. The order regarding costs was a perfectly proper order to be made in the circumstances. The result of her suit has fallen short of the plaintiff's expectation, but it is undoubtedly her own fault in having exaggerated her claim. If she had demanded a reasonable sum of damages against the Railway Co., it is possible that the Railway Co., would have paid without a suit. But the plaintiff having sued for an exaggerated claim the Railway Co., was bound to defend the case. We see, therefore, no reason to allow the case to go further as in no case do we think, after reading the judgment, that the amount of damages awarded to the plaintiff could be increased, as not being a proper and sufficient sum. The appeal is dismissed.

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SHAH AND CRUMP. JJ.

Sakharam and another—Appellants.

v.

Rajmal Girdharilal Marwadi—Respd.

S. A. 778 of 1921 D. 12-9-1922 from Ahmednagar in appeal No. 20 of 1918.

Deccan Agri-Rel Act Ss. 43, 44, 45—Submission and award-Validity—Ordinary rules of arbitration—Applicability.

The plaintiff applied to the conciliator under the Deccan Agriculturists Relief Act on the 30th July 1910 for a certificate. On the 28th November 1910, apparently the parties agreeed before the conciliator that the matter should be settled through arbitration; and they appointed the conciliator as their arbitrator, who made an award on the same day. On the same date the plaintiff made an application to the Court of the Subordinate Judge at Parner for filing the award, and for a decree in terms of the award. The written statement of the defendants was filed on the same date, whereby they agreed that the plaintiff's application should be allowed, but the Subordinate Judge was not satisfied with the statement, and on notices being issued to the defendants, a fresh written statement was filed by them on the 21st December 1910 in which they repudiated the award. The court rejected the plaintiff's application and refused to file the award on the 10th April 1911 on the ground that the claim on the original cause of action would be time-barred at the date of the award. It appeared that the plaintiff again applied on the 28th January 1913 for the restoration of the suit in view of the Bombay Act XIII of 1922; but that application was rejected. Ultimately he filed the present suit on the 25th November 1916 claiming to enforce his rights under the award of the 28th November 1910. *Held*, that the award was not a valid award [P 174 C 1]

R. J. Thakore—for Applnt.

A. G. Desai—for Respdt.

Shah J.—The question of law in this Second Appeal relates to the validity of the award upon which the suit is based. The facts are these. The defendants represent the original owners of the property. The original owners effected a mortgage in favour of one Birdichand on the 3rd November 1890. He assigned his rights to the present plaintiff on the 27th July 1910. The plaintiff applied to the conciliator under the Deccan Agriculturists' Relief Act on the 30th July 1910 for a certificate. On the 28th November 1910, apparently the parties agreed before the conciliator that the matter should be settled through arbitration; and they appointed the conciliator as their arbitrator, who made an award on the same day. On the same date the plaintiff made an application to the Court of the Subordinte Judge at Parner for filing the award, and for a decree in terms of the award. The written statement of the defendants was filed on the same date, whereby they agreed that the plaintiff's application should be allowed, but the Subordinate Judge was not satisfied with that statement, and on notices being issued to the defendants, a fresh written statement was filed by them on the 21st December 1910 in which they repudiated the award. The Court rejected the plaintiff's application and refused to file the award on the 10th April 1911 on the ground that the claim on the original cause of action would be time-barred at the date of the award. It appears that the plaintiff again applied on the 28th January 1913 for the restoration of the suit in view of the Bombay Act XIII of 1912; but that application was rejected. Ultimately he filed the present suit on the 25th November 1916 claiming to enforce his rights under the award of the 28th November 1910.

The trial Court dismissed the suit in December 1917. In the appeal by the plaintiff to the District Court, it was held that the suit was barred by *res judicata*. The plaintiff appealed to this Court, and in Second Appeal No. 427 of 1919, it was held by this Court that the plaintiff was entitled to a decision on the merits, and that his claim was not barred by the plea of *res judicata*. [See *Rajmal* v. *Maruti* (1)]

After the remand by this Court, the appeal was decided by the learned District Judge on the merits. He held that the award in question was a legal and valid award, and accordingly decreed the plaintiff's claim in terms of the award on the 8th August 1921.

The defendants have now appealed to this Court; and it is urged on their behalf first, that the award is not legal, because there was no reference to the arbitrator in writing; and secondly, that the agreement between the parties as represented by the award does not represent a just and legal agreement

(1) [1921] 45 Bom. 329-22 Bom. L R. 1377-59 I. C. 755.

under the circumstances. On the other hand, it is urged by Mr. Desai for the respondent that section 43 of the Deccan Agriculturists' Relief Act does not require any reference in writing, and that the award is not open to the objection which is now urged that it does not represent a legal and equitable agreement finally disposing of the matter.

I have stated the respective arguments on both sides as they were advanced. But as a result of these arguments, the principal point that arises for our consideration is whether in view of the provisions as to conciliation in Chapter VI of the Deccan Act, and particularly in sections 43–45, the award in question can be held to be valid. After a careful consideration of the provisions of the Deccan Agriculturists' Relief Act, and of the arguments urged before us, I have come to the conclusion that this award cannot be treated as a valid award.

As regards the first point, it is true that under section 43 of the Act after the matter is once before the conciliator, if the parties come to any agreement finally disposing of the matter, such agreement shall be forthwith reduced to writing. In the present case what happened before the arbitrator must be considered, in my opinion, to be an agreement finally disposing of the matter between the parties within the meaning of section 43. It was open to the parties to arrive at an agreement between themselves or through arbitration so as to dispose of the matter finally. There is no reference to the arbitrator in writing but it need not be in writing. It is sufficient if the agreement finally disposing of the matter is reduced to writing. The award, which is assented to by the parties, is in writing, and that is the agreement which purports to dispose of the matter finally. The argument as to the absence of any writing relating to the reference to the arbitrator was based upon the provision in the section about an agreement to refer to arbitration. I do not treat what happend in fact before the arbitrator on the 28th November 1910 as merely an agreement to refer to arbitration, but as a completed arbitration resulting in effect in an agreement between the parties disposing of the matter finally. The provisions of section 45 refer to the procedure to be followed when there is an agreement to refer the matter to arbitration, and have an application to the present case. The absence of any writing referring the matter to arbitration does not affect the validity of the agreement evidenced by the award.

The next question is whether the award which was made by the conciliator while the conciliation proceedings were pending before him, is a valid award which gives the parties a fresh cause of action in supersession of the original cause of action between the parties. If the provisions of section 44 are carefully examined, it would appear that if there was an agreement between the parties finally disposing of the matter, the conciliator would have to adopt the procedure laid down in that section, namely, to forward the agreement in original to the Court of the Subordinate Judge, and to deliver to each of the parties a written notice to show cause before such Judge, why such agreement ought not to be filed in such Court; and if the proper procedure had been followed, the Court would have scrutinized the agreement and if it thought that the agreement was legal and equitable finally disposing of the matter, and that it had not been made in fraud of stamp or registration laws, it might have ordered it to be filed, and then it would have taken effect as a decree of the said Court.

Even, assuming for the sake of argument, without admitting it, that the application made by the plaintiff producing the award before the Court was practically a submission to the Court by the conciliator of this agreement between the parties finally disposing of the matter, and that though not in the manner provided in section 44, but otherwise the matter was substantially before the Court, it was still obligatory upon the Court to consider whether it was a legal and equitable agreement between the parties; and unless the Court was satisfied on that point, it could not have given effect to it. For one reason or other the

Court refused to given effect to the agreement evidenced by the award, and it seems to me that it is not open to the plaintiff now to treat this award as affording a distinct and separate cause of action to be dealt with according to the ordinary rules applicable to a suit based on an award. The fundamental difficulty of the plaintiff seems to me to be that it was obligatory upon the parties to adopt the procedure laid down in the Deccan Act, if anything which was in the nature of an agreement finally diposing of the matter before the conciliator was to be givin effect to, by the Court after determining whether it was a legal and equitable agreement. By adopting any other procedure the plaintiff cannot get rid of the necessity to submit the agreement to the Court as required by section 44. In fact what happened before the conciliator on the 28th November 1910 seems to have been misconceived by the plaintiff and he has treated the award as an ordinary private award through an arbitrator appointed by the parties without the intervention of the Court. Once the matter was before the conciliator, that procedure, it seems to me, was not open to them. They had either to come to an agreement finally disposing of the matter, in which case section 44 would apply, or to agree to refer the matter to arbitration in which case the provisions of section 45 would apply; and if neither of these things was done, the plaintiff was entitled to a certificate as provided in that chapter which would enable him to prosecute the suit in a regular way on the original cause of action. The question is not so narrow as the learned District Judge seems to have thought, namely whether it was open to the arbitrator to decide the point of dispute between the parties according to law or not. If this were treated as a private award, it does not matter whether the decision was according to law or not. If it is viewed in the light of an agreement between the parties, as I have indicated it should be viewed, then it seems to me that the non-compliance with the procedure laid down in section 44 is fatal to the suit based on the award.

I would, therefore, allow the appeal, reverse the decree of the lower appellate Court and restore that of the trial Court with costs here and in the lower appellate Court on the plaintiff. The cross-objections are dismissed with costs.

Curmp, J:—I agree, and in view of the possible importance of the point, I desire to add my reasons shortly. It appears to me that when on the 30th July 1910, the plaintiff applied to the conciliator, it must be taken, defendants being agriculturists, that the subsequent proceedings were to be governed by the provisions of the Deccan Agriculturists' Relief Act. The conciliator being thus seized of the matter, it was not, in my opinion, open to him to act otherwise than as provided by the special Legislation. To hold that he could do so, would be to frustrate the object of the Legislature in enacting those provisions for the benefit of agriculturists-defendants. It follows, therefore, that when the matter came before the conciliator there were two courses open to him, and only two. If conciliation was to be effected, he could under section 43 persuade the parties to come to an agreement disposing of the matter, or an agreement to refer the matter to arbitration. There was no third course, such as was suggested in the argument before us Now if either of those results was achieved, then the further steps were subject to the sanction of the Court. Without the sanction of the Court, anything done by the conciliator could have no final effect. Whether the agreement in the present case is regarded as finally disposing of the matter or as an agreement to refer to arbitration, the result is in either case the same. The next step in the former case would be that the Court would deal with the matter under section 44. In the latter case, the Court would deal with the matter under section 45. But in either case the final word lay with the Court. Apart, therefore, from any minor defects in the procedure, such as the absence of a writing or of the failure of the conciliator himself to forward the agreement to the Court, it appears to me there is a fatal defect in the plaintiffs' present case, because the Court in daling with this matter refu-

sed to give effect to that which had been done before the conciliator. The Court apparently regarded this agreement as one finally disposing of the matter, and that is I think, the correct view. But taking that view, the Court said that it was not an equitable agreement, and therefore, refused to give effect to it. The only course then open to the plaintiff in accordance with the provisions of the Act was to obtain a certificate from the conciliator and to file a suit, if so advised. This he did not do. Neither on the other hand, did he take any steps which might have been open to him to challenge the decision of the Court. Therefore, it seems to me impossible to argue, having regard to the provisions of the Deccan Agriculturists' Relief Act, that we have in this case anything which could be termed a valid award. If that is so, the basis of the present suit fails and it must necessarily be dismissed.

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MACLEOD, C. J. AND FAWCETT. J.

Civil Application No. 827 of 1921 D.
13th November 1922.

Appaya Padalaya Guru Mahadevayya -Applicant.

v.

Lakhamgewda Bhavanprabhu Sardesai-Opponent.

Civil P. C. S. 110-Order indirectly involving claim.

Where the applicant's interest in the property was less than 10,000 but the property in dispute was worth over 10,000 leave to appeal was granted.

S. Y. Abhyankar, for Nilkanth Atmaram,—for the Applicant.

S. S. Patkar-for the Opponent.

Macleod C. J.—The plaintiff asked for the relief in his plaint with regard to two properties A and B, which he valued at Rs. 5,000. Then with regard to property C, he asked for an injunction restraining the defendant from interfering with the plaintiff's possession. The Court made an order that property C, which may now be taken as represented by the open space in the compound and the well, should be used equally by both parties. The question is whether that order has prejudiced the interests of the plaintiff to the extent of Rs. 5,000 If, so then taken with the value of the properties A and B, the subject-matter of the suit would be worth more than Rs. 10,000. We, therefore, direct an inquiry under Order XLV, R. 5 Civil Procedure Code to determine whether the interests of the plaintiff have been prejudiced to the extent of Rs. 5,000, or over, by the direction given by the Court in the decree that both parties were equally entitled to the user of the open space in the whole compound and the well.

(The Subordinate Judge reported that the value of the whole compound and the well was above Rs. 5,000; but the value of plaintiff's share in them was far below Rs. 5,000.)

On receipt of the other report the following order was passed.

Macleod C. J—We think that considering the judgment of their Lordships of the Privy Council in *Manilal v. Banu Bai* (1) granting special leave to appeal after a certificate had been refused by this Court *Manilal v. Banu bai* (1) we must grant a certificate in this case. The order made therein involved a question respecting the compound and the well which has now been found by the lower Court to be worth more than Rs. 5,000, and, therefore, that must be the value to be taken when applying the provisions of S. 110, Civil Procedure Code although the value of the appellant's interest appears to be very much less We think the rule must be made absolute and a certificate must be granted on the ground that the final order involves directly or indirectly some claim or question relating to or respecting property worth over Rs. 10,000 in value. Costs will be costs in the appeal.

Rule made absolute.

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(1) (1921) 23 Bom. L. R. 374-63 I. C. 588

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SHAH A. C. J., AND MARTEN, J.

Dadabhai Framji Cama—Appellant.

v.

Cowasji Dorabji Panday-Respondent.

O. C. J. Appeal No. 22 of 1922 dated the 21st July 1922; Suit No. 5265 of 1921, O. S.

(a) Family settlement--'Male heirs'.—

A deed of settlement provided "Upon trust for the said Dhanbaiji for and during her life... and after the decease of the said Dhanbaiji widow, upon trust for the said Rustomji and after his decease upon trust for his sons and their male heirs absolutely in equal shares and proportions as tenants-in-common!! *Held* the estate given to the sons of Rustomji was absolute and not limited. The use of the expression "male heirs" meant no limitation upon it. The words "absolutely in equal shares and proportions as tenants-in-common negative the idea of any limitation upon the estate given to the sons of Framji (i. e. Rustomji's son.) [P. 179 C. 2]

(b) Practice—Addition of Parties.

Co—plaintiffs cannot sever at the trial but must appear by the same solicitors and counsel. Where the proceedings were amended by striking out the appellant as the third plaintiff, and adding him as the tenth defendant. *Held* the original draftsman of the plaint and Originating Summons had fallen into the opposite error of making the appellant both a plaintiff and a defendant, although that this cannot be done. 25 Bom. 606 Foll. [P. 180 C. 2]

(c) Practice—Appeal—Formal order.

Elementary practice both on the original side and in the English High Court is that an appeal lies not from what a judge says but from what he orders and that what he orders is to be found in the sealed or signed formal order which is entered in the records of the Court. Apart from urgency or some special ground, no appeal should be determined without the production of the farmal order under appeal. [P. 181 C. 1]

(d) Parsis-English law does not apply.

Parsis are not subject to English law generally.

Shah, Ag. C. J.—This appeal arises out of an originating summons taken out by the trustees for the construction of two deeds, one of August 13, 1879, and the other of July 19, 1888. The original summons stated the questions in a general form; but the question for decision are stated in the judgment of Mr. Justice Kanga, and we have ordered the summons to be so amended as to indicate in terms the points which we have to decide. On a further hearing of this appeal, we have directed further amendment of the summons, and as a result of that two more questions have been raised.

It will be convenient to show in a tabular form the relationship of the parties interested in these questions:-

Dhanbaiji (died in 1891).

Rustomji (died in 1893) married Maneckbai (died in 1897);

- Framji (died in 1908) = married Havabai (died in 1918).
  - Dadabhai (original plff. No. 3 and subsequently joined as (Deft. 10).
- Ratanbai (daughter) (deft. 2).
  - Hirabai (Deft. 1.)
- Edulji (died in 1920 married Meherbai (deft. 4)
  - Dhanbai (deft. 6.)
  - Kaikhushru (deft. 7)
  - Minocher (deft. 8)
  - Meherbai (deft. 9).
- Gulbai (daughter) (deft. 3)
- Byramji (died in 1886; married Dinbai Dinbai re-married in 1890 Murzban Kohiar) (deft. 5)

The plaintiffs including Dadabhai, son af Framji, obtained the summons as trustees but in view of his personal interest in the estate Dadabhai has been joined as defendant No. 10.

Dhanbaiji executed a deed of settlement in August 1879, by which she settled certain properties upon trustees for her benefit for her life, then for Rustomji for his life, and then for Rustomji's sons and "their male heirs" (Ex. B.) Rustomji in his own

right and as a trustee, and Muncherji Cama as the co-trustee were parties to this deed. Byramji died in 1886 without any issue, but left a widow Dinbai. In 1888 another deed was executed by Dhunbaiji, Rustomji and his two sons, Framji and Edulji, and the trustees under the first deed (Ex. 1 C). This deed in terms purports to revoke the first deed and to settle the same properties in trust upon the same trustees for the benefit of Dhunbaiji, then for her son Rustomji and after his death for the benefit of his sons, Framji and Edulji, in equal shares and for division and distribution, in the manner stated therein, after their deaths. Rustomji and his two sons Framji and Edulji, and the trustees under the first settlement were parties to this deed of revocation. It dealt with the whole property described in the first deed and Government Promissory Notes of the face value of Rs. 10,000.

Dhunbaiji died in 1891 and Rustomji in 1893. Rustomji left a widow Manekbai, who died in 1897. She left a will under which her daughter Gulbai is the residuary legatee. Dinbai widow of Byramji, remarried during the interval. She died in 1901 leaving her second husband and children by the second husband. Framji died in 1908 leaving his widow Havabai, who died in 1918 and a son Dadabhai and a daughter Hirabai. Edulji died in 1920 leaving a widow Meherbai.

The original trustees were succeeded by different trustees as detailed in paragraphs 12 and 13 of the plaint. The plaintiff No. 3, though one of the trustees, is interested in his own right under these deeds. The other trustees seek the directions of the Court as to the administration of the trusts.

Defendant No. 1 is the sister of Dadabhai and is interested like her brother in the estate under the second deed. Defendants Nos. 2 and 3 are the daughters of Rustomji but their interests are not identical so far as Manekbai's share is concerned, Defendant No. 4 is Meherbai, the widow of of Edulji.

The other defendants Nos. 5 to 9 are the second husband and children of Dinbai. The originating summons was taken out in December 1921. The questions raised at the hearing and now stated in the summons are as follows.—

(1). Whether on a true construction of the deed of August 13, 1879, the three sons of Rustomji Dababhai Cama after the death of their father Rustomji Dadabhi Cama took the trust properties absolutely in equal shares, as tenants-in-common or whether they were entitled to a life-interest in the said properties?

(2). Whether the trusts created by the deed of 1879 are validly revoked and whether the deed of 1888 is a valid trust deed?

(3). Whether the claims of defendants 3 and 5 to 9 to the immoveable properties comprised in the trust deed of 1079 are barred by the law of limitation?

(4). Whether the words 'the said trust property' which appear in the following passage of the deed of revocation and re-settlement of July 19, 1888, refer to the whole of the trust estate or to the share therein only of the grandson of the settlor dying without issue, viz., "And if either of them the said Framji Rustomji Cama and Edulji Rustomji Cama shall die without issue then and in such case the said trust property shall go to and be divided between the sons and daughters.?"

(5) In what proportions the income accruing up to the death of Edulji ought to have been distributed among the parties entitled thereto?

(6). Whether the widows of Framji and Edulji took absolute interest under the gift over properties contained in the deed of 1888 or for widowhood only or at all?

The learned Judge came to the conclusion—(*a*) that the three sons of Rustomji took absolutely the trust properties after the death of Rustomji in equal shares as tenants-in-common:

(b) that the deed of 1879 was not revocable but the interests of the consenting parties only were validly settled under the deed of 1888; but the interests of the heirs of Byramji not parties to the deed, i. e. Dinbai (the widow) and Manekbai (the

mother), were not affected thereby, whose shares in the one-third share of Byramji were one-half and one-sixth of that one-third, i. e., one-sixth and one-eighteenth of the whole property respectively according to the rules of Parsi intestate succession:

(c) that the claims of Gulbai claiming under Manekbai and of defendants Nos. 5 to 9 claiming under Dinbai under the deed of 1879 were not time-barred: and

(d) that the words "the said trust property" in the particular clause of the deed of 1888 meant the whole trust property, including the Government Promissory Notes, with accumulated interest effectively settled by that deed.

As regards question 5 it appears that the question of the distribution of the income of the trust property was left over for decision hereafter, but at the hearing of the appeal today the question has been put in a definite form, and it is clear that the point as thus stated can be dealt with by us.

As regards the 6th question, though the opinion of the learned trial Judge is indicated in the judgment, the point does not appear to have been specifically raised.

From this judgment Dadabhai, son of Framji, has appealed, and Meherbai, the widow of Edulji, has filed cross-objections. All the questions have been argued before us on behalf of all the parties according to their respective interests.

I shall deal with these questions in the order in which they are stated.

As regards the first question, the material passage in the deed of 1879 is as follows:—

"Upon trust for the said Dhanbaiji for and during her life...and after the decease of the said Dhanbaiji widow, upon trust for the said Rustomji...and after his decease upon trust for his sons and their male heirs obsolutely in equal shares and proportions as tenants-in-common."

It is urged on behalf of the appellant that the use of the words "male heirs" imposes a limitation upon the interests of the sons of Rustomji and in support of this contention reliance is placed upon the clause about maintenance in the deed.

Looking at the main clause without reference to the maintenance clause, I do not feel any doubt that the estate given to the sons of Rustomji is absolute and not limited. The use of the expression "male heirs" means no limitation upon it. The words "absolutely in equal shares and proportions as tenants-in-common" appear to me to negative the idea of any limitation upon the estate given to the sons of Framji.

Further, the use of the words "male heirs" does not import any limitation. According to the rule of construction laid down in S. 84 of the Indian Succession Act as to wills, such an expression in a will will be rejected as having no effect in the absence of any indication of a contraty intention. I do not see any reason why a different effect should be given to that expression in a deed. It may be that under the English law there is some reason for interpreting the same expression differently when used in a will and in a deed. I express no opinion on that point. But I do not see any reason for such differentiation under the Indian law. Apart from that if the expression is taken literally, it will create an estate which is anomalous and uncertain in its operation. It will include male heirs among collaterals and exclude females in the descending line. No authority has been cited to show that such a construction is permissible. On the contrary it appears from *M' Kenzie* v. *Pestonji* (1), decided so far back as 1852 by sir Erskine Perry C. J., that the grant to "master builders and their sons" and to "their family and descendants" was held to be an absolute estate; and the contention of the son of the grantee that the alienation by the grantee was invalid was disallowed. Though it was a grant by the Crown it was held that it did not create an estate tail and that no reversion to the Crown was reserved.

Further, even according to English law, the use of this expression in deeds imports no limitation. As pointed in Williams on Real Property at p. 90 (21st Edition) and Norton on Deeds, pages 305 and 306 (1906, edition) under a gift to A and his male heirs A takes the fee simple.

(1) (1852) Perry O. C. 531, 534.

Lastly, I do not think that the words used in the maintenance clause curtail in any way the absolute estate to the sons of Rustomji nor do they indicate any intention to the contrary. I do not think that the clause was intended to have or that it can have any such effect even if it be construed as suggested by Mr. Coltman on behalf of the appellant. But in fact it appears as if the clause has been copied from some precedent without any relation to the requirement of the deed in question. I do not think that in fact anything more than "the sons of Rustomji" is meant by the expressions "the male" heirs and "his or their male heirs" used in that clause. I have not considered it necessary to quote the clause here. It is to be found at the top of page 4 of Part III of the paper-book. Even assuming that for the purpose of maintenance and education, if any son of Rustomji died leaving a minor son, that minor son would have a legal right to claim some interest in the share of his father at the discretion of the trustees, I do not think that could be said to curtail the gift to the sons of Rustomji in the prior clause which I have already dealt with. On the contrary it would be rejected as being repugnant to the absolute gift in the prior clause in favour of the sons of Framji, if the clause as to maintenance is read in that sense. I think, therefore, that the view of the learned Judge is right and the appellant's contention must be disallowed.

(The rest of the judgment is not material for our Report).

Marten J.—This is an appeal from the judgment of Mr. Justice Kanga on an Originating Summons taken out by the then plaintiffs as trustees, and asking the following two question viz.

(1) On the true and proper construction of the deed of settlement of August 13, 1879, and the deed of revocation and appointment dated July 19, 1888, who are entitled to the immoveable properties set out in the said deeds and in what proportions?

(2) Who are entitled to the funds mentioned in the deed of revocation and appointment and accretions thereto and in what proportions?

Unfortunately, the parties have given the Court a good deal of unnecessary trouble by disregarding ordinary rules of procedure. In the first place, mere general questions like these should not be asked, when specific question can easily be framed. See *In re Harman Lloyd* v. *Tardy* (2). Accordingly, we directed the Originating Summons to be amended so as to raise the exact question which the Court was asked to decide.

Nor should the third plaintiff have been joined as such. It is true that he is one of the trustees, but his interests as a beneficiary are distinct and substantial, and cannot be represented by any of the other parties. This is exemplified by the fact that he is the sole appellant. There is the further difficulty that, speaking generally, co-plaintiffs cannot sever at the trial but must appear by the same solicitors and counsel. Accordingly before us the proceedings were amended by striking out the appellant as the third plaintiff, and adding him as the tenth defendant. The original draftsman of the plaint and Originating Summons had fallen into the opposite error of making the appellant both a plaintiff and a defendant, although Sir Lawrence Jenkins had long ago pointed out that this cannot be done *Rustomji* v. *Purshottamdas* (3). The trial Court remedied this mistake, but unfortunately the amendment then made was to strike out the appellant as defendant No. I, and to retain him as plaintiff No. 3. Hence the further amendment ordered by us.

Then the preparation of the paper book leaves much to be desired. It does not contain the formal order of the learned Judge: and it now appears that the order was never drawn up, and that we were allowed to hear this appeal without our attention being drawn by anybody to this material omission. The explanation now given to us is, that this was thought unnecessary, because, after the question of construction was decided in the appellate Court, the trial Judge would decide certain further subsidiary points. It is, how-

(2) (1894) 3 Ch. 607, 614.

(3) (1901) 25 Bom. 606–3 Bom. L. R. 227.

ever, elementary practice both on the original side and in the English High Court that an appeal lies not from what a Judge says but from what he orders; and that what he orders is to be found in the sealed or signed formal order which is entered in the records of the Court. Apart then from urgency or some special ground, no appeal should be determined without the production of the formal order under appeal. And, in my opinion, there was no adequate excuse in the present case for departing from this well established practice.

So, too, the notes of hearing before the trial Judge were not printed. Consequently one cannot tell what has been put in evidence and what not. All one can say is that the alleged Exhibit numbers in the Papar Book do not carrespond with the actual Exhibit marks on the documents produced to us. We have taken steps to put all these matters in order, and also to supplement the evidence by a pedigree and by two deeds of appointment of new trustees, but in my opinion this is not the work which appellate Judges should find it necessary to do.

One other matter I wlll mention. No doubt in course of time practitioners in this Court will get more familiar with the procedure for Originating Summons; but with reference to para, 15 of the plaint, I think the better practice is not to plead counsel's opinions. In general, they are no more relevant on a Originating Summons than they are in an ordinary suit. So, too, as regards para. 11., trustees should not submit that certain beneficiaries of theirs are barred by limitation or otherwise. That is for the Court to decide. The trustees should not take sides. [Here the judgment recited the facts and continued as follows.]

On the first point raised on the Originating Summons. The decision of the learned judge was as follows:-

" The first question is, whether on a true construction of the deed of August 13. 1879, the three sons of Rustomji Dadabhoy Cama after the death of their father Rustomji Dadabhoy Cama, took absolutely the trust properties in equal shares as tenants in common, or whether they were only entitled to a life interest in the said propertes.

The Trusts as regards the said three sons of Rustomji Dadabhoy Cama are as follows:—

' From and after his (Rustomji Dadabhoy Cama) decease, upon trust for his sons and their male heirs absolutely in equal shares and proportions as tenants in common.'

It has not been contended before me that Parsis in the Island of Bombay are not subject to English law generally and that the English law does not apply to this case. According to English law, a gift or devise to a man and his heirs gives him the fee. The words " his heirs or his male heirs " are regarded as words of limitation and not of purchase. They are not taken as conferring any estate on the heir, but simply as showing or marking out the estate the ancestor takes.

On the construction, therefore, I hold that the three sons of Rustomji Dadabhoy Cama took absolutely the trust properties after the death of their father in equal shares, as tenants in common "

I concur in the result which the learned Judge arrived at but for somewhat different reasons. The real difficulty arises here from the maintenance clause which runs :-

" Provided...that from and after the decease of the said Rustomji if the sons of the said Rustomji or the heirs male of any of them shall be under the age of eighteen years then...it shall be lawful for the trustees...during every such minority to receive the rents...of the...hereditaments and premises...or the share or shares therein respectively to which such infant son or sons or his or their male heirs shall be so entitled as aforesaid and to pay and apply the same or... part thereof...for...the maintenance and education of the person aforesaid for the time being under the age of eighteen years. "

Then follows a trust for accumulation of the surplus rents. and to stand possessed thereof upon the trusts therein declared " concerning the trust premises or the share or shares therein from which the same

shall have respectively proceeded."

Now this maintenace clause contemplates the heirs male of a son being " entitled " to a share under the trusts of the settlement. If however, the true view is that the son takes absolutely, then his share would pass either to his assigns inter vivos, or on his death to his devisees or his heirs general. In no event therefore, would the heirs male as such take the son's share. Further, if they took at all, they would take as on the intestacy of the absolute owner (viz, the son) and not as persons " entitled " under the trusts of the settlement. Further, this limitation to the sons and their male heirs may be contrasted with the limitations elsewhere in the deed to the trustees and their heirs.

It is consequently argued that this maintenance clause must be read along with the main clause quoted by the learned Judge and that these two clauses when read together show an intention on the part ef the settlor that the heirs male should succeed to the sons. Assuming, for the sake of argument, that that is so, I fail to see how the settlor's alleged intention can be carried out except by construing the limitations as conferring an estate in tail male. But this proposed construction raises many difficulties, and to my mind they are insuperable. In the first place, even, if this was an English deed of settlement, the gift is to the " sons and their male heirs " and not " to the sons and the male heirs of their bodies." Nor are there any other provisions confining this male heirship to descendants of the sons. Consequently, the first requisite for an estate tail is wanting. As is put in Coke upon Littleton, 9 b: " If a man devise land to a man *et sanguini suo* that is a fee simple; but if it be *semini suo* it is an estate tail " (see Halsbury Vol. XXVIII p. 767, note (h)) The word " devise " there means by deed. In those old days its use was not confined to wills as now a days.

The cypres doctrine is an instance of how this may sometimes be done (see Halsbury, Vol,28, p. 673). Another example will be found in Halsbury, Vol. 28, p. 764, where it is said : " The context may show that by 'heirs' was meant 'heirs of the body.' So that an estate tail only is created."

Next, if one confines the limitation to male heirs generally, this limitation as such is unknown to the law. Under English law in a deed a gift to a man and his heirs confers an estate in fee simple ; and a gift to a man and the heirs of his body or the heirs male of his body gives him an estate in fee tail or tail male as the case may be. But a gift to a man and his male heirs is an attempt to create an estate unknown to the law. Consequently, English law rejects the word "male" as being repugnant, and construes the gift as if were to the man and his heirs *simpliciter*, viz , as a gift in fee simple (see Norton on Deeds, page 305, and Williams on Real Property, 22nd Edition, page 148).

Another example will be found in Peerage cases. Thus the limitation in the Letters Patent must be to the future heirs of the patentee and the limitation must be one known to the law. The usual limitation is to the heirs male of the body. But, as stated in Halsbury, Vol. 22, p. 268 : "A limitation to heirs male, as distinguished from heirs male of the body, is void in England but not in Scotland." (See also *Wiltes Claim of Peerage* (4). Then in Halsbury, p. 269, it is said : " A peerage is an incorporeal hereditament, inalienable and descendible according to the words of limitation contained in the grant. A limitation to a man and his heirs will not carry it to collateral heirs. For the purposes of descent, therefore, this limitation is practically equivalent to 'heirs of the body.' It can be understood, therefore, that in a Peerage case there would be a strong reason for construing the limitation as one to the heirs of the body, for otherwise the limitation would practically fail. That reason does not, hawever, exist in English law in a grant of land by deed similar to the one we have to deal with. Such a grant of land would vest an absolute estate in fee simple in the grantee.

But English law draws a distinction between gifts by deed and gifts by

(4) L. R. 4 H. L. 126.

will. In an English will there is authority to show that a devise to a man and his male heirs would be construed as giving an estate in tail male [see Williams on Real Property, 22nd Edition, p. 259; Theobald on Wills, 7th Edition, p. 409; and see *Crumpe* v. *Crumpe* (5).]

But in the present case we have to deal with a deed. If then one applies English law to the present settlement, the word "male" in the main gift and also in the maintenance clause would I think be rejected. And this construction would be aided by the word "absolutely" in the main gift. Under these circumstances the main gift would confer an estate in fee simple, and in my opinion the maintenance clause *quoad* the heirs would be rejected as being repugnant to the prior absolute gift.

But the difficulties of the appellant do not stop there. The settled land is Indian land and must devolve according to the *lex loci*. But estates tail or in tail male are unknown to Indian law, and may they always remain so. To introduce into this country the mixed common and statute law on the subject, and to refer to the Statute De Donis and to recoveries, and fines, disentailing deeds and protectors of settlements would indeed be a calamity. I am, therefore, unable to concur in the view of the learned Judge that Parsis are subject to English law generally, and that English law applies to this case. In my opinion novel estates unknown to the law of India can no more be introduced into Bombay by Parsi settlors than they can be by Englishmen or Hindus. As was pointed out by Mr. Kania for defendant No. 2 the illustrations to S. 84 of the Indian Succession Act make it quite clear that in wills governed by that Act, gifts which under English law would confer an estate tail confer under Indian law an absolute estate. *A fortiori*, therefore, the same result would follow in a settlement effected by deed and not by will. So in effect, both under Indian law as well as under English law, the result would be the same in a settlement effected by deed and not by will, viz., an absolute estate.

I therefore, reject entirely the suggestion that the sons took an estate in tail male.

I also reject the applicant's argument that on the death of Rustomjee in 1893, the persons to take were a class to be ascertained at that date, and consisting of (*a*) his then surviving sons, and (*b*) such of their heirs presumptive then living as were male. This contention appears to me to be a hopeless one. For one thing, it introduces the element of survivorship of Rustomjee, which the settlement itself does not stipulate for. For another, it gives part of the property to persons who on no construction of the settlement can possibly take as specified beneficiaries. Heirs presumptive are not necessarily the heirs at law. *Nemo est hæres viventis.*

Question I will accordingly be answered by declaring that the three sons took the trust property comprised in the 1879 deed absolutely in equal shares as tenants in common.

(5) [1900] A. C. 127.

1923 BOMBAY.

MARTEN AND CRUMP. JJ.

Imperator.

v.

Ahila Manaji, No. 1 and another

Case No. 9 of 1922, (with Appeal Nos. 218 and 219 of 1922 dated the 6th June 1922.

(a) Criminal P. C. S. 510—Certificate of Professor of Anatomy.

The certificate of the Professor of Anatomy is not *perse* admissible in evidence apart from special authority like section 510 of the Code of Cr. P.

(b) Evidence Act S. 114—Discovery on information.

When a man points out unknown matters to others, one may presume under the Evidence Act, section 114 that he is connected with the crime unless he can give some satisfactory explanation as to how he comes by that knowledge.

W. B. Pradhan—for accused No. 1

S. R. Gokhale—for accused No. 2

S. S. Patkar, Government Pleader—for the Crown.

Marten J.:—In this case we had the advantage of hearing from Caunsel for the accused all that can fairly be said on their behalf, but in the result I am satisfied that this is a clear case of murder. We have had

the further assistance of an extremely clear judgment from Mr. Broomfield, the Sessions Judge of Ahmednagar which relieves me from the necessity of setting out in any detail the facts of the case,

Shortly stated the deceased was a money lender belonging to the village of Brahmanwada, and it is alleged by the prosecution that he was murdered by people to whom he had lent money, namely, the accused who were inhabitants of the neighbouring village of Kalamb. The two villages are about a couple of miles distant and the case for the prosecution is that the deceased left his own village one morning to settle up some accounts at Kalamb, that he left Kalamb the same evening, and was murdered on his way home by the accused and one other man called Yesu an approver in the case; and that the accused afterwards carried the deceased's body to an inaccessible spot and threw it down a precipice.

The exact fate of the deceased man was not discovered for a long time. Suspicion arose next morning by his horse turning up at his home. Thereupon inquiries were at once made. The police were communicated with and searches were made without any result for some 11 days. The alleged murder took place on the 15th November and it was on the 26th or 27th that the Police first got any real information as to what had happened. The Sub-Inspector of Police did not even know for certain whether the deceased was dead, and was at a loss to know what had really happened. However, suspicion had fallen on accused No. 1, partly because he was in debt to the money lender and had been in litigation in connection with the debt, and partly because of his suspicious movements. Accordingly the police questioned him and they proceeded to move their camp to Brahmanwada the other village taking accused No. 1 along with them. It was then that accused No. 1 volunteered to point out certain matters which would show the fate of the deceased.

The punch were accordingly summoned and accused No. 1 took the parties first of all, to the spot called Kothal Dara very much northwest of the village of Kalamb, and approximately west of the village of Lahit, shown in the map which is exhibited in the case. Nothing however was found there. Then accused No. 1 said that he would take them to this other village of Lahit, and there too nothing was found in one of the house that he took them to. But in the other house that he took them to, some clothes of the deceased man were found. Then he said that he would show them the place where the dead body was, and going south they went to the place Koch Kada No 12 in the map and there were found certain human remains and other articles which have been identified as those of the deceased man. Later again he said he would show a certain further point, and so he took them further south again to the place where the murder is said to have taken place, and where there were found more articles which were identified as having belonged to the murdered man. In particular there was the chit Exhibit D admittedly in the handwriting of the deceased, and referring to certain accounts with persons who were called as witnesses in the case. Later on again the saddle of the deceased's horse was found at a point close by deceased's own home. Following on other information given by accused No. 1, the police arrested accused No. 2, and he also took them to certain spots connected with the murder. After this both the accused were arrested and they were sent at once to the Magistrate to make their confessions.

The confessions are Exhibits 37 and 38. In my opinion they have been taken with great care by Mr. Phanase, the First Class, Magistrate, and in particular, I notice with approval that the Magistrate was careful to follow the English practice of warning prisoners that whatever was said might be used in evidence against them. The confessions, to my mind, read as being entirely true stories. These confessions together with the evidence of the approver Yesu and the discoveries which I have already alluded to in which

accused No. 2 also took part to some extent, constitute in the main case against the accused.

There is in addition the evidence of the deceased's brother that the accused borrowed different sums and that they were in debt to the deceased. The prosecution case too is that the deceased was a hard man and was exorbitant in the terms which he demanded from his contituents and that in fact half the village of Kalamb was in debt to him. There is one other man, Sheku Sakharam (Ex. 12) who purports to have over heard a talk about the murder and to have seen the parties returning homes late that night. But the learned Sessions Judge thought it safer to discard his evidence altogether, and for the purpose of my judgment I prefer to do the same.

My learned Brother raised one point on the evidence which is none the less valuable because it is technical. I refer to the certificate which was admitted in evidence of the Professor of Anatomy at the Grant Medical College as to the bones. That is Ex 36 and it is referred to by the learned Sessions Judge at page 49 line 35 of his judgment. The technical point is whether that certificate as such is admissible in evidence. What took place is this, that certain articles which were found in the place I mentioned, such as sack, dhoti, rags, gunny bag etc., were sent to the Chemical Analyser. The Chemical Analyser was not called but merely his certificate was put in. That was correct. The person who was called was the Sub-Assistant Surgeon and his evidence was: "The Sub-inspector of Police, Akola, had sent to me some articles. They are all before the Court. All the articles except bones were sent to the Chemical Analyser, Bombay. The bones were sent to the Professor of Anatomy, Grant Medical College, Bomboy. The certificates from these officers were received and they are those shown to me. The articles were also received back and were then sent by me to the Sub-inspector of Police, Akola." There was no cross-examination of the Sub—Assistant Surgeon. The point is whether the certificate which he thus produced was evidence without the Professor of Anatomy being himself called. The Government Pleader has said that there is a High Court Circular giving directions in this class of cases that bones are to be sent to the Professor of Anatomy Grant Medical College. That of course is a right and proper course, but the certificate of the professor is not *per se* admissible in evidence apart from special authority like section 510 of the Code of Criminal Procedure. It seems to me then that without some special authority on that behalf a certificate from a third party like this is only hearsay evidence and is not admissible in the absence of any Statutary authority. But even setting aside that certificate as I in fact do, it still remains in evidence that certain bones were found.

Now what are the real facts here. I have not the smallest doubt that the articles which were found at point 4 and point 16 were those of the deceased man and that the remains at point 16 are his remains. It is also perfectly clear to my mind, having regard to the circumstances of the case and the blood which was found on some of the articles that this man had been murdered.

The next question is on what hypothesis ought I to reject the confessions made by the accused? I would rather take the earlier instance of the discovery of the articles by the accused. No explanation is given so far as I am aware as to how they account for their guilty knowledge of the locality of these particular articles When a man points out unknown matters like these, one may presume under the Evidence Act, Section 114 that he is connected with the crime unless he can give some satisfactory explanation as to how he comes by that knowledge. As far as I can see these accused give no explanation as to that, apart from their confessions which as I have already said are extremely clear and bear on them *prima facie* the stamp of truth. Apart from that, the identifications, like, for instance, the rafter used to carry the body and the discovery of the particular building from which it was

taken as stated by the accused are to my mind most material. I have already raferred to Ex. D. and other articles found at point 4.

Next, if one turns to the evidence of the approver there is ample corroboration of that evidence in the various circumstances of the case and in what was actually found at particular places. If I understand rightly the defence argument that has been presented to us amounts to this, that two men Manku and Aba who were parties to the conspiracy to commit murder are not before the Court and that Manku has in some way got up this case against the accused. But the argument involves this difficulty that it leaves no explanation as to how Manku induced the accused first of all to point out these various articles and then to confess what they had done.

Then there is one other point which has been urged upon us viz., that some of the articles, clothes for instance, were found at the village of Lahit and that the saddle was found just close to the house of the deceased. This it is said shows that something must have taken place after the death of the deceased and that somebody must have removed the articles in this way so as to throw suspicion upon others. Let that be so but I fail to see how the placing of these clothes in another village could in any possible way damnify the accused. That would be no evidence against them so far as that goes. The whole point against the accused is how did they come to know where these particular articles were. The explanation given so far as it goes about the second village is that the articles which were found there were placed there by some enemy of the accused in order to arouse the suspicion of the Police against them and that this was similarly the reason for the saddle being found in the house of the deceased instead of at the place of the murder. I fail to see how these two matters really assist the accused in any way. The suspicion would not be thus directed against them, for they lived in Kalamb, and not at either of the other two villages.

Another point was urged regarding the delay in the Police discovery of the crime between the 15th and the 26th November. But when one thinks of this mountainous district and its valleys, I fail to see how it helps the accused that it was not until the accused themselves opened their mouths on the subject that the Police had any real idea as to what had happened. In fact, one can see from the facts that the Police were searching in the wrong direction from where this body was. The body was far away at Koch Kada north-west of Kalamb though the murder had taken place south of Kalamb.

I have now dealt with the main points urged in favour of the accused. As I have already said the case is an extremely clear one, and in a premeditated cold-blooded murder such as this there can be only one sentence namely, that which the learned Sessions Judge has passed upon the accused.

There is one matter about motive which was urged before us. This is not the first time that a money lender has met with his death at the hands of people who owed him money, and to my mind, that formed an adequate motive for the crime being committed in the present case.

The convictions and sentences will accordingly be confirmed and the appeals dismissed.

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Crump J.—I agree. The main point for consideration in the present case is what weight should be attached to the confessions made by the accused persons. Considering the care with which these confessions were recorded and the precaution adopted by the Magistrate to secure that they were voluntary and in the absence of any circumstance in the case suggesting that they were improperly obtained, it is difficult to see any ground for refusing to accept them as good evidence. In particular I am impressed by the fact that the Magistrate allowed these two persons a delay of 24 hours before recording their statements during which time they were kept in his custody and not in the custody of the Police. Assuming that the confessions were voluntary, and no other conclusion seems to be possible in the circumstances of the case,

their truth can herdly be questioned having regard to the corroboration which is furnished not only by the conduct of the accused but also by the evidence of the approver The disclosure of properties connected with the crime at places spread at a considerable distance in a wild and mountainous country, and the discovery of the human remains at the foot of the precipice known as Kock Kada, convince me that the confessions contain a true account of the manner in which the deceased met his death. That the deceased was murdered is fairly established even apart from the confessions of the accused. The deceased left his village on the morning of 15th November 1921 with the intention of being absent for a day only and on the following morning his horse returned to his house without the saddle and trappings. From that day onwards he has never been heard of and the various articles and property found at different points noted in the case have been proved to be the property of the missing man. Although the portion of the skull which was found at the foot of the precipice cannot naturally be identified, the general evidence leading up to that point is so clear that it is impossible to feel any reasonable doubt that this was the skull of the missing man, and that he was murdered by some person or persons is a reasonable inference in the circumstance of the case. Everything points to the death having been caused by some of the deceased's debtors in the neighbourhood and therefore the general facts of the case go strongly to support the case against the accused. In view of the very clear and cogent judgment of the learned Sessions Judge I do not feel that it is necessary for me to deal at any greater length with the case. I agree in the conclusions arrived at by the learned Sessions Judge, and in the circumstances of the case, having regard to the premeditated nature of the crime, I can see no ground for refusing to impose the extreme penalty. I agree therefore with my learned Brother that the convictions and sentences must be confirmed and the appeals dismissed.

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SHAH AG. C. J. AND CRUMP J.

Fattechand Anandram Marwadi–Applicant.

Umaji Valuji Mahar–Respondent.

S. A. No. 769 of 1922, dated 12th September 1922, from the decision of Sub. J. at Nasik, in Appeal No. 39 of 1921 confirming the decree passed by Second class Sub. J. at Nasik, in Civil Suit No. 154 of 1920.

(a) Reg. Act Ss,77 & 72—Refusal under S, 72

It is clear that in order that the suit may be, treated as maintainable under S. 77, the order must be one of refusal to order the document to be registered under S. 72 or S. 76; an order refusing to sanction acceptance of penalty and refusing to condone delay cannot be treated as a refusal to register by the Registrar within the meaning of s. 76 (a.) An order was made by the Sub-Registrar refusing registration, on the Registrar refusing to condone delay; The executant of the deed then applied to the Registrar to set aside the order of the sub Registrar who rejected the application. *Held* the order was one under S. 72: [P 189 C 2]

Reg, Act Ss, 33 & 77—Inter—relation,

S. 34, which is subject to the provisions of various sections including S. 77, is not intended to lay down any limitation upon the effect of Ss; 71 to 77. It simply provides that the document shall not be registered unless the delay is excused. But where there is an order made by the Sub-Registrar refusing the registration and where the Registrar has refused to direct the registration of the document on an application which, may be treated as an appeal, the final order of the Registrar can be said to satisfy requirement of S. 72 of the Indian Registration Act.[P 190 C 1]

P. B. Shingne–for the Appellant.

Mr. Alex A. Rais–for the Respondent.

Shah Ag. C. J.—The question of law, that arises in this appeal, relates to the interpretation of the provisions of of the Indian Registration Act. The facts which have given rise to it are these. Apparently a sale deed was executed in favour of the plaintiff by the defendants on November 20, 1919. It was presented by the plaintiff on March 20, 1920, for registration to the Sub-Registrar. The Sub-Registrar accepted it and issued notice to the defendants. The defendants appeared on April 7, 1920, and they made a statement which may be briefly described as admission of execution subject to the proviso that the sale was subject to the agreement that the plaintiff was to recover the property on payment of the amount mentioned

in the sale deed. He also accepted in accordance with the rules under the Indian Registration Act the penalty which was leviable in consequence of the admission of execution of the document not having been made within the time allowed by law under S. 34 of the Indian Registration Act, subject to the sanction of the Registrar who would have power under the proviso to that section in case of urgent necessity or unavoidable accident to condone the delay. The Registrar did not sanction the acceptance of the penalty and did not condone the delay, with the result that on April 15, 1920, the Sub-Registrar endorsed on the document his order refusing to register it on the ground that the Registrar had not given the necessary sanction for accepting the fine and for registering the document. Thereafter the plaintiff made an application to the Registrar, but he saw no reason to revise the order already passed by him and refused the application on May 5.

The present suit was filed by the plaintiff on May 19, 1920, under S. 77 of the Indian Registration Act for a decree directing the document to be registered. The defendants resisted the plaintiff's claim, and the trial Court dismissed the suit on the ground that the suit was outside the scope of S. 77 of the Indian Registration Act, and therefore not maintainable.

The plaintiff appealed to the District Court, and the First Class Subordinate Judge, with appellate powers, who heard the appeal, came to the same conclusion and affirmed the decree of the trial Court.

The plaintiff has appealed to this Court, and his contention briefly stated is that the suit is within the scope of S. 77 of the Indian Registration Act. On the other side, the contention is that it is outside the scope of S. 77, because the order made by the Registrar is not covered by either clause (*a*) or clause (*b*) of s. 76. It is urged that there is no refusal on the part of the Registrar to register the document within the meaning of clause (*a*), and that there is no refusal to direct the registration of the document under clause (*b*). By way of reply to these contentions it is urged on behalf of the appellant that the case is governed by clause (*a*) of sub-section (1) of S. 76 because in effect there is a refusal by the Registrar to register the document, and further that in any event it is covered by clause (*b*).

It is clear that in order that the suit may be treated as maintainable under S. 77, the order must be one of refusal to order the document to be registered under Sec. 72 or S. 76. I do not think that the order in question can be treated as a refusal to register by the Registrar within the meaning of S. 76 (1) (*a*). We have to consider whether it amounts to a refusal to direct the document to be registered under S 72 as provided in S. 76 (1) (*b*). I may mention here that it is difficult to appreciate the need for referring to S. 72 in S. 77 as the orders of refusal by the Registrar under that section are included in S. 76. The point is not easy to decide under the provisions of the Indian Registration Act. But it seems that the true answer to the question that arises is to be found in the correct interpretation of the facts as they occurred before the Sub-Registrar and the Registrar. It appears that the document was accepted for registration under S. 24 of the Indian Rsgistration Act as it was presented within the time allowed by law. But the registration was refused by him on April 15, 1920, as the persons executing the document did not appear before the registering officer within the time allowed for the presentation of documents, and as the Registrar did not condone the delay. We have not got on the record a copy of the application made by the plaintiff to the Registrar thereafter. But we have got a certified copy of the order which the Registrar made on that application. We have also got a certified copy of the entry made by the Sub-Registrar on April 15 in his own book, though it does not appear in terms whether that is Book No. 2 referred to in S. 51 of the Indian Registration Act. From the nature of the extract put in, it appears to me that the Sub-Registrar really refused on April 15, 1920, to register this document, on the ground stated

in the endorsement. It is clear that the refusal to register was endorsed on the document, and there was also an entry in Book No 2 of the reasons for such an order as required by S. 71. Therefore so far as the act of the Sub-Registrar is concerned, in spite of the previous reference to the Registrar which is referred to in his endorsement, it seems to me that it must be treated as an order under S. 71. So far there is no difficulty.

The further step that is necessary to consider is whether the application made by the plaintiff to the Registrar after that was an appeal under S. 72 of the Indian Registration Act, and whether the order rejecting the application is an order refusing to direct the registration of the document under section 72. S. 72 is not referred to in terms in this order, and we do not know whether it was referred to in the application which the present plaintiff made to the Registrar on May 3. But under S 72 the refusal of the Sub-Registrar, such as we have in this case, is open to appeal to the Registrar; and no particular form of appeal is prescribed, at least none has been brought to our notice. The rules under the Act which have been referred to are not shown to contain any particular form in which the appeal provided by S. 72 is to be made. We may, therefore, treat the application made by the plaintiff as an appeal. It is true that when the District Registrar refuses to direct the registration of the document under S. 72, he has to record reasons for such order in his Book No. 2 as provided in S. 76 (1). It does not appear on the record of this case that any such entry of the order was made by the Registrar in Book No. 2, and we must assume for the purposes of the present appeal that no such entry was made. It is conceivable that the Registrar merely dealt with the plaintiff's application as an application to revise the order which he had already communicated to the Sub-Registrar on April 15. But the omission of the Registrar to refer the order to the proper section of the Indian Registration Act, and to make the necessary entry in Book No. 2 as required by that Act would not be a sufficient justification for our refusing to refer that order to the proper section, if it could be so referred.

After a careful consideration of the nature of the order and the steps taken in this particular case before the Sub-Registrar and the Registrar, I have come to the conclusion that the order made by the Registrar on May 5 was in substance an order under S. 72 refusing to direct the registration of the document which the Sub-Registrar had already refused to register. It is no doubt a somewhat anomalous position that the power which the District Registrar has under the proviso to S 34 to condone the delay should be exercised by him in the first instance on a reference by the Sub-Registrar, which might be, for all that we know, without any knowledge of, and in the absence of, the parties concerned and that the party should have a right to appeal to the same authority practically to reconsider the decision so arrived at by him at an earlier stage. But under S. 72 the party has the right of appeal in the case of refusal, except when the refusal is based on the ground that the execution is denied, with which exception we are not concerned and for which exception a different procedure is provided. The present refusal of the Sub-Registrar to register the document would clearly be one in respect of which there could be an appeal to the Registrar. As there was an application to the Registrar after the refusal by the Sub Registrar, it seems to me to be fair to treat that application as an appeal, and the order thereon as an order by the Registrar refusing to direct the registration of the document in question. When the order is read in that manner, it is quite clear that the suit is well within the scope of S. 77, That is the view which I take of the nature of the orders made by the Sub-Registrar and I am, therefore, of opinion that the suit is maintainable under S. 77 of the Indian Registration Act.

I desire to add a word with reference to the argument based on the provi-

sions of S. 34 that no document shall be registered under the Act, unless the persons executing such document, or their representatives, assigns or agents authorized as aforesaid, appear before the registering officer within the time allowed for presentation by the provisions of Ss. 23 to 26. It is urged that where the Registrar refuses to excuse the delay under the proviso to that section, the document cannot be registered and that, therefore, the suit for the registration of such a document is outside the scope of S. 77. It is true that if S. 34 is literally read, it does present an apparent difficulty; but it seems to me that S. 34, which is subject to the provisions of various sections including S. 77, is not intended to lay down any limitation upon the effect of Ss. 71 to 77 with which I have already dealt. It simply provides that the document shall not be registered unless the delay is excused. But where there is an order made by the Sub-Registrar refusing the registration as in the present case and where the Registrar has refused to direct the registration of the document on an application which, as I have already stated, may be treated as an appeal, I do not see how the final order of the Registrar can be said not to satisfy the requirements of S. 72 of the Indian Registration Act. In spite of the difficulty, which no doubt does arise in view of the apparent conflict between the provisions of S. 34 and those of Ss. 71 to 77, I think that the present suit should be treated as falling within the scope of S. 77 of the Indian Registration Act.

I would, therefore, allow the appeal, discharge the decrees of the lower Courts, and remand the suit to the trial Court for disposal according to law. All costs up to date to be costs in the suit.

CRUMP J,—I concur.

Appeal allowed.

1923 BOMBAY 190

MACLEOD, C. J. AND CRUMP. J.

Hirachand Motichand—Appellant.

v.

Hansabai Ganpatrao—Respondents.

S. A. No. 670 of 1921, dated the 8th November 1922, from the decision of Joint Judge of Poona, in Appeal No. 190 of 1920, confirming the order passed by Sub-J. at Baramatji, in Darkhst No. 655 of 1119.

Deccan Agriculturists Relief Act S, 22-Heirs of agriculturist not covered.

If it had been intended that in the case of the death of a judgment debtor who was an agriculturist, his property in the hands of his heirs could be taken possession of by the Collector under the directions of the Court, then that ought to have been specifically stated in the second para of S. 22.

S R. Bakhale—for the Appellant.

Macleod C. J.—A question arises in this appeal which does not appear to have been decided in any reported case. The plaintiff obtained a decree against one Sagunabai. It was an ordinary money decree, and, therefore, he could not seek to execute the decree against the immoveable property of the judgment-debtor who was held to be an agriculturist. But plaintiff might have applied to the Court under paragraph 2 of S. 22 of the Dekkhan Agriculturists' Relief Act to direct the Collector to take possession, according to the terms of that paragraph, of any immoveable property of the judgment-debtor to the possession of which he was entitiled, and which in the opinion of the Collector was not required for her support and the support of the members of her family dependent on her. The judgment-debtor having died, this Darkhast was filed against her daughters as her heirs; and it is now contended that the Court has jurisdiction to direct the Collector to take possession of the immoveable property which has come to the daughters as heirs of the original judgment-debtor. Both Courts have dismissed the Darkhast, and we think they were right. If it had been intended that in the case of the death of a judgment-debtor who was an agriculturist, his property in the hands of his heirs could be taken possession of by the Collector under the directions of the Court, then that ought to have been specifically stated in the second

para. of S. 22. We cannot accede to the argument that we should read into the section the words "or his heirs" after the word "judgment-debtor" with the various consequential alterations which would have to be made in that paragraph. That would be, so far as I can see, entirely contrary to all canons of construction, and if the Legislature thinks that a creditor should have the remedy provided by S. 22, paragraph 2, not only against the judgment-debtor, but also against his heirs, then it is for the Legislature to make the necessary amendments in the Act. The appeal will be dismissed.

Appeal dismissed.

1923 BOMBAY 191

SHAH AND CRUMP JJ.

Naru Hari Gujar— Appellant.

v.

Tai Kom Devji— Respondent.

. . A. No. 683 of 1921 D. 25th September 1922, against the decision of Asst. J. of Satara in Appeal No. 242 of 1920.

Hindu Law--Alienation—Widow—Surrender in favour of next reversioner—Death of this reversioner--Rights of second next reversioner.

One Gopal was the owner of the property in suit. He died leaving a widow, a daughter and a nephew. In March 1911 the widow conveyed the whole of her estate by way of gift to her daughter by a registered deed. The daughter conveyed the whole estate absolutely to the widow on the 14th December 1912. The daughter died in 1915 leaving a daughter Tai, the present defendant. The widow gifted away the lands now in the suit to her granddaughter, the defendant, on the 6th April 1916. The plaintiff, who is the nephew of Gopal, claims these lands as a reversioner. The widow died in November 1918, and the plaintiff filed this suit in April 1919 to recover the lands as a reversioner. The defence was that the widow completely and effectively surrendered her whole estate to the next reversioner, her daughter, in March 1911, that when the daughter conveyed back the lands in December 1912 to her, the widow got an absolute estate, and that therefore, the gift of the lands in suit by her in 1916 in favour of her granddaughter was valid, and not liable to be questioned as an alienation by the widow. [P 192 C 2]

Held following *Rangasami* v. *Nachiappa* 46 I. A. 72, and *Sureshwar* v. *Maheshrani* 47 I. A. 233, that there are two conditions which must be fulfilled to make a surrender by the widow, with consent of the next heir valid. The first is that the surrender must be total, not partial. The second is that the surrender, must be *bona fide* surrender, not a device to divide the estate with the reversioner, that both the conditions are fulfilled in the present case, and therefore the alienation by the widow in 1911 could not be challenged by the reversioner.

Manerikar—for the Appellant.

Koyaji—for the Respondent.

JUDGMENT.—The facts which have given rise to this appeal are few and simple. One Gopal was the owner of the property in suit. He died leaving a widow named Venai and a daughter named Vithai. He also left a nephew. In March 1911 the widow conveyed the whole of her estate by way of gift to her daughter by a registered deed. The daughter conveyed the whole estate absolutely to the widow on the 14th December 1912. The daughter Vithai died in 1915 leaving a daughter Tai, who is the present defendant. Venai the widow gifted away the lands now in suit to her granddaughter, the defendant, on the 6th April 1916. The plaintiff, who is the nephew of Gopal, claims these lands as a reversioner. Venai died in November 1918, and the plaintiff filed this suit in April 1919 to recover the lands as a reversioner. The defence of the defendant was that the widow Venai completely and effectively surrendered her whole estate to the next reversioner, her daughter, in March 1911, that, when the daughter Vithai conveyed back the lands in December 1912 to her, the widow got an absolute estate, and that therefore, the gift of the lands in suit by her in 1916 in favour of her granddaughter was valid, and not liable to be questioned by the revisioner as an alienation made by the widow.

The trial Court decided in favour of the plaintiff holding that the result of the two transactions of March 1911 and December 1912 was that there was no surrender of the widow's estate, and that in effect the widow continued to hold the widow's estate at the date of the gift in favour of the present defendant. She was therefore, held to be incompetent to convey any interest beyond her lifetime, as there was no suggestion of any legal necessity in the case. Accordingly a decree was passed in favour of the reversioner.

In appeal the learned Assistant Judge declined to treat the two transactions of 1911 and 1912 as part of one and the same transaction. He

treated the transaction of March 1911 on its own merits, and came to the conclusion that thereby Venai effectively surrendered the widow's estate in favour of her daughter, the then next reversioner; and that she got back in 1912 not the original widow's estate, but a complete and absolute ownership over the lands which was vested in the daughter at that date. He was, therefore of opinion that the gift of the lands in suit to the granddaughter in 1916 by the widow was valid, and the reversioner had no right to challenge it. The suit was accordingly dismissed.

In the appeal before us it is contended that the transaction of 1911 should not be accepted as an effective surrender of the widow's estate in favour of the next reversioner and that the second transaction of 1912, whereby the daughter conveyed back the properties to her mother should be treated as evidence of the fact that the original gift in favour of the daughter was not intended to be an unconditional surrender of the estate. It is also pointed out in view of the recital in the deed of 1912 that the sanction of the Collector in respect of some lands was believed to be necessary to give effect to the first conveyance, and that as that sanction was not obtained, the surrender evidenced by the first document could not be accepted as valid. In support of this contention reference has been made to the decisions in *Hem Chunder Sanyal* v. *Sarnamoyi Debi* (1). *Challa Subbiah Sastri* v. *Palury Pattabhirnmay a* (2) and *Rangappa Naik* v. *Kamti Naik* (3).

It is needless, however, to examine those decisions in detail in view of the pronouncements of their Lordships of the Privy Council in *Rangasami Gounden* v. *Nachiappa Gounden* (4) and in *Sureshwar Misser* v. *Maheshrani Misrain* (5). The following observations in *Sureshwar* v. *Maheshrani* (5) are pertinent to the point in the present case. Now there are two conditions as there laid down which must be fulfilled to make a surrender by the widow, with consent of the next heir (necessity being out of the question), valid. The first is that the surrender must be total not partial. The second is that the surrender, in the words of *Gonnd n's case* must be a *bona fide* surrender, not a device to divide the estate with the reversioner.

Applying these two tests to the present case, it seems to us clear that in March 1911, the widow surrendered her whole estate in favour of the next reversioners. It is admitted that the lands and the house referred to in that document constituted the whole of her estate It is not suggested that surrender was partial. The second condition that it must be a *bona fide* surrender, not a device to divide the estate with the reversioner, also is fulfilled. It cannot be suggested in the present case that in 1911, when the widow was in bad health and her widowed daughter was staying with her it was intended to be merely a device to divide the estate with the reversioner,

The question of transfer of possession does not present any difficulty to our mind, because the widow and the daughter both lived together, and such transfer of possession as was possible and necessary under the circumstances was effected. It seems to us that looking to the transaction of 1911 alone for the moment, it was undoubtedly a good surrender.

It is argued, howevr, that the transaction of December 1912, must be taken as part of the same transaction, and that when the land was conveyed back to the widow, it was the original widow's estate that was restored. and not that the lands were conveyed back to her absolutely as owned by the daughter at the time. We are

(1) [1895] 22 Cal. 354.
(2) [1908] 31 Mad. 445 (451).
(3) [1908] 31 Mad. 366-18 M. L. J. 309-3 M. L. T. 355 (F. B.),
(4) [1919] 42 Mad. 523-46 I. A. 72-36 M. L. J. 493-17 A. L, J. 536-29 C. L. J. 539-21 Bom. L. R. 640-10 L. W. 105-23 C. W. N. 777-(1919) M. W. N. 262 26 M. L. T. 5-50 I. C. 498 (P. C;).
(5) [1920] 47 I. A. 233-39 M. L. J. 161-18 A. L J. 1059-12 L W. 461-(1920) M. W. N. 472-28 M. L. T. 154-57 I. C. 325 (P. C.).

at all sure whether the widow's estate once effectively sarrendered could be re-created. But that is not so much the question raised by the appellant. What we are asked to hold by the appellant is that the intention of the parties must be gathered from the recitals in the second document which would show that the first transfer was invalid. We do not think, however, that a document executed nearly a year and nine months after could be treated as part of the same transaction, and the recital in the document as to the absence of the Collector's sanction cannot be relied upon as proving either the necessity for such sanction, or the tenure of the land conveyed by the widow to her daughter. Under these circumstances, the second document cannot be read in the sence in which it is argued on behalf ofthe appellant it should be read by the Court; and it seems to us that the lower appellate Court was right in treating the document as a later and independent transaction conveying the estate, which it does purport to convey namely the absolute interest of the daughter in the land. If that position is accepted, it follows necessarily that the gift by Venai in favour of her granddaughter in 1916 was perfectly valid, and not liable to be challenged by the present plaintiff. We, therefore, affirm the decision of the lower appellate Court and dismiss the appeal with costs.

1923 BOMBAY 193

MACLEOD, C. J. AND CRUMP, J.

Bapurao Sakharam Karmarkar—applicant.

v.

Sadhu Bhivba Gholap—Opponent.

Civil Extraordinary application No. 57 of 1922, dated the 7th November, 1922, from an order passed by Sm. C. Ct. Judge in mis Application No. 24 of 1921.

Limitation Act Art. 164-Specific knowledge necessary.

The words of the Article mean something more than mere knowledge that a decree had been passed in some suit, in some Court against the applicant. It means that the applicant must have knowledge not merely that a decree has been passed by some court against him, but that a particular decree has been passed against him in a particular Court in favour of a particular man for a particular sum.

D. A. Tuljapurkar—for the Applicant.

K. H. *Kelkar*—for the Opponent.

Macleod C. J:—We think that the learned Judge was wrong in refusing to entertain the applicant's petition for setting aside the exparte decree passed against him. Under Article 164 of the Indian Limitation Act the defendant had thirty days from the date of the decree, or where the summons was not duly served, when the applicant had knowledge of the decree. The petitioner alleges that the summons had not been duly served, and that he had no knowledge of the decree until execution was levied against him. The plaintiff's reply was that the defendant had knowledge of the decree because he (the plaintiff) had asked two persons to tell him about the decree and asked him to settle. Those two persons were examined on commission. We do not think that their evidence is sufficient to impose knowledge of the decree on the defendant within the meaning of Article 164. We think the words of the Article mean something more than mere knowledge that a decree had been passed in some suit in some Court against the applicant. We think it means that the applicant must have knowledge not merely that a decree has been passed by some Court against him, but that a particular decree has been passed against him in a particular Court in favour of a particular person for a particular sum. A judgment-debtor is not in such a favourable position as he used to be when he had thirty days from the time when execution was levied against him. But we do not think that the Legislature meant to go to the other extreme by laying down that time began to run from the time the judgment-debtor might have received some vague information that a decree had been passed against him. We think, therefore, that the rule must be made absolute and the Judge should now decide the application to set aside the *exparte* decree on its merits. Costs will be costs in the application.

Rule made absolute.

1923 BOMBAY 194 (1)

MARTEN AND FAWCETT. J. J.

Emperor.

v.

Khashaba Tatyai Lawand— Accused

Criminal Reference No. 71 of 1922 dated 6th November 1922.

Criminal P C S 341-Deaf and dumb accused--Attempt to commit suicide

A deaf and dumb accused was convicted on his confession indicated by signs indicating to attempt to commit suicide and the High Court sentenced him to one day's simple inprisonment

S. S. Patkar, Government Pleader — for the Crown.

Accused absent.

Marten J.—In this case the record and proceedings have been submitted to us under S. 341 of the Criminal Procedure Code to pass thereon such order as the Court thinks fit. The accused is deaf and dumb and he has been convicted of attempting to commit suicide. His apparent reason for making this attempt is that his brother had refused to partition the lands which they jointly held. The reason given seems an inadequate one. Litigation would seem a more ordinary remedy, but the unhappy condition of this unfortunate man must to my mind weigh very largly in his favour in considering what course we ought to take under the present circumstances.

As far as the authorities go, in *King-Emperor* v. *Monda* (1) the accused was acquitted, as the Court considered that it was not established that he knew the nature of the act commited or that he acted with a dishonest intention In *Emperor* v. *A Deaf and Dumb Accused* (2) a deaf and dumb man was convicted of theft: and *In re A Deaf and Dumb Man* (3) the Court remanded the case to the Magistrate to make enquiries about his antecedents and his ordinary mode of life and as to how he ordinarily made communications with his relatives and others.

In the present case it would appear that the accused made certain sign to signify what took place, as will be found on reading his statement on page 11. It is not shown to us how the specific questions put to the accused were communicated to him. Unfortunately the learned Magistrate does not say definitely whether the accused is able to read or write and consequently to communicate with people in that way. But on the whole I do not think it necessary to have this case remanded or to direct a retrial. I think the justice of the case will be met if we affirm the finding that he is guilty of the offence and convict him accordingly of an attempt to commit suicide and direct that he be sentenced to one day's simple imprisonment. At the same time the First Class Magistrate at Karad should be requested if practicable to admonish the accused, and to point out to him that it is wholly improper for him to attempt to take his own life as a remedy for his brother's conduct.

On the whole I have considered it inadvisable to proceed under S. 562 of the Criminal Procedure Code as it does not appear clear whether the accused would be capable of entering into the bond and so on for good behaviour which is indicated in that section.

FAWCETT J; I agree.

(1) (1902) 4 Bom. L. R. 296.

(2) (1916) 40 Bom. 598—18 Bom. L. R. 553-8 Cr. L. R. 438.

(3) (1906) 8 Bom L. R. 849-4 Cr. L. J. 444

1923 BOMBAY 194 (2)

MACLEOD C. J. AND CRUMP. J.

Emperor.

v,

Nasurbhai Abdullabhai Lalji.

Cr. A. No. 633 of 1922 D. 20th December 1922, from the convinction and sentence passed by Third Presidency Mag. Bombay.

Companies Act S. 76 - Extraordinary meeeting is no substitute for ordinary meeting.

The fact, that certain share holders of the Company sent in a requisition to the directors for the holding of an extraordinary meeting and according to that requisition an extraordinary meeting was held, is not a compliance with the provisions of S. 76.

Strangm n. Jinnah and Desai,—for the Accused.

Velinkar,—for the Complainant.

Kanga, Advocate General-(Public Prosecutor) for the Crown.

Macleod C. J.—The first accused, the Standard Aluminium and Brass Works Ltd, and accused Nos. 2 to 6 as directors of the said Company were charged before the Third Presidency Magistrate with having committed offence under Ss. 76 and 131 of the Indian Companies Act VII of 1913. The facts are not in dispute. The Company was registered on February 27, 1920, and commenced business on January 3, 1921 The statutory meeting under S. 77 was held on March 30, 1921. A general meeting was held on the same day. Then under S. 76 the Company had to hold a general meeting within fifteen months of that date, that is to say, before June 30, 1922. It must be admitted that no general meeting within the meaning of that term under the Articles of Association was held before June 30, 1922, nor was any balance sheet, audited by the auditors of the Company, prepared and oread before the Company in a general meeting. It appears then that there can be no doubt that the Company and its officers had committed a default under S. 76 and S. 131 of the Indian Companies Act. But reliance was placed by the accused on the fact that certain shareholders of the Company sent in a requisition to the directors for the holding of an extraordinary meeting, and according to that requisition an extraordinary meeting was held on June 29. It was very strenuosly argued before the Magistrate that the holding of that meeting was a compliance with the provisions of S. 76.

Aricle 60 provides for the statutory meeting required by S. 77 of the Indian Companies Act. Then under Article 61 other general meetings shall be held once in the year 1921, and in every subsequent year at such time and place as may be prescribed by the Company in general meeting and if no other time or place is prescribed at such time and place as may be determined by the directors. The first of such general meetings may be held on the same day as the statutory meeting. Under Article 62 the general meetings referred to in the last preceding clause shall be called ordinary meetings; all other meetings of the Company shall be called extraordinary meetings.

It seems to us it is quite impossible for us to hold that extraordinary meetings, such as the one which was held on the requisition of the shareholders on June 29, was a general meeting within the meaning of that terms in S. 76. Reference was made before the Magistrate to certain English cases, but we do not think there is any need to refer to cases decided under the English Act, as we have before us the Indian Companies Act and the Articles of Association of the Company, and we need only consider what is prescribed by that Act read with the Articles.

The convictions were, therefore, right unless any of the accused could prove that they were not directors at the time the default was committed. But that has not been proved. Only in the case of accused No. 2 it was argued that he could not knowingly be a party to the default, as he had sent in his resignation to the Company on March 24, and under Article 97 he ceased *ipso facto* to be a director at the time when the notice was sent in. Although afterwards he did attend meetings of the Board and actually presided at the meetings as Chairman, his contention now seems to be that he presided as a private individual. When we asked what meetings he had attended after he had sent in his resignation, we were told he presided at meetings on June 24 and June 28, and as it was quite impossible for the Company to hold a general meeting before June 30, in the absence of any notices having been sent out under Article 64 he could not be liable for the default. We doubt very much whether that argument would be successful. But there is no need to consider it because on reference to the Minute Book the attendances of accused No. 2 at the Board meetings can be seen. He presided at the meeting of March 9. He was absent from the meeting held on May 16. The first minute of that meeting is as follows:— "Mr. Hajibhoy A. Thaver was apppointed Chairman in the

absence of Mr. Nasurbhai A. Lalji (that is to say the second accused) from Bombay." It is curious to note that we can find no reference to the letter of accused No. 2 resigning his office as director in the minutes of that meeting, although there is a reference to a letter received from Dadabhoy S. Madan resigning his office of director which was by a resolution accepted. At the time of the meeting of June 13 the second accused had returned to Bombay and presided as Chairman. Again he presided at meetings of June 19, June 22, June 24 and June 28. Then in accordance with the provisions of the Articles of Association he resigned his office as director on June 30. There is no substance, therefore, in the defence which has been urged before us on behalf of the second accused which as a matter of fact was not urged before the learned Magistrate. We can only consider that the statement of the second accused which he made to the effect that after his resignation was sent the Board for reasons best known to them did not choose to accept it, and in ignorance of the law on the subject he did attend some meetings, does him very little credit.

Then accused Nos. 3 and 5 have not improved their case by alleging as an excuse for not complying with the provisions of S 131 that the auditor had conspired with some of the shareholders to delay in bringing out his report on the Company's accounts. The auditor in his evidence said he had asked to see the securities for the Rs. 2,47,000 drawn by the Agents and had not seen them up to that day. Further comment on these allegations of this accused is unnecessary. In any event, even if such a conspiracy had been proved, that would not prevent a default on the part of the accused being committed.

Accused No. 4 complained that the Magistrate had unjustifiably fined him Rs. 50 more than accused Nos. 2, 3 and 5. The Magistrate says:—

"From the attitude taken up by the accused No 4, Vaikunth Ambala Desai, I have had reason to think tha he had been misguiding the othe accused in wrongly interpreting the law to them."

We can safely rely on the Magistrate's appreciation of the attitude of this accused.

This case took a very long time before the Magistrate and he remarked at the end of his judgment :—

"In conclusion it only remains for me to say that I was obliged to write a somewhat lengthy judgment after a regular trial by reason of the legal defence set up in the case. If that was not so, I should have disposed of the case in summary trial under S. 278 of the Act."

The Magistrate was obviously right. None of these defences set up by the accused at very great length had any substance whatever, but the Magistrate was obliged to deal with them also at very great length in a very able judgment. If the accused had been better advised with regard to the attitude that ought to have been taken up before the Magistrate, they would have admitted the default, and pleaded extenuating circumstances. If that had been the case, we have no doubt the matter would have terminated in a way more satisfactoy to the accused than it did. The appeal will be dismissed.

Appeal dismissed.

1923 BOMBAY 196

MACLEOD C. J., AND CRUMP.

Bai Kashibai—Appellant.

Purshottam Keshavji—Respondent.

O. C. J. Appeal No. 97 of 1922 D. 17th Jan. 1923. in Suit No. 1371 of 1921.

(a) Easements Act Ss,32,and33-Form of decree,

Once the plaintiff establishes that his windows are ancient and the defendant by the proposed buildings threatens to disturb his easements, then he is entitled to an injunction with regard to the windows which have been held to be ancient and it will depend upon the future action of the defendant whether the injunction has been disobeyed, Form 15 of Appendix D of the Code of Civil Procedure is the form prescribed for a decree in a *quia timet* action asking for an injunction against a building higher than the old level. But this form is not appropriate as expressing what the Court should direct if the plaintiff succeeds in a *quia timet* action. Though the plaintiff may have an easement of light and air for all the windows which obtained light over the defendant's old buildings, he has no cause of

action, against the defendant unless defendant threatens to disturb his enjoyment of the easement, Therefore, if he succeeds in proving that, he is entitled to an injunction restraining the defendant from disturbing the easement, to the enjoyment of which he has been held to be entitled. When the defendant is so enjoined, it will depend upon the future character of his building whether he has disobeyed the injunction in such a way as to give rise to a right of action,

Strangman with Kanga and Petigara—for the Appellant.

Inverarity with Coltman — for the Respondent.

Malcleod C. J—This a *quia timet* action filed by the plaintiff as owner of a property in Lalwady, old Hanuman Cross Lane, Kalbadevi, asking for an injunction against the defendant from erecting or maintaining erected any building or erection on her premises mentioned in the plaint so as to cause a disturbance of the plaintiff's easements of light and air across the defendant's premises enjoyed by the ancient windows referred to in the plaint. The trial Court granted a decree and declared that the windows in the South wall of the plaintiff's premises mentioned in the plaint and shown in the plan annexed as Ex. C to the plaint were ancient windows and that the plaintiff was entitled to an easement of light and air for his premises over and across the defendant's premises mentioned in the plaint save so far as the same was obstructed by the defendant's old bulding also mentioned in the plaint and shown by a white broken line in the said plan. Then an injuction was granted against the defendant from erecting or continuing to erect or maintaining erected upon her premise mentioned in the plaint any house, building or erection of a greater height than the building which formerly stood upon her premises and which had been recently pulled down so or in such manner as to darken, injure or obstruct the windows of the plaintiff marked 6, 7, 8, 10, 11, 12, 13, and 14 in the said plan save and so far as the same were obstructed by the defendant's old building.

The defendant has appealed against the decision of the learned Judge who found against her on all the issues. It has not been contended before us that the plaintiff's windows were not ancient; it was only suggested that the easements of light and air enjoyed previously by some of the windows might not be materially affected if the defendant built according to the proposed plan. It is not necessary, however, to enter upon such details in the case, for once the plaintiff establishes that his windows are ancient and the defendant by the proposed buildings threatens to disturb his easements, then he is entitled to an injunction with regard to the windows which have been held to be ancient and it will depend upon the future action of the defendant whether the injunction has been disobeyed. The defendant does not mention in the memorandum of appeal that she objects to the form of the decree, but we think there is considerable substance in the objection which has now been raised. It is quite true that Form 15 of Appendix D of the Code of Civil Procedure is the form prescribed for a decree in a *quia timet* action asking for an injunction against a building higher than the old level. That form is the common form of injunction which has been used in England ever since the case of *Yates v. Jack*, (1) but it is obvious, when reference is made to the Indian Easements Act, that this form is not appropriate as expressing what the Court should direct if the plaintiff succeeds in a *quia timet* action. Though the plaintiff may have an easement of light and air for all the windows which obtained light over the defendant's old buildings, he has no cause of action against the defendant unless she threatens to disturb his enjoyment of the easement. Therefore, if he succeeds in proving that, he is entitled to an injunction restraining the defendant from disturbing the easement, to the enjoyment of which he has been held to be entitled. By S. 32 of this Act the owner of a dominant heritage is entitled to enjoy an easement without disturbance by any other person. What amounts to an actionable disturbance is defined in S. 33 of the Act. When the defendant is so enjoined, it will depend upon the future character of his building whether he has disobeyed the injunction in such

(1) (1866) L. R. 1 Ch. 295

a way as to give rise to a right of action. In the case of *Colls v. Home and Colonial Stores, Limited* (2) Lord Macnaghten pointed out that the common form of injunction which had been in use since the case of *Yates v. Jack* (1) was not altogether free from objection. Their Lordships thought it better that the order when expressed in general terms should restrain the defendant from erecting any building so as to cause a nuisance or illegal obstruction to the plaintiff's ancient windows as the same existed previously to the taking down of the house which formerly stood on the site of the defendant's new buildings. If the decree stood as it has been drawn up, it might follow that if the plaintiff's ancient windows were in the slightest degree darkened, injured or obstructed by the defendant's new buildings, that would constitute a disobedience of the injunction, though it might obviously be no disturbance according to the provisions of the Indian Easements. Act. The decree will, therefore, be amended by perpetually restraining the defendant from disturbing the easements to which the plaintiff is entitled in respect of the windows on the South walls of his premises mentioned in the plaint which were held to be ancient windows save in so far as they were obstructed by the defendant's old building. There was no necessity to mention particular windows of those found to be ancient. They are all equally entitled to protection.

The appellant must pay the costs of the appeal.

Decree amended.

(2) [1904] A. C. 179.

1923 BOMBAY 198

MACLEOD C. J., AND CRUMP, J.

Dattaji Nana Patil— Appellant.

v.

Narayanrao Bhimrao Patil—Respondent.

F. A. No. 168 of 1919, D. 22nd December 1922, from the decision of Sub. J., of Belgaun in suit No. 186 of 1917.

Criminal P. C. S. 88—Confiscation and Re-Grant, effect of.

On absconding of the plaintiff his property was confiscated and re-granted; to defendant No. 1 *held* a suit for possession of the property cannot be maintained on the mere chance that something which might be decided in the Civil Courts might influence the revenue authorities in matters in which the decision is entirely within their province.

Coyaji, with D. K. Manerikar—for the Appellant.

Strangman, with A. G. Desai—for Respoadents Nos. 1 and 2.

V. D. Limaya—for Respondent No 3.

J. G. Rele,—for Respondent No. 5.

CRUMP, J,—The plaintiff in this suit seeks to recover certain property as the adopted son of one Nana, the adoption having been made to Nana by his widow Laxmi after his death. It appears that in 1908 the plaintiff committed a criminal offence and absconded. Measures were taken to secure his attendance under the Code of Criminal Procedure. A proclamation was issued on January 2,1907, and an order for sale and confiscation of his property was made on June 22 of the same year. Under S. 89 it was necessary for the piaintiff to appear within two years and move that this order be set aside. He failed so to appear, and after certain further proceedings an order of confiscation was made on October 20, 1911. The effect of that order clearly was to put an end to any title which the plaintiff might have had with regard to the confiscated property, and unless he has in some way acquired a title since that order, it is difficult to see how the present suit can be maintained. He relies upon certain subsequent proceedings before the revenue authorities It appears that on the death of Laxmi an inquiry was held as to who was the nearest heir of Nana, and the Assistant Collector, on October 17, 1913, held that Narayanrao, who is the first defendant in the case, should be recognized as heir. The ground upon which he proceeded was that the adoption of the plaintiff had not been reported to the Collector as required by S. 34 of the Bombay Hereditary Offices Act of 1874. In the course of his order he remarked that the Collector would not be bound to recognise the adoption even if it were supported by an heirship certificate of a Civil Court. That order was upheld by the Collector in appeal, and

in his order he stated that the plaintiff's claim could not be entertained without a Civil Court's order. Therefore it appears that the Revenue authorities declined to recognise the plaintiff as the heir of the deceased Nana.

Subsequently proceedings were taken by the revenue officers as regards the question of the restoration of these lands, which are Patilki Vatan lands. The order, so far as it is relevant to the present case, is in the following terms :—

"In all other cases in which Watan land has been attached on account of Dattaji's default, the attachment should be released in favour of Narayanrao, since Dattaji was not recognised and had no right over the Watan property."

Upon these orders it is argued for the plaintiff that what was in effect decided was that the property should be re-granted to the nearest reversioner, that by virtue, of his adoption, which the revenue authorities refused to re-cognise, he is the nearest reversioner, and that the terms of the Collector's order showed that the revenue authorities were prepared to recognise his adoption, if he obtained a decree of the Civil Court. It is difficult to spell out any decision to that effect on the part of the revenue officers. They appear to have merely suggested that possibly a decision of the Civil Court might assist the plaintiff in establishing his claim.

Apart from that the decision is perfectly clear. The property was confiscated, and was at the disposal of the Government, and was by them re-granted to defendant No. 1. In these circumstances it is clear that the plaintiff has not acquired any title since the confiscation of the property; and, therefore, he cannot maintain this suit for possession.

It is suggested that this plea as to the validity of his adoption should be entertained on the chance that if he obtained a decision in his favour, the revenue authorities might be constrained to reconsider their order. But the civil Courts are not really concerned with that matter. The reasons which actuated the revenue authorities dot not come before us. We are only concerned with the decision at which they arrived, and as that decision, that is to say, the re-grant of the property to defendant No. 1, for whatever reasons it was made, is clearly adverse to the plaintiff, it is impossible that this suit can be maintained on the mere chance that something which might be decided in the Civil Courts might influence the revenue authorities in matters in which the decision is entirely within their province. It follows, therefore, that the decision of the lower Court is correct and should be confirmed. The appeal must, therefore, be dismissed with costs One set of costs. *Appeal dismissed.*

1923 BOMBAY. 199

MACLEOD C. J., AND CRUMP. J.,

Rangappa Kandappa Korpe—Appellant.

v.

Vithu Khrishnaji Waiker—Respondent

S. A. No. 572 of 1921, D-12th Jan. 1923 from the decision of Dt. J., of Poona, in Appeal No. 15 of 1920.

Mortgage-Mortgagee-Possession.

Once the mortgagee gets into possession of the property mortgaged to him, then the property is security for his debt. He is entitled to remain in possession, though as a matter of fact if he endeavours to recover the martgage money by suit he might find himself barred by the statute of limitations.

P. D. Shingne—for the Appellant.

K. V. Joshi—for the Respondent.

Judgment.—This is a suit filed by the plaintiff to eject the defendants and recover possession of the plaint property, the defendants being in possession under a rent rule of June 1,1904 executed in plaintiffs favour on annual rent of Rs. 18-12—.The plaintiff is a mortgagee, the defendant having executed four mortgages with regard to the plaint property. They are set out at page 6 of the print. The first three are simple mortgages and the fourth one was a martgage with possession, and this is a suit really by a martgagee in possession against his tenant. The Courts however, have dealt with the case as if it were a suit filed under O. 3 (7) of the Decen Agriculturists' Relief Act, and have entertained a claim by the defendants to be allowed to redeem. The defendants then claimed that they were entitled to redeem the mortgaged property on paying off the mortgage money under Ex 23 only, and that as

the plaintiff-mortgagee could not sue to recover on the simple mortgages, the defendants were entitled to redeem without paying those amounts. The defendants obtained a decree on those terms in the trial Court and again in the Appeal Court. But we are of opinion that both those decisions were wrong. Once the mortgagee got into possession of property mortgaged to him, then the property was security for his debt. He was entitled to remain in possession, though as a matter of fact if he endeavoured to recover the mortgage money by suit he might find hemself barred by the statute of limitation. If the decision were to stand, it would follow that the mortgaget debt would still be liable to be redeemed without receiving any of the mortgage money. We think, therefore, that the decree must be set aside, and the case remanded to the trial Court to take an account of what is due to the plaintiff under the mortgages Exs. 21 22 and 23. As the mortgage Ex. 33, refers to other properties, the plantiff's pleader does not ask an account to be taken of the money due thereunder. The plaintiff is entitled to his costs througout.

1923 BOMBAY 200

MACLEOD C.J. AND CRUMP. J.

Elias Haji Ahmed—Plaintiff.

v.

Haji Esmail Sait—Defendant

O. C. J. Appeal No. 76 of 1921 dated the 16th Jan. 1923. in Suit. No. 393. of 1916.

(a) Appeal—Commissioner's report—Objections to-Appeal from order.

The Lower Court is incompetent to deal with directions and costs on commissioner's report while an appeal is pending from an order on objections to the Commissioner's report.

(b) Civil P. C S. 105—Final decree must be appealed from.

A final decree giving directions or ordering costs of commissioner will remain effective notwithstanding the decision of the appellate Court reversing the order on objections to the Commissioner's report, though the appellate Courts decision was given after the final decree and though in Law the Lower Court was incompetent to give directions and deal with costs until disposal of the appeal from the order on objections,

Bahadurji—for the Plaintiff.

Kamdar—for the Defendant.

Macleod C. J.—This case has been set down before us in a some what informal manner owing to an extraordinary series of errors of procedure which have been committed. Originally there was a reference to the Commissioner and on that reference to the Commissioner, a report was made. The plaintiff filed exceptions to the Commissioner's report which were heard by Mr. Justice Kajiji. The plaintiff dissatisfied with the decision of Mr. Justice Kajiji filed an appeal, and to a certain extent succeeded in this Court, but while the appeal proceedings were pending, it seems that the case was set down before the Judge for directions and costs on the Commissioner's report. That could only properly be done after the exceptions had been dealt with and finally disposed of. While the hearing of the exceptions was pending in this Court the lower Court was not competent to hear any application for further directions on the Commissioner's report which had not been finally settled. The Court having made an order on further directions a decree was drawn up. Then the decision was given by this Court on the exceptions, but it was incumbent on the plaintiff, as there was a final decree on the record, to appeal from that decree.

The plaintiff instead of appealing against the decree made an application to the Commissioner to amend his report in accordance with the decision of the Appeal Court, and the series of errors was completed by the Commissioner amending his report and the defendants filing exceptions to it. The whole of the proceedings in the lower Court while the appeal was pending were incompetent, but as a decree has been passed, the only way that the plaintiff can get rid of it is by an appeal. At present he is out of time, but he can make an application to have the delay excused. The defendant has asked for time and, therefore, we will hear the application next Monday. All costs to be reserved.

1923 BOMBAY. 201 (1)

MACLEOD C. J. AND CRUMP- J.

Emperor

v.

Parshhot amdas M. Shah and others

Cr. Rev. Nos. 333 to 335 of 1922 D. 7th Feb. 1923 from an order passsd by Dt Mag. of Panch Mahals.

Cr P C S 476–Revision

There must be any error of law, any abuse o or failure to exercise judicial discretion, such as would justify interference in revision. Revision is proper, if it is started on grounds merely fanciful, grounds so empty and so obviously wrong, that the Court cannot be said to have ormed a serious judicial opinion

G. N. Thakor (with M. H. Mehta)-- for Acc. No. 1

H. C. Coyajee, (with Ratanlal Ranchhod-das for Acc No. 2

N. M. Desai for Acc No. 3

MACLEOD C. J.—We are asked to interfere in revision with an order passed by the District Magistrate under S. 476, Criminal Procedure Code, on October 25,1922 in which, after finding that there was a *prima facie* case against certain persons, he directed that the case should be sent for inquiry to the First Class Magistrate. The principles, which the High Court should follow in dealing with an application in revision in such a case, were considered in *In the Matter of the petition of Alamdar Hussain* (1). The Chief Justice said;

"Now it has been held by this Court that the High Court has power in revision to set aside an order passed by a Civil, Criminal or Revenue Court under section 476 of the Code; and I assume that this view is correct. Still, one must have regard to the nature of the revisional jurisdiction, and must not, in a case arising under section 476, any more than in any other case, allow what would virtually be an appeal from the order of the Court below. It is necessary, as in all other cases, to see whether there has been any error of law, any irregularity, any abuse of, or failure to exercise judicial discretion, such as would justify interference in revision. Now let us see whether, there is any fault of that kind to be found in the Collector's proceedings. The condition of his acting under section 476 is his forming the opinion that there was ground for inquiring into any offence referred to in section 195. The test is his opinion, and not the opinion of any superior Court; and if he has formed a real opinion to the effect stated, he has power to act under the section, and he commits no error or irregularity in doing so even though another Court may think the opinion erroneous. I say, if he forms a real opinion, because, no doubt, if a case arose in which the Court acted on merely fanciful grounds, on grounds so empty so obviously wrong that it could not be said to have formed a serious judicial opinion at all, then this Court would probably hold in revision that there had been no such action as section 476 contemplates."

With respect we entirely agree with the learned Chief Justice. On a consideration of all the arguments addressed to us, we cannot say that any grounds have been put forward on which we can possibly interfere with the direction given by the District Magistrate. It cannot be said that he gave those directions on grounds merely fanciful grounds so empty and so obviously wrong that he cannot be said to have formed a serious judicial opinion. We discharge the Rules in these three applications. The only amendment we make in the order is that we set aside the amendment made by the District Magistrate himself on October 30, 1922, adding "195" after "193" in the original order.

Rules discharged.

1923 BOMBAY 201 (2)

MACLEOD C. J. AND CRUMP. J.

Shrinivas Laxman Naik—Appellan .

v.

Chanbosapagowda Basangowda Gowdur-- Respondent.

S. A. No. 480 of 1921 D. 8th November 1922 from the decision of Dt. J. Bijapur, in Appeal No. 33 of 1919, confirming the decree passed by Joint Sub. J. at Bagalkot, in Civil Suit No. 215 of 1917.

(a) Limitation Act. Art 75—Cause of action Default—Limitation begins unless there is waiver.

(1) (1901) 23 All. 249—(1901) A. W. N, 59.

It is not correct to say that because a party to whom money is due is not bound to file a suit, therefore time is not running against him. If that argument were to hold good, it would nullify the Statute of Limitation, for no one is obliged to bring an action. What the Statute of Limitation lays down is that if a party has a right of action the right can only be allowed to remain in existence for a prescribed time. If he does not choose to bring a suit within the time prescribed then his right of action is gone. (1915) 37 All. 400, (F. B.) Foll, (1921) 43 All. 671. Foll. (1916) 39 Mad. 981. Diss.

(b) *Civil P. C.O. 2 R. 2—Mortgagee suing for a part of mortgage money when whole is due.*

A mortgagee who could file a suit as to the whole of the amount but files only a suit for instalments that had been defaulted is precluded from filing later on a suit for that whole amount.

G. N. Thakor with H. B. Gumaste—for the Appellants.

G. P. Murdeshwar—for the Respondents.

Judgment.—This suit was filed by the plaintiffs to recover on a mortgage bond the balance due. The mortgage was passed on the 22nd October 1902. It was for Rs. 1200, and it provided for the payment of R. 1200 by 12 annual instalments of Rs. 100 each. In case of default of payment of any one instalment the mortgagors agreed to pay the whole amount remaining due at once. There was further clause to the effect that the defendants should pay interest at 15 per cent on the amount accrued due from the date of default until the date of payment. The defendant only paid Rs. 44 during 1902 and 1903. In 1905 the mortgagee filed Suit No. 173 of 1905 to recover the amount of the first two instalments and obtained a decree for Rs. 180 No evidence was given to show whether anything was paid under the decree. Then the mortgagee waited until 20th May 1917 when he filed this suit for the remaining 10 instalments. Two main issues were raised.—Whether the plaintiff's suit was in time; and whether the suit was barred by Order II, R. 2 of the Civil Procedure Code.

Now under the terms of the mortgage deed in the case of default the whole amount was payable, and consequently a suit could be brought by the mortgagee to enforce payment of the money charged upon the immoveable property within 12 years from the default because the money became due on such default. It seems to have been urged that because a party to whom money is due is not bound to file a suit, therefore time is not running against him. If that argument were to hold good, it would nullify the Statute of Limitation, for no one is obliged to bring an action. What the Statute of Limitation lays down is that if a party has a right of action, that right can only be allowed to remain in existence for a prescribed time. If he does not choose to bring a suit within the time prescribed then his right of action is gone. Therefore it would appear that certainly in 1905, the plaintiff had a right of action to sue for the whole of the mortgage amount, and as he only sued for 2 instalments, when he ought to have sued for the whole amount, any later suit to recover the balance was barred under Order II, rule 2. The learned Judge found it necessary to find on that issue as he found on the question of limitation that the suit was barred. But as a matter of fact the 2 issues are really connected with each other, because if the right of action to sue for the whole amount arose in 1905, when the first default was made, then clearly the present suit was barred by limitation. It was also barred under Order II R. 2 because plaintiff chose to file a suit in 1905 for 2 instalments when he ought to have claimed the whole of the relief to which he was then entitled.

We have been referred to various decisions. In *Gaya Din* v. *Jhumman Lal* (1) a Full Bench held that if in a mortgage repayable by instalments the whole amount would be recovered in the case of default, the mortgage money became due on such default and Article 132 of Schedule I of the Indian Limitation Act was applicable. Again in *Nathi* v. *Tursi* (2) the same point arose in a case where a mortgage bond provided a

(1) [1915] 37 All. 400-13 A. L. J. 510-28 I. C. 910.

(2) [1921] 43 All. 671-19 A. L. J. 712-63 I. C. 886.

period for repayment, but also provided that if the borrower made default in the payment of any instalment of interest, the creditor could sue for the whole amount due. It was held that limitation, under Art. 132 of the First Schedule to the Indian Limitation Act, 1908, began to run from the date of the first default, that being the date when according to the terms of the bond the whole money became due. In the judgment their Lordships say "The terms of the bound may be compendiously stated as providing that if the borrower makes default in the payment of any instalment of interest, the lender can sue for the whole amount, although a fixed period is provided for repayment if the borrower repays regularly according to the terms of the bond. It is imorsible to hold whether you call it an option or not, that a creditor has a right to sue and yet that the money is not due. It is merely a question of contract. The borrower has agreed that the creditor shall have the right to sue for the whole of the principal and interest ' become due'. Further they say "the liability to pay, or in other words, the test whether money becomes due or not, is the obligation which the borrower has taken upon himself by his signature to the written document. It cannot depend on the volition of the creditor. The volition of the creditor merely decides the remedy which he chooses to seek. No mortgagee or creditor is ' bound to sue,'

We prefer to follow those cases rather than the contrary decision in *Narana* v. *Ammani Amma* (3) They are also in conformity with the decision of this Court in *Raichand* v. *Dhondo* (4) which no doubt was a case relating to the execution of an instalment decree, but the principle applicable is the same. We have also been referred to the decision in *Amrit* v. *Govind* (5) of Mr. Justice Heaton and myself where we held that the evidence showed that the parties had agreed that no advantage should be taken of the clause in the decree which enabled the creditor to take out execution for the whole amount.

But there is no evidence in this case that there was an arrangement between the mortgagor and the mortgagee that in spite of the default the clause in the mortgage bond enabling the mortgagee to sue for the whole amount should be treated as a nullity. In fact there is no evidence whatever of any communication between the plaintiff and defendant with regard to this mortgage after the 1st payment was made of Rs. 44- We do not know whether the defendant appeared in the suit which was filed in 1905, and it is impossible for us to find any thing in the record from which we could infer that there was any agreement between the parties which could enable us to hold that it was arranged that the mortgage money should not be considered as having become due when default was made in paying instalments.

The result must be that we think that the decision of the the lower Court on the question of limitation was correct. It follows that the appeal must be dissmissed with costs.

Crump. J:—I concur

(3) (1916) 39 Mad. 981—31 M.LJ 865—20 M, L. T. 176—(1916) 2 M.W.N. 125—4 L. W. 77—35 I, C. 418.

(4) (1918) 42 Bom. 728—20 Bom. L. R. 773—47 I, C. 313.

(5) (1920) 22 Bom L. R. 919-58 I.C,65.

1923 BOMBAY. 203

MACLEOD C J.. AND CRUMP J.

Gangaram Balkrishna Sawant—Appellant.

v.

Vasudeo Dattatraya Kirloskar—Respondent.

S. A. No. 794 of 1917, D. 10th November 1922, from the decision of Asst. J. of Ratnagiri, in Appeal No. 484 of 1912.

Civil P. C. S. 11—Co—defendants.

Where an ajudication between the defendants is necessary to give the appropriate relief to the plaintiff, the ajudication will be *res judicata* between the defendants as well as between the plaintiff and defendants. But for this effect to arise, there must be a conflict of nterests between the defendants and a judg-

ment defining the real rights and obligations of the defendants *inter se*. Without necessity a judgment will not be *res judicata* amongst defendants, nor will it be *resjudicata* amongst them by mere inference from the fact that they have been collectively defeated in resisting a claim to a share made against them as a group. *(1886)* *11* Bom. 216. Foll. *(1886)* P. J. 15. Dist. *(1914)* 38 Bom 438 *16* Bom. L. R. 283. Foll. In a partition suit all the parties who are interested in the property to be partitioned occupy much the same position whether they are plaintiffs or defendants and a party claiming or resisting partition whether he is plaintiff or defendant is bound by the decision of the Court. *(1914)* 17 Bom. L.R. *1*. Dist. [P 205 C 1,2]

G. N. Thakor, with S. Y. Abhyan kar—for the Appellant.

P. B. Shingne—for the Respondent.

MACLEOD C. J.—The plaintiff filed this suit for partition of property alleged to be joint family property, claiming one-tenth share therein. The property originally no doubt was the joint family property of the Kirloskars. The pedigree of the family appears at p. 23 of the print. It shows that several generations back the family had been split up into two branches, and undoubtedly, for years, various members of each branch have been alienating portions of the family property as if they were separately owned. Apparently the allegation of the defendants who contest the plaintiff's suit is that there was a partition of the family property so far back as 1823. The evidence shows that the whole of the family property has got into the hands of strangers. The plaintiff seeks to set aside the alienations made by various members of the family, and to get back one-tenth of what was originally the family property on the ground that the property is still joint, and that he is entitled, in spite of those alienations, to his proper share therein. The first issue, the main issue in the suit, was whether the plaint property was the joint property of the parties, Kirloskars. That issue was found in the negative. Both the lower Courts have come to the conclusion that very many years ago there had been a partition certainly between the two branches, and the plaintiff's branch had nothing to do with the other branch. The plaintiff, however, relies upon the principle of *res judicata*, as ostopping the defendants from contesting his claim to partition.

The plaintiff's contention has been disallowed in both the lower Courts, and has been fully argued by the appellant's counsel in this Court. The plaintiff relies upon the proceedings in Suit No. 345 of 1890. That was a suit filed by Sakharam, one of the five sharers of Rama's branch in the pedigree at p. 23. The plaint was drawn in a very ambiguous manner. It stated that "certain lands and the whole village of Kirloo formed the undivided joint ancestral property of the plaintiff and defendants 1—4 and 10—21, the share of the plaintiff and defendants 1—4 being half and that of defendants 2—21 half, that these latter held separate property as their share from a long time, the plaintiff's share in his own branch is one-fifth and not one-tenth, of the whole property that if defendants 10—21 confirm the old private partition the plaintiff should be awarded one-fifth of such property as is held by his own branch or otherwise one-tenth in the entire property." Owing to various alienations which had already been then made, the only contesting defendant in that suit was defendant No 5 who set up a mortgage by other members of Sakharam's branch. Sakharam contended that that mortgage was not binding on his share That contention prevailed. It is quite true that the decree seemed to have directed that the plaintiff was entitled to one-tenth of the whole property, but a direction in the decree is given that if the plaintiff's share in the Khasgi lands held by his own branch consisting of himself and his own brothers can be made up from other lands held by that branch of similar quality then in that case the lands mortgaged to defendant No. 5 should in partition be allotted to the shares of defendants Nos. 1—4 and continued in the possession of defendant No. 5.

There is no evidence to show how that decree was carried out or whether in execution the plaintiff obtained any properties that were in the possession of members of the other branch or their alienees.

But the question now before us is whether the other persons who were entitled to nine-tenth of the whole property were barred by the decision

in that suit from contending thereafter that the nine-tenth which remained in their hands was not joint family property, so that they were bound by the finding in that suit to partition nine-tenth on a partition being asked for by any member of the other branch. Apart from that, it is clear to my mind that there is no direct finding that the whole of the property which was originally joint was still joint at the time of this decree.

The principle to be followed in deciding the question whether a matter is *res judicata* as between co-defendants in a suit was laid down in *Ramchandra Narayan* v. *Narayan Mahadev* (1). The head-note says:

"Where an adjudication between the defendants is necessary to give the appropriate relief to the plaintiff, the adjudication will be *res judicata* between the defendants as well as between the plaintiff and defendants. But for this effect to arise, there must be a conflict of interests between the defendants and a judgment defining the real rights and obligations of the defendants *inter se*. Without necessity, a judgment will not be *res judicata* amongst defendants, nor will it be *res judicata* amongst them by mere inference from the fact that they have been collectively defeated in resisting a claim to a share made against them as a group.

Applying that dictum to the facts of this case, even assuming that all the defendants in the suit of 1890 collectively resisted the claim to share made against them as a group by the plaintiff, and were defeated, unless it could be shown that there was a necessity that the question whether the nine-tenth was joint family property in their hands should be decided in order to give relief to the plaintiff, then no question of *res judicata* could arise in a later suit between those parties. It is obvious from the judgment in the suit of 1890 that the present question was never at issue There was no necessity to decide whether as between the persons who might be entitled to the remaining nine-tenth of the family property, that property in 1890 was joint or separate. The decision in *Ramchandra* v. *Abaji* (2) is not in conflict with the decision in *Ramchandra Narayan* v. *Narayan Mahadev* (1) as that decision was referred to by Mr. Justice West and distinguished. In the former case their Lordships referred to certain Calcutta cases in which it was laid down that:

"The material point for deciding whether a matter had become *res judicata* under S. 13 is whether it was directly and substantially in issue between the same parties and was finally decided. If the issue is clearly raised between the several parties to the suit and adjudicated, it matters not that the parties were marshalled in the one case differently from the other."

That is an entirely different question from the one which came before this Court in *Ramchandra Narayan* v. *Narayan Mahadev* (1) where the test was whether there was the necessity to decide the point, whether as a matter of fact it was ever raised between co-defendants, and whether it was decided. That decision has been consistently followed by this Court. I need only refer to the decision of *Hari Annaji* v. *Vasudev Janardan*. (3).

No doubt in a partition suit all the parties who are interested in the property to be partitioned occupy much the same position whether they are plaintiffs or defendants, and a party claiming or resisting partition whether he is plaintiff or defendant is bound by the decision of the Court. But in this case none of the parties were claiming or resisting partition except the plaintiff, and therefore any questions regarding partition which might thereafter arise between the defendants in that suit remained open to be decided. Nor is the decision in *Nalini Kanta* v. *SarnamoyiDebya* (4) of any assistance to the plaintiff. In that case there had been a succession of suits for partition by various members

(1) (1886) 11 Bom. 216.

(2) (1886) P. J. 15.

(3) (1914) 38 Bom. 438-16 Bom. L, R. 283-23 I. C. 944.

(4) (1914) 17 Bom. L. R. 1-27 M. L. J. 76-1 L. W. 607-16 M. L. T. 544-(1914) M. W. N. 948-21 C. L. J. 23-19 C. W. N. 531-24 I. C. 294 (P. C.)

of the family until there was only one left who had not filed a suit for partition, with the result that all the members who had filed suits had got their shares, and the balance of the property remaining in the hands of the last member of the family represented his share. He claimed that as a result of the various partitions what was left to him was less than his legitimate share in the family property. He sought to re-open the various partitions which had taken place in consequence of the suits brought by the other members of the family, and it was held that the various partitions made were binding upon him. That does not in any way touch the question now before us whether between the defendants in the suit of 1890 the question whether the property was joint or separate is *res judicata*. What the plaintiff seeks to do in this suit is to recover a share in the whole property after his own branch had been alienated and after the other members of the other branch had alienated their properties. It is perfectly clear that he is not entitled to upset the various dealings with the family property which had taken place over a very lengthy period. The original plaintiff seems to have alienated his interest, whatever it might be worth, in this property pending the first appeal, and the present appellant is really a purchaser of litigation. In my opinion the appeal must be dismissed with costs.

CRUMP J.—I agree.

Appeal dismissed.

1923 BOMBAY 206

MACLEOD C. J., AND CRUMP J.

Khimchand Narotamdas Bhavsar—Applicant.

v.

Sobhagchaned Bhogilal—Opponent.

Extra Civil Application No. 318 of 1920, D. 18th December 1922, from an order passed by Sub. J., of Ahemedabad. in Suit No. 572 of 1919.

(a) Civil P. C. O. 23 R. 1—Costs.

When a plaintiff finds himself unable to proceed with his suit and asks for leave to withdraw it, the defendant in ordinarily entitled to the costs in defending the suit.

(b) Costs—Appellate Court.

It may be a sound exercise of discretion to refuse costs where the suit is based on a state of law which has been afterwards altered either by statute or by the decision of a superior tribunal; but this is so only if the successful party is responsible for the litigation. Where there is an omission to consider the necessary circumstances then there cannot be a sound exercise of discretion, and the Appellate Court in that case can reverse the order as to costs.

H.V. Divatia with Hiralal D. Nanavati—for the Applicant.

R. J. Thakor—for the Opponent.

Macleod C. J.—This is an application in revision to set aside the order of the First Class Subordinate Judge of November 17, 1920, by which he allowed the plaintiff's suit No. 572 of 1919 to be withdrawn, but refused to allow the defendants their costs. The ordinary rule is that costs follow the event, and that if the plaintiff finds himself unable to proceed with his suit, and asks for leave to withdraw it, then the opposite party is entitled to the costs which he has been put to in defending the suit. The granting of leave to withdraw from a suit is a concession because the defendant is ordinarily entitled to ask the Court to decide the suit on the merits, and if he wins, he would be entitled to his costs. The Judge declined to follow the ordinary rule, as he thought he ought to follow the decision in *Ramasami Naiken* v. *Venkatasami Naiken*, (1) where it was held that it was a good cause for depriving a successful respondent of the costs of an appeal if the law had been altered since the filing of the appeal. But it seems to me that he has read one portion of the judgment in that case, and not the other, with the result that he has failed to realise the *ratio decidendi*. No doubt it may be in a particular case a sound exercise of discretion to refuse costs where the suit is based on a state of law, which has been afterwards altered either by statute or by the decision of a superior tribunal, and that might be a good ground for the decision in this case provided the learned Judge had also considered the facts, for the judgment in *Ramasami Naiken* v. *Venkata-*

(1) (1919) 43 Mad. 61-37 M. L. J. 271-26 M. L T. 219-10 L. W. 326-(1919) M. W. N. 792-5 I. C. 7,

sami Naiken (1) proceeds at p. 64 as :—

"Under the Indian law, it can safely be stated that the discretion of the Court as to the award of costs, so long as it is judicially exercised, should not be bound down by any artificial rules. A great deal must depend upon the facts of each case and upon its presentation by the party and upon circumstances and authorities which were pre-existing before the suit was launched. In the present case, the first defendant has been responsible for the whole of the litigation; neither the plaintiffs nor the other defendants have been guilty of any act of commission or omission which can be charged against them. If the judgment of the Divisional Bench had stood, the appellants might have succeeded. That is a consideration which cannot altogether be ignored in apportioning costs. Taking all these circumstances into consideration, we think the appellant should not be made to pay the costs of defendants."

There the costs had followed the event. Tho first defendant who was responsible for the whole of the litigation was made to pay the costs of the other defendants. In this case it is just the opposite way. From the decision in Civil Suit No. 85 of 1918, the basic suit in these disputes, which came up to this Court, and is reported (as *Khimchand* v *Bhogilal* (2), it will be seen that it is the present respondents-plaintiffs who had been in the wrong throughout, and if the learned Judge had considered all the facts and surrounding circumstances of the case, he would have seen that it was not the present applicant who was responsible for the litigation, but the respondents-plaintiffs. That makes a great deal of difference in considering who should pay the costs of the suit which was allowed to be withdrawn. In this case the Judge has not considered all the facts, which he was bound to consider, before exercising his discretion with regard to the award of costs ; and when there is an omission to consider the necessary circumstances then there cannot be a sound exercise of discretion, and this Court is entitled to interfere. We think the application must be allowed and the applicant must get his costs of the suit and of this application.

Rule made absolute.

(2) (1922) Bom. 436-46 Bom. 854-24 Bom L. R. 361-67 I. C. 913

1923 BOMBAY 207

MACLEOD C. J., ND CRUMP. J.

Hansraj Godhaji Marwadi—Appellant

v.

Bapu Krishnasuami Pile— e pon-dent.

F. A. No. 490 of 1920, D. 27th November 1922 from the decision of Sub. J., of Poona, in Darkhst No. 628 of 1919.

Limitation Act Art 75—Waiver-Proof

Where the only facts were that on April 9, *1917*, a payment of Rs 5500 was made, and that, on Jan. *19, 1918*. that is to say. eight months afterwards a payment of Rs. 400 was made i. e. eight times the instalments due under the decree, *Held*. These circumstances are not alone sufficient to infer that the parties came to an arrangement that there should be an agreement for a new period of limitation. *22* Bom L. R. *919* Dist

Coyajee with J. R. Charpure,—for the Appellant

Thakor, with P. K. Shingne,—for the Respondent.

Macleod C J.—On February 29, 1916, an award decree was made whereby the defendants were bound to pay to the plaintiffs Rs. 6,562-8-0 with interest thereon by instalments of Rs. 50 every month. It was provided that in case of default in payment of any six instalments, the whole amount should become due by sale of the mortgaged property specified in the decree. On September 27, 1919, the decree-holder put in a Darkhast, and it was objected that his Darkhast was time-barred because by August 1916 there had been a failure to pay six consecutive instalments. Therefore at that date the whole amount of the decree became due. *Prima facie* the Darkhast being given tnree years after the date on which the whole amount was recoverable would be time-barred.

It has been suggested that by reason of a payment made on April 9, 1917. limitation is saved by virtue of S. 20 of the Indian Limitation Act. But it is clear that S. 20 could have no application, as the payment in question

did not appear in the handwriting of the person making the same.

It was further argued that in the circumstances of this case, the Court should infer a waiver. The only facts pointed out are that on April 9, 1917, a payment of Rs. 5500 was made, and that, on January 19, 1911, that is to say, eight months afterwards, a payment of Rs. 400 was made, i. e., eight times the instalments due under the decree. But it is impossible from these circumstances alone to infer that the parties came to an arrangement that there should be an agreement for a new period of limitation.

The appellant relies upon *Amrit v. Govind* (1) in which case it was held that, upon the facts there established, a waiver might be inferred. But a perusal of the judgment in that case shows at once that there is no analogy between the facts there found and the facts in the present case. There execution proceedings were taken out from time to time without any objection being taken; and there were other circumstances also from which the Court inferred that as a matter of fact there had been a waiver. There is nothing of the kind here, and we are unable to hold that any waiver can be inferred. It follows that the order is correct and that the appeal must be dismissed with costs.

Appeal dismissed.

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(1) [1920] 22 Bom L. R. 919-58 I. C. 65.

1923 BOMBAY. 208

MARTEN, AND FAWCETT. JJ.

Ramachandra Sadashiv Sidras Oka—Original Plaintiff)-Appellant.

v.

Keshav Dhondu Narvekar and others—Original Defendants) Respondents.

S. A. No. 613 of 1920 D. 9th November 1922, against the decision of Asst. J. Ratnagiri in Appeal No. 289 of 1917.

Evidence Act Ss. 107 & 108--Construction--Presumption

Sections 107 and 108 only relate to the date when the suit was brought, that is to say, as to whether a man is alive or dead as the case may be at the date of the suit, and not at some particular period anterior to the suit. The decisions also establish that there is no presumption as to whether a particular p on was dead at any time within the peried in question.

F. V. Kane—for the Appellant.

H. C. Coyajee with A. G. Desai—for Respondents Nos. 3 and 4.

S. R. Parulekar—for the respondents Nos. 3 to 5.

MARTEN J.—The point in this appeal is one of the onus of proof as to the date of the death of one Baji. The suit is an ejectment suit. The defendants have been in possession under a Court sale since 1889. The plaintiff, who is the appellant, relies for his title on a conveyance in 1910 by one Dwarkabai, who was a sister of Baji. The suit was brought as long ago as February 1911, and has already been remanded once by the High Court for an amendment of the pleadings. On that amended case, the plaintiff's case is that Annapurnabai, the wife of Baji, was a widow at the date of her death in 1908, and that Dwarka accordingly was a reversioner, and the plaintiff sues in right of Dwarka as reversioner. A further amendment was asked for on the remanded trial, which will be found in para 28 of the judgment of the learned trial Judge, viz, to add Dwarka as a co-plaintiff. But that amendment was refused.

Now the plaintiff is suing for possession, and the onus of proof is on him to make out his title to the property. It is clear that that property was at one time in the ownership of Baji, he being a son of one Anant, who died prior to 1872. Baji married Annapurnabai about 1872, and it appears that some time after that date he left the village. He apparently came back after 2 years, stayed only a couple of months, and then went away again. There is some conflict of evidence as to when he was last heard of, but it appears that on a judicial enquiry held in Miscellaneous Application 61 of 1880, it was held that he was then alive. Next in a mortgage deed of 1886, Exhibit 64, there is a recital that Baji was wandering from home for many years. That recital is relied on as showing that he had not been then heard of for over 7 years, but the learned Judges came to the conclusion that that recital in the face of other

evidence was not sufficient to establish that fact.

We come then to the question on whom the onus of proof lies. The appellant contends that defendants must prove that Baji was dead in 1889 when the defendants purchased the property. But it is clear to my mind that that is not the right way in which to begin the consideration of this case. Baji is the last person proved to have been the owner. If the plaintiff claims under some reversioner or heir of Baji, the onus is on him to establish his title. That being so, the plaintiff next asks the Court to presume that Baji was dead in 1910 when the plaintiff purchased the property from Dwarka.

It has been held in a large number of cases in India, and only recently by this apellate Court in Second Appeal No 856 of 1920, that the only presumptions in Indian law as to the fact of death are contained in sections 107 and 108 of the Evidence Act. It has further been held that sections 107 and 108 only relate to the date when the suit was brought, that is to say, as to whether a man is alive or dead as the case may be at the date of the suit, and not at some particular period anterior to the suit. Accordingly on those decisions it would or might be presumed in the present case, that Baji was dead in 1911 when this suit was filed. But those decisions also establish that there is no presumption as to whether a particular person was dead at any time within the period in question. Consequently, stopping there, there would be no presumption that Baji was dead in 1910, because that was a date anterior to the date of the filing of the suit.

I may quote from what Mr. Justice Crump says in the above recent case. "The result in the present suit would be that the burden of proving that Rakhama was dead at the date of the suit would lie upon the defendants. Therefore in the absence of evidence the Court would hold that Rakhama was dead at that date. This result does not assist in any way the determination of the question whether Rakhama predeceased Ahilau who died 4 years before that date. This is the reasoning of the lower appellate Court, and it is supported by authority apart from the apparent meaning of the section itself. Assuming that this is the correct view the result is that section 108 is inapplicable and the question must be considered apart from it. In that case there is no special rule in the Indian Evidence Act and the burden of proof would lie on plaintiff. Though it is proved that Rakhama disappeared 20 years ago, there is nothing to authorise the presumption that he was dead at the end of the first 7 years of that period."

Assuming then in favour of the present appellant that section 107 does not apply for the above reason or for the reason that it is not shown that the appellant was alive within 30 years from the date of the suit, and assuming further in favour of the appellant that section 108 is not applicable either, then we are brought to consider the matter irrespective of sections 107 and 108. The appellant asks us to say that, because according to his view Baji was not heard of for 30 years prior to 1910, that therefore the presumption under section 114 is that he was dead at the end of those 30 years.

It seems to me however, in the first place that the appellant has taken the wrong period. On his case as he has framed it after due deliberation on the remand by the Court, it is necessary for him to prove that Annapurnabai was a widow at her death in 1908, for otherwise Dwarka would not be a reversioner. Therefore, the 30 years would be the 30 years prior to 1908. On the other hand, as I have already pointed out, by the judicial finding in 1880, Baji was found to be alive then, and therefore the appellant does not satisfy the test of 30 years which he asks us to adopt.

But irrespective of that, and even assuming we have to take the period as being 30 years before 1910, admittedly there is no authority that he can produce for the proposition that under Indian law when a man has not been heard of for 30 years, he is presumed to be dead at the end of that time. On the contrary, the passage I have already quoted from Mr. Justice Crump's judgment would appear to negative that proposition. There can

hardly be any magic in 30 years as compared with 20 apart from the fact that 30 years is mentioned in section 107.

Further, in *Narayan Bhagwant* v. *Shriniwas Trimbak*: (1) it will be found that over 30years had elapsed between the dis-appearance of Trimbak, the person in question there, and the date when that suit was brought. There Sir Lawrence Jenkins held that the lower Court arrived at no error of law in holding that it was not proved that Trimbak had predeceased his brother Appa who died in 1880.

Then in *Mulla Cassim* v. *Mulla Abdul Rahim* (2) which was an appeal from Burma, it will be found on reading the judgment of the learned Judges of the Burma Court at page 176 that on the dates there, more than 30 years had elapsed. They say, for instance, "Moolla Ahmed" " had not been heard of for more than seven years-in fact, for more than 30 years-before the date of the institution of the suit." Notwithstanding that, they held the onus of proof was on the person there who alleged that Moolla was alive at the particular date.

In the present case the question is of proving the man was dead, but in my opinion it is merely an accident as to whether the particular fact that has to be proved, is whether the person is alive or has survived a particular period or whether he is dead. In each case we have merely to consider on whom the onus of proof lies

The point as to these 30 years is dealt with in the judgment of the learned trial Judge in para 18 and the conclusion he arrived at is this 'So I simply presume that Baji is dead and there is absolutely no evidence in the case directly or indirectly proving when he died. On the contrary plaintiff's own admission shows that apart from the legal fictions of presumptive death or civil death Baji's wife till her death conducted herself as a wife of a living husband in private life, and in legal business with others as regards her property. Men of Baji's age are yet alive and so there is no presumption of his death, but for the rules in sections 107 and 108. Plain it is that I simply presume Baji's death for this trial, but make no presumption as to the time of his death either after the expiry of 7 years or after the expiry of 30 years.".

In my opinion on the Indian authorities the learned Judge arrived at a correct conclusion. Speaking for myself, I wish to say that sitting in this Court I merely follow the previous decisions on these points without expressing any opinion of my own on law in question. Nor do I express any opinion on the question as to what is the corresponding law in England, viz, whether the period of 7 years may be any period of 7 years, or whether, as has been held in India, it must be confined to a period of 7 years before suit. There is a conflict of opinion on that point between the Allahabad and the Calcutta Courts as to the English law on the point, and for the purpose of this case the matter may rest there Whatever the law may be in England, I am sitting here as an Indian Judge, and all we have to do is to administer Indian law as laid down by the Courts of this country. In view of the carefully considered judgments of my Brothers Shah and Crump in the recent case, I think that it is quite unnecessary for us in the present case to consider the whole question *de novo*. It is sufficient for us to say that this latest decision is one binding on us in this Court.

The result is that in my opinion the appellant has failed to discharge the onus of proof which lies on him to show either that Baji was dead in 1908 or in 1910. Consequently in my judgment the judgments of the lower Courts were correct, and this appeal should be dismissed with costs.

Fawcett J.—I concur that the appeal should be dismissed with costs, and agree generally with the reasons given by my learned Brother.

The appellant's main ground of appeal is that lower Courts were wrong in their interpretation of sections 107 and 108 of the Evidence Act. But this is certainly not correct in regard to

(1) (1906) 8 Bom. L. R. 226.
(2) [1905], 33 Cal. 173—32 I. A. 177-7 Bom. L. R. 892=2 C. L. J 236. 10 C. W. N. 33-2 A. L. J. 798 -15 M. L. J. 317.

the judgment of the Subordinate Judge who tried the suit, for in para 17 of his judgment he has referred to the main cases that deal with the construction of sections 107 and 108 and he has rightly held that under those rulings all that he can presume under those sections is that Baji was dead at the date of the suit, and that he could not presume that he had died at any particular time. The Assistant Judge in dealing which this part of the case says that in February 1911, when the plaint was filed Baji will have to be taken to be no longer living and that in March 1889 Baji was alive. The latter conclusion is no doubt one which is not justified by section 108 under the rulings already referred to. But this does not vitiate the judgment he has given against the appellant, and as has been shown fully in my learned Brother's judgment, sections 107 and 108 do not really help the appellant's case. His first difficulty is that he has to show that Annapurnabai was a widow in 1908, and that throws on him the burden of proving that Baji had died prior to 1908 I fully concur with my learned Brother that there is no ground for answering that issue in the affirmative.

It was said by Mr. Kane that the claim in the plaint as a reversioner of Baji was one of mere false description and that the plaintiff should also be held to be claiming as an heir of Baji. But that argument is clearly not open to the appellant, in view of the proceedings under which he was allowed to amend the plaint so as to claim as a reversioner, but the request to add Dwarka as a co-plaintiff was disallowed.

Then it was said that the onus of proving the date of Baji's death should fall upon the respondents, because if he was dead in 1889, they merely purchased Annapurnabai's interest in the property as a widow and the suit being within 12 years of her death would be in time. On the other hand, if he was alive in 1889, they could only claim by a title from adverse possession as against Baji, so that the burden would be on them to show that Baji was alive in 1889. There seem to me to be two objections to allowing this argument. First of all, the plaintiff has not got over the initial stage of sustaining his title as a reversioner of Baji, to which I have already referred. Secondly, supposing the question of adverse possession by the respondents arises, the Evidence Act clearly puts them in a better position than the appellants. For under section 110 of the Evidence Act their admitted possession from 1889 throws the burden of proving that they are not the owners of property upon the plaintiff-appellant. And apart from that, I think that, under section 103 the burden of proving that Baji was not alive in 1889 would really lie on the appellant, for there is a strong probability, that he was alive in 1889, and if so, the respondents clearly obtained a good title to the property by reason of adverse possession.

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MACLEOD C. J., AND CRUMP, J.

Kurpal Hemraj— Appellant

v.

Shamrao Raghunath Taote— Respondent.

O. C. J. Appeal No. 50 of 1921 dated the 22nd December 1922 in suit No 2293 of 1919.

(a) Specific Relief Act S. 35-Default by Plaintiff-Suit by defendant for rescission can lie-Court also in same suit can order rescission of contract,

There can be no doubt that S. 35 is somewhat obscurely drafted. Where there has been default in payment of the purchase money which the Court has ordered a party to pay in a decree for specific performance of the contract of sale, it is open to the opponent to file a suit for rescission of the contract. It is not at all clear to what the words "in the same case" refer, but these words must refer to case (c) in the section, so that the Court is empowered to make an order in the suit in which a decree has already been made, to rescind the contract, instead of putting the opponent to file another suit for rescission. [P. 212 C. 2]

Strangman—in support of notice of motion.

Mirza—for the Opponent,

MACLEOD, C. J.-A decree was passed in this suit granting specific performance to the plaintiff of the suit contract for the sale of certain land. The decree directed him to pay Rs. 12,000 as the purchase price, but unfortunately no time was mentioned within which the purchase price should be paid. As the plaintiff did not comply with the direction in the

decree that he should pay the purchase price, an application was made to this Court for an order in the suit that the decree should be vacated as a consequence of such default on the part of the plaintiff. The plaintiff has now paid the money. So that the only question is whether the plaintiff should pay the costs of the motion. It is urged on his behalf that a wrong procedure has been followed, for under S, 35 of the Specific Relief Act a suit ought to have been filed in order to secure the performance of the contract or its rescission. There can be no doubt that S. 35 is somewhat obscurely drafted. First it directs that any person interested in a contract may sue to have it rescinded, and such rescission may be adjudged by the Court in any of the following cases :—

"(*a*) Where the contract is voidable or terminable by the plaintiff :

"(*b*) Where the contract is unlawful for causes not apparent on its face, and the defendant is more to blame than the plaintiff :

(*e*) Where a decree for specific performance of a contract of sale, or of a contract to take a lease, has been made, and the purchaser or lessee makes default in payment of the purchase money or other sums which the Court has ordered him to pay."

Therefore in the last case where there has been a default in payment of the purchase money which the Court has ordered a party to pay in a decree for specific performance of the contract of sale, it is open to the opponent to file a suit for a rescission of the contract. Then by the last paragraph of the section it is stated :—

"In the same case, the Court may, by order in the suit in which the decree has been made and not complied with rescind the contract, either so far as regards the party in default, or altogether, as the justice of the case may requires."

It is not at all clear to what the words "in the same case" refer, but it appears to me that these words must refer to case (c) in the section so that the Court is empowered to make an order in the suit in which a decree has already been made, to rescind the contract, instead af putting the opponent to file another suit for rescission. That is clearly the English practice as appears from Fry on Specific Performance, Sixth Ed., pp. 546, 547; paragraph 1171 :—

"There are two kinds of relief after judgment for specific performance of which either party to the contract may, in aproper case, avail himself."

Paragraph 1172 (i) :

"He may obtain (on motion in the action) an order appointing a definite time and place for the completion of the contract by payment of the unpaid purchase money and delivery over of the executed conveyance and title-deeds, or a period within which the judgment is to be obeyed, and, if the other party fails to obey the order, may thereupon at once issue a writ of sequestration against the defaulting party's estate and effects."

And paragraph 1173 (ii) :

"He may apply to the Court (by motion in the action) for an order rescinding the contract. On an application of this kind, if it appears thatthe party moved against has positively refused to complete the contract, its immediate rescission may be ordered otherwise, the order will be for rescission in default of completion within a limited time."

In my opinion this is the practice which it has been directed, should be permissible by the last paragraph of S. 35 of the Specific Relief Act, and the argument urged by Mr, Mirza that this Court has no jurisdiction to make an order on a motion of this kind after specific performance has been decreed cannot be sustained. The opponents must, therefore, pay the costs of the motion; including costs resersed.

Ardeshir, Hormasji, Dinshaw and Co. :—Solicitors for the applicants.

Kharas and Co. :—Solicitors for opponent No. 1.

1923 BOMBAY. 213

SHAH, AND CRUMP. JJ.,

Raoji Thakaram Patel Nihalkar and others-(Original Defendants) Appellants.

v.

Pemraj Sadaram Marwadi (Original Plaintiff)—Respondent.

S. A. No, 777 of 1921 D-22nd August 1922 against the decisions of Dt. J, of Nasik in Appeal No 2 of 1921.

(a) *Hindu Law-Alienation by guardian-Binding nature on minor,*

The test with regard to the binding nature of alienation by natural guardian upon the minor as laid down in *Hunooman Persad* v, *Mt. Babooee* 6 M. I, A, P. 393 at pages 423 and 424, is that the power must be exericsed by the guardian rightly for necessity or for the benefit of the infant. It would be open to the alienee to establish that he had made all proper and necessary inquiries and that he had acted in good faith in advancing the moneys to the natural guardian of the minor.

(b) *Hindu Law Guardianship-Son by first husband.*

The mother continues to be the natural guardian of her infant son, even after her remarriage if the infant son lived with her.

D. R. Patwardhan-for the Appellants.

A. G. Desai—for the Respondent.

Interlocutory Judgment:—The planitiff in this case sued to recover possession of certain survey Nos. on the strength of a sale deed passed in his favour by Laxman and his wife Jai who purported to act on behalf of Bhavdya the minor son of Jai by her first husband. It appears that the property originally belonged to Laxman but before his marriage with Jai he conveyed the property to the minor Bhavdya in 1905. After the sale deed in favour of the plaintiff, Bhavdya apparently mortgaged the property in suit to the Defendants in 1916 and sold the same to them in 1918. Bhavdya's whereabouts at the date of the suit were not definitely known. The suit was filed on the 18th December 1919 and the question between the parties was really as to the merits of their respective titles.

The trial Court disallowed the plaintiff's claim on the ground that the sale deed in favour of the plaintiff was not proved.

The plaintiff appealed to the District Court, and that Court directed further evidence to be taken on the 21st June 1921. After the further evidence was received the learned Judge came to the conclusion that the sale deed was proved. But the question as to whether the sale deed was binding upon the minor Bhavdya does not appear to have been considered in the trial Court, nor in the lower appellate Court. It appars that in the trial Court on the 9th September 1920 the defendants made an application requesting the Court to raise an issue as to whether the conveyance in favour of the plaintiff was for the benefit of the minor Bhavdya. They wanted to raise the question as to whether the sale deed was really for the benefit of the minor but the trial Court rejected the application and did not raise the issue on the ground that it was inconsistent with the defendant's contention.

In the lower appellate Court it appears that the objection was taken in a different form. It was urged that the minor had repudiated the sale deed. With reference to that point the learned Judge observed that the objection had been taken on that ground in the lower Court but it was belated and was disallowed. The point as to the repudiation of the sale deed by the minor was dealt with by the learned Judge and decided against the defendants:

It seems to us, however, that both the lower Courts have missed the real point at issue in connection with this sale deed. It was a sale of the property belonging to a minor by two persons Laxman and Jai. Laxman had no right whatever to deal with the property of the minor. It is not suggested that he was his legal guardian. Jai was his mother and she might he able to deal with the property as the natural gardian of her minor son for his benefit. But the test with regard to the binding nature of such an alienation upon the minor has been laid down in *Hunooman Persad Panday* v. *Musummat Babooee Munraj Koonwree* (1) at pages (423 and 424). It must be shown before the plaintiff can succeed that the power was exercised rightly for necessity or for the benefit of the infant. It would be open to the plaintiff to establish as pointed out in that

(1) 6 M. I. A. 393 18 W. R. 81 (F. N.) 2 Suther 29-1 Sar. 552 (P. C.)

case that he had made all proper and necessary inquiries and that he had acted in good faith in advancing the moneys to the natural guardian of the minor.

It has been suggested before us that Jai was not in the position of a natural guardian at all after her remarriage and that therefore she would not have even the limited power which the natural guardian of a Hindu infant would have, to deal with the property of the infant. We must however disallow this contention having regard to the fact that she was the natural mother of the minor who lived with her at the time; under the circumstances she was the natural guardian of the minor.

Before we can dispose of this appeal it is necessary to have a distinct finding on the question as to whether this sale deed has been shown to be binding upon the minor Bhavdya. We accordingly send down the following issue to the lower appellate Court:—

Is the sale deed of 1912 binding upon Bhavdya?

Parties to be at liberty to adduce further evidence on this point. Finding to be certified in 3 months.

1923 BOMBAY. 214

MACLEOD C. J. AND CRUMP. J.

(Bai) Mani—Appellant.

v.

Ranchodlal Amritlal—Respondent.

F. A. F. O. No. 69 of 1921 D/- 16th November 1922 against the order passed by J. of Sm. Causes Court with A. P., at Ahmedabad, in Appeal No. 439 of 1919.

(a) Civil P. C. O. 21 R. 101—Appeal entertained though incompetent—Revision lies.

Where Court erroneously entertains an appeal against an order made under order XXI, rule 101 the High Court can set aside the decision in appeal under S. 115 of the Code.

(b) Civil P. C. S. 47- Auction purchaser is no representative.

An auction-purchaser is a stranger to the proceedings, and is not a representative of any of the parties to the suit, so that any questions which might arise between him and the parties to the suit or their representatives must be determined by a separate suit. But if the question raised by the judgment debtor as to the legality of the Court sale is virtually one between the parties to the suit, i. e. between the decree holder and the judgment debtor, and if in the decision and result of that question the auction purchaser was interested, the judgment debtor ought not to be allowed to attack the sale in a suit. [P. 215 C 2]

G. N. Thakor, with M. B. Dave—for the Appellant.

H. V. Divatia—for the Respondent.

Macleod C. J.—This was an application by Bai Mani daughter of one Keshavlal Ranchhod under Order XXI, rule 100, Civil Procedure Code, complaining that she had been wrongfully dispossessed of certain property, and claiming that possession should be restored to her. The facts leading up to this application are set out in the judgment of the trial Court. The house belonged to one Mulchand Haribhai. It was mortgaged with possession for more than Rs. 3,500 to one Amritlal. A money decree was passed against Mulchand, and in execution of that money decree this house was sold subject to the mortgage rights of Amritlal, and was purchased by the opponent Ranchodlal Amritlal. Bai Mani claimed either to be mortgagee or to have a mortgage lien to the extent of Rs. 500, and she applied to the Court to have her mortgage lien for Rs. 500 notified in the sale proclamation, but her application was not granted, so she appealed to the District Court. Pending that appeal the house was sold and purchased by the opponent. After the sale the District Court held that the executing Court ought to have notified the mortgage claim of Bai Mani in the sale proclamation and reversed the previous order of the executing Court. Then the opponent as an auction-purchaser applied to the Court for delivery of possession of the house purchased by him. That application would be made under Order XXI, rule 95. The house was at that time closed by the lock of Bai Mani. Consequently an application had to be made under Order XXI, rule 97. That question came up for decision under rule 97. Bai Mani was present, but the opponent was absent, consequently his application was dismissed, and Bai Mani remained in possession, and as she was present she must have informed the Court of her claim. Although the opponent was

absent, it cannot be said that the application was dismissed for default of appearance of both parties, because from the nature of the proceedings, it must be taken that it was a decision of the Court maintaining the obstruction by Bai Mani.

The opponent then made a fresh application, which purported to be made under rule 95 for possession. The previous application, which had been made for possession and dismissed for default, was recited, but no mention whatever was made of his previous application to remove the obstruction by Bai Mani having been dismissed. If mention had been made of that application, then we do not think the Court would have entertained the second application for possession. However, an order was made for possession which necessitated Bai Mani applying for its discharge.

The trial Judge said:

"I think the conduct of the opponent in obtaining a warrent for delivery of possession of the house described in this application, by suppressing the fact that his application for removal of obstruction was dis. missed amounts to a distinct fraud upon the Court. He clearly abused the process of the Court. If the fact of the dismissal of opponent's application for removal of obstruction made by the applicant were known to the Court no warrant for delivery of possession would have been issued. After the dismissal of opponent's application the only remedy open to him was a suit. I therefore order that *status quo ante* should be restored by placing applicant in possession of the house leaving it open to opponent to take whatever steps he may be advised to take to enforce his rights as a purchaser and to have possession of the suit house from the applicant."

That, therefore, was an order under Order XXI, rule 101. However, the opponent filed an appeal. The learned Small Cause Court Judge, before whom the appeal was heard, seemed to think that the question whether an appeal lay was of a trivial nature, while on the facts it seems to us that the Judge failed to appreciate what actully occurred. He did not think that the opponent had suppressed any facts in his last application for possession which he ought to have disclosed. We cannot agree with him We think the trial Court was perfectly correct in stating that the opponent had suppressed the most important fact in his last application for possession. It seems to us, therefore, that the order of the Subordinate Judge should be restored on the ground that no appeal lay to the District Court.

The respondent has taken a point that no appeal would lie from the order of the Small Cause Court Judge. It really makes no difference if that order was made without jurisdiction. We can deal with it under S. 115, Civil Procedure Code. It will not be necessary, therefore, to deal with the somewhat complicated question whether the proceedings should continue in execution under S. 47, instead of the right of the parties being determined in the future by a separate suit.

It may be pertinent to observe that this Court has always consistently held that an auction-purchaser is a stranger to the proceeding, and is not a representative of any of the parties to the suit, so that any questions which might arise between him and the parties to the suit or their representatives must be determined by a separate suit unless the test laid down *Gokulsing Bhikaram* v. *Kisansingh* (1) could be made applicable. There it was held that "though an auction-purchaser at a Court-sale in execution of a decree was not a party to the suit in which the decree was passed, and though he was not a party to the suit in which the decree was passed, and though he was not a representative of either the decree-holder or the judgment-debtor for the purposes of S. 244, yet if the question raised by the judgment-debtor as to the legality of the Court-sale was virtually one between the parties to the suit, i. e., between the decree-holder and the judgment-debtor, and if in the decision and result of that question the auction-purchaser was interested, the judgment-debtor ought not to be allowed to attack the sale in a suit."

In this particular case, the question

with regard to Mulchand's mortgage was not a question between the parties to the suit, that is to say, between the dacree-holder and the original judgment-debtor Mulchand. The only question in the suit was whether the plaintiff owed a simple debt to Mulchand, and the question which now arises between Bai Mani and the auction-purchaser is whether the auction-purchaser-obtained title to the property free of Bai Mani's charge or subject to it. Therefore the decision in *Gokulsingh Bikaram* v *Kisansing* (1) does not assist the present respondent. We set aside the order of the lower appellate Court and restore that of the Subordinate Judge with costs throughout.

Order set aside.

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(1) (1910) 34. Bom. 546—12 Bom L. R 539—7 I. C. 457.

1923 BOMBAY. 216(1)

MACLEOD, C. J., AND CRUMP, J.

Shankar Ganpat Lele and another—Appellant.

v.

Damodar Bhukandas—Respondent.

F. A. No. 119 of 1921 D. 29th November 1922, against the decision of Joint J. of Poona in Mis. Application No. 34 of 1920.

Will—Administration—Panchas.

Where the will directed six persons to be Panchas of whom one was to supervise the work of administration and the Panchas were given power to appoint other panchas. *Held* that power could only be exercised by the whole body of Panchas. Evidently the testator had never intended that Panchas should have the power to appoint other Panchas by will because it was intended by the testator that they should exercise that power as a body. That would exclude any power to appoint by will. At the most one panch would be a person who might apply for letters of administration *de bonis non.*

H. C. Coyajee with A. G. Desai—for the Appellants.

G. S. Rao and B. G. Rao—for the Respondent.

Judgment:—The petitioners applied for letters of administration *de bonis non* with a copy of the will annexed of one Bandoba Vithoba who died on the 11th March 1896. The petition was opposed by Damodhar Bhukandas the son of one of the persons appointed panchas by the will. The will directed six persons to be Panchas of whom one was to supervise the work of administration. The Panchas were given power to appoint other Panchas That power could only be exercised by the whole body of Panchas and when Bhukandas asserted his right to appoint his son to succeed him by his will he was attempting to do what was not authorised by the terms of the will of Bandoba. Evidently the testator had never intended that Panchas should have the power to appoint other panchas by will because it was intended by the testator that they should exercise that power as a body. That would exclude any power to appoint by will. It follows then that Damodhar Bhukandas has no inherent right to be considered as executor of the will. At the most he would be a person who might apply for letters of administration *de bonis non.* Whether the petitioners are proper persons to be appointed administrators has not been decided by the Court below Therefore we allow the appeal and the case must go back to the lower Court for the decision of the question whether the petitioners or any other persons should be appointed administrators *de bonis non* with the will annexed.

The Petition of Damodhar Bhukandas for probate which was granted by the lower Court has no foundation in law. The petition ought to have been dismissed. First Appeal No. 122 of 1921 will be allowed and the petition dismissed.

Costs in both appeals to be costs in the cause.

1923 BOMBAY. 216(2)

MACLEOD C. J. AND CRUMP, J.

Mulchand Jekisondas—Appellant.

v.

Bai Rukshmani— Respondent.

S. A. No. 587 of 1921, D 15th Nov. 1922 from the decision of Asst. J., Ahmedabad, in Appeal No. 471 of 1920.

(a) *Hindu Law-Gift-Gift to wife-Construction.*

A will provided: "I appoint my wife Bai Rukhi alias Juma to be the owner of my property. Therefore after my death my wife is to take my property into her possession with full authority. And after doing the same my

wife Bai Rukhi alias Juma is to consume, enjoy or do what she likes with respect to what remains out of my property, and after the death of my wife my son Chimanlal is the owner of my estate; the said Chimanlal may do what he likes with respect to my property. *Held* the testator did not intend that the widow should have absolute powers of disposition during the life-time of the son; considering the ideas a Hindu testator ordinarily has with regard to what will happen to his property on his death, he would not be anxious if he had a son alive to give an absolute estate to widow; especially as he only gave powers to the widow because the son was incapable of managing his own affairs. If words were used conferring absolute ownership upon the wife, the wife enjoyed the rights of ownership without their being conferred by express and additional terms, unless the circumstances or the context were sufficient to show that such absolute ownership was not intendent. *Held* further that the son took vested interest in his life-time, and on his death that would go to his mother, who would under Hindu Law take only a limited interest, and if the disposition in her favour did not give her an absolute interest in the first instance, the fact that she succeeded as heir of her son would not enlarge that estate. [P. 218 C. 1]

G. N. Thakor with R. J. Thakor—for the Appellant.

G. S. Rao—for the Respondent.

MACLEOD, C. J.—One Ranchoddas died seven years back leaving a lunatic son by name Chimanlal and a widow. He left a will in which he stated after setting out his property :

"So long as I am living I am heir and owner of the said property, the same I may consume, enjoy, use or do what I like. But if by the will of God I die, on my death I appoint my wife Bai Rukhi *alias* Juma to be the owner of my property. Therefore after my death my wife is to take my property into her possession with full authority, and is to perform the funeral and obsequious ceremonies with respect to my death. And after doing the same my wife Bai Rukhi *alias* Juma is to consume, enjoy or do what she likes with respect to what remains out of my property, and after the death of my wife, my son Chimanlal is the owner of my estate; the said Chimanlal may do what he likes with respect to my property. Therein none of my relatives, friends or other persons have a right or claim"

Chimanlal died before the widow, and the present suit has been brought by persons asserting their rights as reversioners to restrain the widow from wasting the estate. The suit has been dismissed in both the lower Courts on the ground that under the terms of the will the widow took an absolute estate.

The principles of construction to be applied to a will of this kind have been quite clearly laid down by various decisions of the Privy Council. At one time it was considered by the Indian Courts that the husband did not confer an absolute estate by his will on his wife, unless he gave express powers of disposition, that it was not sufficient for him to say that the wife was the owner of the property, he must also say that she had the power of alienation. But in *Surajmani v. Nabi Nath Ojha* (1) it was held that if words were used conferring absolute ownership upon the wife, the wife enjoyed the right of ownership without their being conferred by express and additional terms, unless the circumstances or the context were sufficient to show that such absolute ownership was not intended.

That decision was referred to with approval in *Bhaidas Shivdas v. Bai Gulab* (2). In that case the testator by his will appointed his wife executrix, and by clause 3 constituted her owner (Malik) of his property, and provided that she should leave whatever property might remain after her death to two named daughters as she liked. It was argued that later clauses in the will in their terms were inconsistent with the view that the provisions of the earlier clause 3 constituted the wife an absolute owner, but it was eventually held by their Lordships that the subsequent clauses in the will were not sufficient to displace the language of clause 3.

In the present case, we have to see whether the words which purport to give an absolute estate to the widow have been displaced by the later dispo-

(1) [1908] 35 I. A 17-30 All. 34-10 Bom. L. R. 59-5 A. L. J. 67-12 C. W. N. 231-18 M. L J. 7-7 C. L. J. 131-3M. L. T. 144 (P C.)

(2) [1922] P. C. 193-46 B. 193-49 I. A 1-24 Bom. L. R. 551-20 A. L. J. 209-35 C. L. J. 314-26 C. W. N. 129-15 M. L. W. 412-42 M. L. J. 385-30 M. L. J. (P. C.) 149-25 I. C. 974 (P. C.).

sition of the property to Chimanlal as Malik after the death of the widow. In *Lallu* v. *Jagmohan* (3), the testator provided as follows: "When I die, my wife named Suraj is owner of that property. And my wife has powers to do in the same way as I have absolute powers to do when I am present, and in case of my wife's death my daughter Mahaluxmi is owner of the said property after that (death)." It was held that Suraj took only a life estate under the will, with remainder over to Mahaluxmi after her death. That decision was before the decision in *Surajmani's case* (1). It may be that the Court might not have considered the words in that will sufficient to give the widow an absolute estate apart from the gift over to the daughter. It seems obvious in this case that the testator did not intend that the widow should have absolute powers of disposition during the lifetime of the son; considering the ideas a Hindu testator ordinarily has with regard to what will happen to his property on his death, he would not be anxious if he had a son alive to give an absolute estate to the widow; especially as in this case he only gave powers to the widow because the son was incapable of managing his own affairs. Nor do we think that it was intended that the son should only have a contingent interest as the learned Judge thinks. That would be contrary to the usual ideas of a Hindu testator, nor was there anything in the will to show that Chimanlal's interest was merely a contingent one, as the case would have been if such words had been used as "if my son Chimanlal survives my wife then he will be malik of my property." We think Chimanlal took a vested interest in his life-time, and on his death that would go to his mother, who would under Hindu Law takes only a limited interest, and if the disposition in her favour did not give her an absolute interest in the first instance, the fact that she succeeded as heir of her son would not enlarge that estate.

We think, therefore, that the widow has not an absolute estate with powers of disposal over the property. The appeal must be allowed and the suit must be remanded for decision on the remaining issues. The appellants to have costs here and in the Court below. Costs in the first Court will be costs in the cause.

Appeal allowed.

(3) [1896] 22 Bom. 404.

1923 BOMBAY 218

MARTEN AND PRATT JJ.

Pandy Walad Dagadu Mahar and another-(Original Defendants) Appellants.

v.

Jamnadas Cholumal Marwadi-(Original Plaintiff.)-Respon ,

L. P. A. No. 5 of 1922 D. 13th October 1922 against the decision of this Court in S. A. No. 750 of 1921 preferred against the decision of Dt. J. of Poona, in Appeal No. 263 of 1920.

(a) Limitation Act S. 14 (2)—Another Civil Proceeding—Proceeding partially wrong.

Marten J.—The two separate Courts of Poona and Vadgaon have a common Judge; from the 1st to the 20th of each month the Judge sits at Haveli, Poona; from 21st to 25th he sits at Vadgaon, and from the 25th to 30th of the month he sits at Lonavli a part of the Vadgaon Court. The plaintiff filed his Darkhast No. 284 of 1912 on the 10th April 1912. He filed it at Vadgaon quite correctly, but as the Judge was then sitting at Haveli, the Court officials apparently sent the papers to the Judge at Haveli, and he on the 11th April 1912, gave a notice to the defendants returnable on the 14th or 15th April 1911 in the Haveli Court. The defendants did not appear, and on the 15th April the Judge sitting in the Haveli Court made the Warrant for possession absolute. Defendants appealed and on the 26th February 1913 this order was set aside on the ground that the Judge had no jurisdiction to direct the defendants to appear in the Haveli Court, nor to make the order against them in that Court. It was accordingly directed that the Court of first instance should take up the Darkhast at the point where it was when the order for issuing the warrant of possession was passed. The plaintiff appealed to the High Court, but on 3rd Feb. 1915 his appeal was dismissed. On 29th June 1915 the Darkhast was brought on again, that the plaintiff was present but as the Judge was away the proceedings were adjourned to the next day. The plaintiff this time was not present in Court and accordingly the Darkhast was struck off. The next Darkhast he filed was, on the 7th June 1916. *Held* that it was not time barred.

(b) Limitation Act Art 182 (5)-Step in aid-Stay order.

Marten J. Quere--Whether a stay of proceedings granted at the instance of the plaintiff can be said to be a step-in aid of execution. A mere adjournment has been held not to be such a step-in-aid of execution, although an application for adjournment in order to obtain further evidence has been held to be a step-in-aid. 27 cal. 285 ref.

Pratt. J the application for stay is not a step in aid of execution.

(c) *C. P. Code S. 98-Letters Patent S. 36-Applicability—Judges differing in opinion.*

The natural place to find the rules governing the exercise of the appellate civil jurisdiction over the other Judges of the High Court would be the Letters Patent, while the natural place to find the rules governing the exercise of the appellate civil jurisdiction ever the civil Courts of the mofussil subject to the High Court would be the Civil Procedure Code. The Code makes no provision for an appeal within the High Court, that is to say, from a single Judge of the High Court. This right of appeal depends on clause 15 of the Charter. Appeals under the Letters Patent are governed by the Letters Patent, and appeals under the Code are governed by the Code. Further the Code only deals with appeals from certain courts and does not deal with appeals within the High Court from the decision of one Judge of the Court to another. Therefore when a Bench of two Judges is hearing an appeal from the decision of a single Judge of the same High Court whether on the original side or the appellate, and they differ in opinion, the opinion of the senior Judge would prevail. 26 All 10; (1921) 23 Bom. L. R. 623. Ref. [P.224 C. 2]

V. D. Limaye,-for the Appellant.

N. M. Patwardhan with D. G. Dalvi-for the Respondent.

Marten J.—This is an appeal under the Letters Patent from the order of Mr. Justice Shah dated 13th December 1921 dismissing the defendants' appeal against the order of the District Judge of Poona who directed the Subordinate Judge of Vadgaon to proceed with the execution of the decree under Darkhast No. 29 of 1919.

The question is one of limitation and concerns primarily section 14, sub-section 2 and Article 182 (5) of the Indian Limitation Act. To explain it I will state shortly the material facts. The suit was an ejectment suit brought in 1906, and on the 27th November 1907 the plaintiff obtained a decree for possession in the Vadgaon Court. I understand from counsel that the plaintiff has now recovered possession of all the suit land except a particular cottage, and that the present Darkhast relates only to that cottage. Be that as it may, there have been numerous Darkhasts since the original decree, but it is unnecessary to mention them all. It is common ground that the present Darkhast No. 29 of 1919 is in time if another Darkhast of 7th June 1916 (No. 411 of 1916) was itself in time. This 1916 Darkhast in its turn depends upon whether the time occupied over certain proceedings under an earlier Darkhast of 1912 (No. 284 of 1912) can be deducted under Sec. 14 (2). That Darkhast was admitted on 10th April 1912, so that 3 years from that date would expire in April 1915, and consequently unless some exemption can be claimed, the Darkhast of 1916 would be out of time. The plaintiff contends that he is entitled to that exemption under s. 14 (2) of the Indian Limitation Act, and this is how he makes out his claim.

It appears that the two separate Courts of Poona and Vadgaon have a common Judge, that is to say, from the 1st to the 20th of each month the Judge sits at Haveli, Poona; and from 21st to 25th he sits at Vadgaon, and from the 25th to 30th of the month he sits at Lonavli which is also a part of the Vadgaon Court. The plaintiff filed his Darkhast No. 284 of 1912 on the 10th April 1912. He filed it at Vadgaon quite correctly, but as the Judge was then sitting at Haveli, the officials apparently sent the papers to the Judge at Haveli, and he, on the 11th April 1912, gave a notice to the defendants returnable on the 14th or 15th April 1912 in the Haveli Court. The defendants did not appear, and on the 15th April the Judge sitting in the Haveli Court made the warrant for possession absolute. Defendants appealed, and on the 26th February 1913 this order was set aside on the ground that the Judge had no jurisdiction to direct the defendants to appear in the Haveli Court, nor to make the order against them in that Court. It was accordingly directed that the Court of first instance should take up the Darkhast at the point where it was when the order for issuing the warrant of possession was passed. That means, I take it, that the proceedings as from the 14th or 15th of April 1912 were in effect set aside, but as the Darkhast itself was in order, the Court was to proceed on it. The

plaintiff appealed to the High Court, but on 3rd February 1915 his appeal was dismissed. Counsel states that on 29th June 1915 the Darkhast was brought on again, that the plaintiff was present but as the Judge was away the proceedings were adjourned to the next day. The plaintiff this time was not present in Court and accordingly the Darkhast was struck off. The next Darkhast he filed was, I have already said, on the 7th June 1916 and the question is; was it in time ?

Turning to the Limitation Act, section 14 (2) runs as follows.—

"In computing the period of limitation prescribed for any application, the time during which the applicant has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance or in a Court of appeal, against the same party for the same relief, shall be excluded, where such proceeding is prosecuted in good faith in a Court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it."

Then under Article 182 (5), the period of limitation, (namely 3 years) begins to run from " the date of applying in accordance with law to the proper Court for execution, or to take some step-in-aid of execution, of the decree or order ". Now it is not contended by either party that the 1912 Darkhast was not filed in the proper Court. It was filed at Vadgaon and Vadgaon was the proper Court. But it is said that the subsequent proceedings between 15th April and 3rd February 1915 ought to be excluded, because within the meaning of S. 14 (2) the plaintiff was prosecuting a proceeding in good faith in a Court which, from defect of jurisdiction or other cause of a like nature was unable to entertain it. " viz., the Court at Haveli (Poona).

Defendants' first answer to this contention is that the 1912 Darkhast was not prosecuted in good faith having regard to the definition of "good faith" in S. 2 (7) of the Act. The definition runs thus .—

" 2 In this Act, unless there is anything repugnant in the subject or context,..(7) "good faith"; nothing shall be deemed to be done in good faith which is 'not done with due care and attention."

It is said that the plaintiff showed a want of due care and attention in prosecuting any orders obtained in the Haveli Court.

In my opinion there is no substance in this contention. The plaintiff obtained a decision of the Court in his favour and under Explanation II to section 14 in resisting the defendant's appeal from that order he was to be deemed to be prosecuting a proceeding. The order made by the Court of the first instance may have been a wrong order, as indeed it was eventually held to be, —but it cannot, I think, be said that it was made without due care or attention. Nor can the plaintiff be penalised for having obtained it, nor for having endeavoured to support it, apart of course from any deliberate misstatement of facts to the Court, which it is not suggested, occured in the present case.

The next point is of much greater difficulty for it is one which found favour with the Judge of first instance and is the main point argued on this appeal. That point is that s. 14 (2) only applies to " another civil proceedings", and that the 1912 Darkhast was not " another civil Proceeding " because it was instituted in the right Court, and that time began to run under Art. 185 (5) from its institution. It is further argued that the plaintiff cannot be put in any better position by having taken a wrong proceeding than if he had taken a right proceeding, and that even if the 1912 Darkhast had been prosecuted throughout in the right Court, time would have expired in 1915 unless some effective order had been made on that Darkhast in the meanwhile. But, in my opinion, s. 14 (2) is intended to protect a party from time running against him during the pendency of a *bona fide* proceeding which may eventually prove abortive by reason of want of jurisdiction or some similar cause. This sub-section was added by the 1908 Act, but even before that amendment, the general principle was recognised by the Courts. *Hiralal* v.

Budridass (1) was a decision of the Privy Council on S. 20 of the Act of 1859 which corresponds to S. 14 (1) of the present Act. There the headnote runs:—" A proceeding to enforce a decree taken *bona fide* and with due diligence before a Judge whom the party, *bona fide* though erroneously, believes to have jurisdiction, is a proceeding within the meaning of S. 20, Act XIV of 1859; whether the Judge actually decides that he has jurisdiction, or supposing himself to have jurisdiction acts accordingly." And with reference to S. 14 of the Act, their Lordships observed:—" It was, therefore, the object of the Legislature, at least with regard to the limitation for the commencement of a suit to exclude the time during which a party to the suit may have been litigating *bona fide* and with due deligence before a Judge whom he may suppose to have had jurisdiction, but who yet may not have had jurisdiction "

Accordingly in the present case the defendant conceded that if the 1912 Darkhast had been presented originally to the wrong Court, for instance to the Haveli Court, the time occupied in proceeding with that wrong Darkhast ought to be allowed to the plaintiff. But on principle, I see no reason why the Legislature should not also protect proceedings which are not wholly void but which are partly void as was the case with the 1912 Darkhast. Here the 1912 Darkhast was presented in the right Court, but was almost immediately transferred to the wrong Court and prosecuted there or on appeal for nearly 3 years. The injury to be guarded against is almost exactly the same in each case. Nor in principle is it a sufficient answer to say that the plaintiff cannot be better off by having taken a wrong proceeding than if he had originally taken the right one. The Act clearly says that he is to be better off to this extent, namely, that the time taken over a proceeding which is wholly wrong is to be deducted But why should not the greater include the less, and thus protect partially wrong proceedings as well as wholly wrong proceedings.

The basis of the desire of the Legislature is, I take it, not to punish litigants unduly for mistakes of procedure whether those mistakes are made by the Court or the litigant, for every practitioner knows how easy it is to make mistake in procedure having regard to the bewildering mass of rules on the subject, and to each Judge having to some extent his own views as to minor matters of practice. And it must be remembered that the 1912 Darkhast originally resulted in a warrant for possession being ordered. If that order had been valid, no subsequent Darkhast would have been necessary. It is therefore hardly fair to compare the 1912 Darkhast with hypothetical proceedings which result in no effective order to an applicant.

Nor I think does the express wording of the Act, namely, the words "another civil proceeding" prevent a more liberal construction of the Act being adopted. We have to consider by what date the 1919 Darkhast must have been presented. Under Art. 182 (5), the 3 year's period ran from the 12th April 1916. But in applying that period of limitation, the time during which the applicant prosecuted with due diligence another proceeding, viz., the 1912 Darkhast in a Court unable to entertain it may be excluded under S. 14 (2). In other words, the period of limitation which we have to compute is that prescribed for the 1916 Darkhast and not for that of the 1912 Darkhast. Accordingly "another civil proceeding" under S. 14 (2) is the 1912 Darkhast or rather so much of it as consisted of proceedings in excess of the jurisdiction of the Court. If in S. 14 (2) the words " the 1916 Darkhast" be substituted for "any application," and the words ' the 1912 Darkhast" for "another civil proceeding" and "such proceeding," what I am endeavouring to explain will I think be made clear. In the view I take, it is accordingly immaterial that the period of 3 years in question happens to date from the 1912 Darkhast. It is merely a period which has commenced to run, and apart from actual,

(1) [1879] 2 All. 792—7 I. A. 167—6 C. L. R. 561—4 Sar. 157 (P. C.)

dates it would make no difference in principle if the period had begun to run from the date of the decree under A. 182 (1). This is of course on the assumption which has not been contested in this case, that each separate Darkhast is a separate civil Proceeding within the meaning of S. 14 (2).

In the result therefore I agree with Mr. Justice Shah in thinking that the 1916 Darkhast and consequently the 1919 Darkhast were both brought in time.

A further point was taken on behalf of the plaintiff that certain applications by him for a stay of proceeding pending the appeal from the order of 26th February 1913 amounted to a step-in-aid of execution of the decree within the meaning of Article 182 (5), and that time ought therefore to be calculated from the date of such applications. It appears that on 20th July 1913 the plaintiff applied to the Court of execution that as an appeal had been filed against the order of 26th February 1913, the Darkhast proceedings should be stayed and that on the 16th December 1913 an order for stay was made accordingly. But I feel a difficulty in seeing how a stay of proceedings granted at the instance of the plainitff can be said to be a step-in-aid of execution. A mere adjournment has been held not to be such a step-in-aid of execution, (see *Kartick Nath Pandey* v. *Jagannath Ram* (2) although an application for adjournment in order to obtain further evidence has been held to be a step-in-aid : see *Abdul Kader Rowther* v. *Krishnan Malaval Nair* (3). But the adjournment here was not based on latter ground, and if the present plaintiff had relied solely on this point, his case might well have failed. But as I am in his favour on the other point, it is unnecessary for me to express any final opinion on this secondary matter.

I would accordingly dismiss the appeal with costs.

Pratt J.—The only question for decision in this appeal is whether the Darkhast filed on the 7th June 1916 is in time.

The next preceding Darkhast was filed on the 10th April 1912.

The Darkhast of 7th June 1916 is therefore beyond the time limited by Article 182 (5).

It is contended, however, that certain proceedings taken under the Darkhast of 1912 entitle the applicant to an exclusion of time under S 14 (2) of the Limitation Act.

The Darkhast dated 10th April 1912 was filed in the proper Court-the Court of the Subordinate Judge of Vadgaon. This is admitted, as indeed it must be, for if the Darkhast had not been filed in the propor Court, the starting point for limitation would have to be the next preceding Darkhast.

But although it was filed in the proper Court and so was the *terminus a quo* for limitation under Article 182 (5) the Subordinate Judge on the 15th April 1912 passed orders on it at a time when he was not sitting within the local limits of his jurisdiction. On appeal it was held by the District Court on the 26th February 1912 that all proceedings under that Darkhast subsequent to the 15th April 1912 were void. This order was confirmed by the High Court in second appeal on the 3rd February 1915. When the proceedings under the Darkhast were revived as from the 15th April 1912 in consequence of these orders the applicant failed to appear and that Darkhast was dismissed for his default. This necessitated the filing of the fresh Darkhast on the 7th June 1916.

On these facts the contention is that the applicant is entitled to a deduction of the time occupied in the proceedings under the Darkhast of 1912 from the 15th April 1912 till the decision of the High Court on the 3rd February 1915.

This claim seems to be inadmissible. Section 14 (2) applies to cases where after limitation has begun to run the applicant in good faith takes a proceeding in a Court which is unable to entertain it. An application to a wrong Court does not afford a new starting point for

(2) [1900] 27 Cal. 285.
(3) [1915] 38 Mad. 695-1 L.. W. 271-(1914) M. W, N. 563-26 M. L. J. 433-15 M. L. T. 005-23 I. C. 533 (P. C.)

limitation because under Article 182 (5) the application must be to the proper Court. The starting point of limitation is therefore the last preceding application to the proper Court but the period occupied by a subsequent proceeding in the wrong Court is deducted. A proceeding under an application to a proper Court can never be deducted, for under Article 182 (5) the period of limitation runs from the date of application and not from the date of disposal of the execution proceedings.

It is admitted that if the High Court had held that the Subordinate Judge's order of the 15th April was valid the Darkhast of 1916 would be time-barred.

The applicant's contention therefore is that the want of jurisidiction of the first Court had put him in a better position than he would have been in, if the Court had jurisdiction This is surely not what the section 14 (2) of the Limitation Act means. Limitation implies a *terminus a quo* as well as a *terminus ad quem* The *terminus ad quo* is the date of the application of 1912. The *terminus ad quem* is 3 years from that date. Section (2) refers to "another civil proceeding." Surely that must be a civil proceeding other than that which forms the *terminus a quo*. In 7 I. A. 167 the time excluded was taken up by other applications made after limitation had begun to run to a Court to which the execution of the decree had been illegally transferred. The applicant is defeated not by limitation but by his own latches in not prosecuting the Darkhast of 1912 after the order of the High Court in 1915. It is not contended that the application of 1916 was merely to revive that of 1912, but there is one other point taken and that is, that the applicant on the 20th July 1913 made an application for stay of proceedings in the Darkhast of 1912. But I do not think such an application can be construed as a step-in-aid of execution. On the contrary it is in fact an application to the Court not to take any step-in-aid of execution (see *Fakir Muhammad* v. *Gulam Husain* (4) I would therefore reverse the order of the lower appellate Court and restor that of the Subordinate Judge.

Marten J.—The question is what order the Court should make having regard to the difference of opinion between my learned brother and myself on this Letters Patent Appeal from the judgment of Mr. Justice Shah. Now the question as to what is the proper order where a Bench of Judges of a High Court is divided in opinion has been considered recently in more than one case. The first case I refer to is *Surajmal* v. *Horniman* (5). There Mr. Justice Macleod sitting on the Original Side decided in favour of the plaintiff. On appeal to Sir Basil Scott and Sir John Heaton, the learned Judges were divided. Sir Basil being for reversing the decree and Sir John Heaton for confirming it. It was then held by both Scott C. J. and Heaton J. that it being an Original Side Appeal, the provisions of the Letters Patent applied and that the opinion of the senior Judge would prevail, although he was in a minority of one. Next an appeal was presented from the decision of Scott C. J. to a Bench of three Judges, and in the result, the Bench of three Judges agreed with Sir Basil Scott and accordingly his decision prevailed.

The proposition that where there is a difference of opinion on an Original Side Appeal the opinion of the senior appellate Judge prevails, can no longer be questioned because the precise point has been decided by the Privy Council in *Bhaidas Shivdas* v. *Bai Gulab* (6) which was decided after *Surajmal's case*. (5)

Then following on *Surajmal's case* whole position was considered in *Bhuta Jayat Sing* v. *Lakdu Dhansing* (7) by a Full Bench of this Court consisting of

(4) (1876) 1 All. 580, (583). (F. B.)

(5) (1918) 20 Bom. L. R. 185-47 I. C. 442

(6) (1921) 45 Bom. 718-48 I. A 181-23 Bom. L. R 623-40 M. L. J. 519-25 C. W. N. 605-38 C. L. J. 488-19 A. L J. 409-26 C W. N. 129-14 L. W. 7-29 M. L. T. 350-(1921) M. W. N. 408-60 I. C. 822 (P. C.)

(7) (1919) 43 Bom. 433-21 Bom. L. R. 157-50 I. C. 715 (P. B.).

Scott C J., Heaton J., Macleed J. Shah J. and Hayward J. on a difference of opinion between Beaman J. and Heaton J. on a second appeal from the mofussil. The precise point there was as to the procedure in second appeals from the mofussils. It was held that on the appellate side of the Bombay High Court where the Judges differ in such appeals, the procedure is governed by S. 98 of the Civil Procedure Code and not by clause 39 of the Letters Patent of the Bombay High Court. It will be found that Mr. Justice Heaton and Mr. Justice Shah agreed with the judgment of Sir Basil Scott, and, I take these few passages from the judgment of Sir Basil Scott. At p. 76 he says:—"In my opinion S. 98 like S. 104 read with Order 43, rule I, must be taken to apply to appeals from Courts of inferior jurisdiction to the High Court, and not to appeals from one or more Judges of the High Court. And then at p 177 he says:—"It appears to me therefore both upon the provisions of the Code and Letters Patent and the reported decisions of this and other High Courts that the procedure under clause 36 should be followed in case of appeals from the Original Side. It should also be followed in other cases to which section 98 cannot properly and without straining language be applied as was decided by the Allahabad High Court in *Husaini Begam* v. *The Collector of Muzaffarnagar* and in the latter case of *Lachman Sing* v. *Ram Lagan Singh* (8).

Then I find that Mr. Justice Hayward deals in detail with the various descriptions of appeals. He refers to three different classes of appeals, viz., (1) appeal from the decision of a single Judge on the Original Side, (2) appeals under the Letters Patent, and (3) second appeals from mofussils. The conclusion he arrives at is that the second class of case, viz, appeals under the Letters Patent which we have to deal with here are governed by the same rules, as those dealing with Original Side appeals. Thus at p 180 he says.—"It appears to me the rule would, as held in the case of *Surajmal* v. *Hroniman* (5), still apply in the exercise of the appellate civil jurisdiction over the Judges of the High Court. It has aleady been indicated that this jurisdiction has arisen entirely out of the Letters Patent; while the appellate civil jurisdiction over the civil Courts of the mofussil subject to the High Court has been derived from the provisions of s. 332 of the Civil Procedure Code of 1859 as amended by s. 23 of Act XXIII of 1861. It appears to me to follow that the natural place to find the rules governing the exercise of the appellate civil jurisdiction over the other Judges of the High Court would be the Letters Patent; while the natural place to find the rules governing the exercise of the appellate civil jurisdiction over the civil Courts of the mofussil subject to the High Court would be the Civil Procedure Code." Then after quoting certain decisions he says at p. 181.—" It was finally observed by Sir Lawrence Jenkins C. J. in 1915 that the Code makes no provision for an appeal within the High Court, that is to say, from a single Judge of the High Court. This right of appeal depends on clause 15 of the Charter". (*Debendra Nath Das* v. *Bibhudhendra Mansingh* (9).

I agree that so far as counsel's industry has brought the Indian authorities to our notice, no express decision of our Court as to Letters Patent appeals has been brought to our attention. This last case, as I have said, was a decision of a second appeal from the mofussil and was not a Letters Patent appeal, but as I have already pointed out both Sir Basil Scott and Mr. Justice Hayward in their judgments considered the whole question and incidentally dealt with appeals of that nature. Shortly stated, therefore, this Full Bench decision amounts to this, that appeals under the Letters Patent are governed by the Letters Patent, and appeals under Code are governed by the Code Further the Code only deals with appeals from certain Courts and it does not deal with appeals within the High Court from the decision of one Judge of the Court to another.

That being, in my opinion, the true

(8) (1904) 26 All. 10-23 All. N. 162.

(9) (1916) 43 Cal. 90-33 I. C. 745.

view of the relative position of the Letters Patent and the Code, what are the facts which we have got here? To my mind, it is perfectly clear that we are not hearing a second appeal from the mofussil but we are hearing an appeal from the judgment of Mr. Justice Shah. In fact but for the Letters Patent there would be no appeal whatever from Mr. Justice Shah's judgment. I agree the learned Judge gave no notice to the respondent, but that seems to me to make no difference in principle. Shah J. summarily dismissed the suit and that was the order or decree of the High Court which operated finally to dispose of the suit. If one looks to Code alone there is no appeal from that decision. The appeal is admittedly brought under the Letters Patent and that is the appeal we are now hearing.

The fact that this Letters Patent appeal was admitted by Macleod C. J. and Coyajee J. is immaterial. The object of that course was to save the necessity and expense of notice to the respondent, supposing the appeal had been considered too clear to warrant further argument. Otherwise appellants could always force their opponents to appear by appealing under the Letters Patent from a summary dismissal by a single Judge. The admission of the Letters Patent appeal merely amounted to this that in the opinion of Macleod C. J. and Coyajee J. with which I respectfully agree, there was a case which required to be argued, and accordingly it was necessary to give notice to the other side. They in no way reversed Mr. Justice Shah's judgment and accordingly what we are hearing is an appeal from another judge of this High Court viz Mr. justice Shah. In the present case unlike *Suraimal's case*, it so happens that the senior Judge is in favour of the decree. But that to my mind is immaterial except possibly on the question of costs.

In the result I am clearly of opinion that the matter is governed by Letters Patent, and accordingly the opinion of the senior Judge prevails in accordance with the decision of the Privy Council in 23 Bom. L. R. 623.

The order of the Court will be that this appeal will be dismissed and there will be no order as to the costs of this appeal. In Surajmal's case Sir Basil Scott C. J. and Heaton J. made no order as to costs because the senior Judge was in a minority of one. In the present case the opinion of the senior Judge is with the majority. I think that, on the whole as the result of the appeal is nugatory, is fair, as far as we are concerned, that we should make no order as to costs. If there is any further appeal the learned Judges who will hear the further appeal, can make such order as they think fit as regards the costs here and in the Courts below.

Pratt J:-I agree that the procedure should be regulated by S. 36 of the Letters Patent. It has been made clear by the recent decision of the Privy Council in *Bhaidas Shivdas* v. *Bai Gulab* (6) that section 98 of the Civil Procedure Code appties to appeals under the Civil Procedure Code and S 36 of the Letters Patent applies to appeals under the Letters Patent. The appeal which we have now heard is under the Letters Patent, and therefore S. 36 of the Letters Patent applies.

Mr. Limaye argues that as the judgment of Shah. J. which is before us in appeal is an appellate judgment, therefore the appeal that we are now hearing is in fact a second appeal, and therefore an appeal under the Civil Procedure Code. But the name second appeal does not make this a Civil Procedure Code appeal for that Code does not provide for appeals within the High Court. The Civil Procedure appeal was disposed of by Shah J. Section 15 of the Letters Patent makes no distinction between an original judgment and an appellate judgment. The appeal we have heard is under S. 15 and so S. 36 now applies.

There is an express authority for the application of S. 36 of the Letters Patent in a difference of opinion upon the hearing of an appeal under the Letters Patent from a judgment in an appeal under the Civil Procedure Code. That is a case in 26 All. 10. That was an appeal under the Civil Procedure Code. It was disposed of by one Judge and on that there was a Letters Patent appeal to two Judges

of the Allahabad High Court. On a difference of opinion then arising it was held that S. 36 of the Letters Patent applied and that the opinion of the senior Judge prevailed.

1923 BOMBAY. 226

SHAH. AND CRUMP, JJ.

Tribhuvan Uttamram; and others — (Original Plaintiffs) Appellants.

v.

Bai Kushal daughter of Ranchhod Bapuji and others—(Original Defendants) Respondents.

S. A. No. 785 of 1921, D. 26th Sep. 1922, against the decision of Asst. J. of Ahmedabad in Appeal No. 451 of 1919.

Registration Act S. 17—Right to or interest in immoveable property—Pre-emption, agreement as to

The agreement as to pre-emption was in these terms :—" If the plaintiff and defendant I wish to sell the houses situate at Singlaw, they should first sell them to trustees Nos. 2 to 6 at the market value ; that is to say, first right in respect of 'safil' is to be reserved for them ; and accordingly they have been given by this document a right in respect of ' safil.' *Held* that this agreement is an agreement between the parties which could be enforced by the plaintiffs, and that it does not create any right in immoveable property and that it is admissible without registration. 24 Mad. 449 Foll. 32 All. 206 Diss.

R. J. Thakor—for the Appellants.

H. V. Divatia—for the Respondents.

Judgment.—The facts which have given rise to this Second Appeal are these. One Girjashankar made a will in respect of his properties on the 3rd September 1907, and he appointed the present plaintiffs as executors under that will. He died in October 1907. Thereafter in 1908 a suit was filed by his widow against the present plaintiffs and the present defendant No. 1, who is the sister of Girjashankar. In that suit there was a compromise. In accordance with that compromise, a decree was passed in favour of the then plaintiff i. e. the widow of Cirjashankar so far as it related to the suit. The rest of the agreement being outside the scope of the suit was not incorporated in the decree. The present defendant 1 sold the properties in suit to defendant 2 in April 1917.

Thereupon the plaintiffs filed the present suit in December 1917 with a view to enforce the agreement relating to their right of pre-emption in respect of the two houses in suit.

The defendants raised various defences, one of which was that the agreement under which the plaintiffs claimed the right of pre-emption required to be registered, and that as it was not registered, it was inadmissible in evidence.

The trial Court overruled this plea, and on other points, which need not be detailed, the learned Subordinate Judge decided in favour of the plaintiffs. It accordingly passed a decree in their favour, holding in effect that on the plaintiffs paying Rs. 650 in Court for payment to defendant 2, the properties were to be conveyed to the plaintiffs.

The defendants appealed, and in appeal the learned Assistant Judge came to the conclusion that the agreement required to be registered, and accordingly dismissed the plaintiffs' suit. The learned Judge also remarked that even if he had confirmed the decree of the trial Court, he would have found it necessary to remand the case for findings on the issues relating to the validity of the bequest in the will relating to *dharmada*.

The plaintiffs have appealed to this Court, and the point as to registration has been argued before us. It is urged on behalf of the plaintiffs that the agreement does not require registration, and that the decree of the trial Court is right. The agreement as to pre-emption is in these terms :-"If the plaintiff and defendant 1 wish to sell the houses situate at Singlaw, they should first sell them to trustees Nos. 2 to 6 at the market value : that is to say, first right in respect of ' safil ' is to be reserved for them ; and accordingly they have been given by this document a right in respect of ' safil ' The plaintiff and defendant 1 referred to in the agreement are the widow and the sister of Girjashankar. The lower appellate Court has relied upon the decision in *Kashi Kunbi* v. *Sumer Kunbi* (1) in support of its view and the same decision has been relied upon before us on behalf of the respondents. On behalf of the appellants reliance is placed in support of the argument that the agreement does not require regis-

(1) (1910) 32 All. 206-7 A. L. J. 206 -5 I. C, 234.

tration upon there remarks in *Ramasami Pattar* v. *Chinnan Asari* (2).

Apart from the authorities, we think that this agreement is an agreement between the parties which could be enforced by the present plaintiffs, and that it does not create any right in immoveable property. It cannot stand on any footing higher than an agreement to sell immoveable property. In terms and in effect it is merely an agreement to sell to certain persons in case the widow or the sister wished to sell the houses which they got under the compromise. It would in any case, when the occasion for pre-emption would arise, be enforced as an agreement, and the plaintiffs in the present suit seek to enforce that agreement against the owner, (defendant 1) and the purchaser from her (defendant 2).

In the case of *Ramasami Pattar* v. *Chinnan Asari* (2), to which we have referred, Bhashyam Ayyangar J. observes as follows :—"In cases in which the right of pre-emption springs from a contract it rests only upon a covenant which doos not run with the land. Being only a species of contract for the sale of immoveable property the contract of pre-emption stands on no higher footing than a contract for the sale of immoveable property and does not of itself create any interest in or charge on the immoveable property which is subject to the right of pre-emption-vide section 54 of the Transfer of Property Act. Until the contract is carried out by specific performance either by act of parties or decree of Court, the pre-emptor acquires no title to or interest in such property which alone can extinguish the mortgagor's right of redemption, though he may have a right to call for a conveyance of the property."

This view is no doubt in conflict with the decision in *Kashi Kunbi* v. *Sumer Kunbi* (1). We have considered the *ratio decidendi*, in this case, and with great respect we are unable to concur in the view taken in that case that an agreement, such as we have here, requires registration. We are not concerned in the present case with the question as to whether the compromise, so far as it related to the title of the various parties to the immoveable property, and so far as it has not been incorporated in the decree, required registration or not. We are only concerned with the question as to whether this particular agreement relating to the right of pre-emption requires registration. On that point, as we have already indicated, the agreement could be proved without registration ; and there can be no doubt in that view of the matter that the present plaintiffs are entitled to the decree which was passed in their favour by the trial Court.

We should like to make it clear that we agree with the lower appellate Court that " the properties pre-empted should be only those that are sold by Exhibit 17, and that the present plaintiffs should take them only in their capacity of trustees or executors of Girjashankar's will so that they will be bound to fulfil the directions in the will." It is hardly necessary to add this because in any case, the present plaintiffs are bound to fulfil their obligations with respect to that property as executors under the will when they get the property in suit.

There is one other point as to which we may add a word. The lower appellate Court has expressed the opinion that a remand would have been necessary in order to determine in this suit whether certain bequests were not void on account of uncertainty and vagueness. That is a point which does not arise in the present suit. It is entirely outside the scope of the suit, and the question as to whether any property which the executors may hold should be used as directed in the will, or that there is any intestacy in respect of any part of that property, is a question which cannot possibly be considered in this suit.

In the result, therefore, we allow the appeal, reverse the decree of the lower appellate Court and restore that of the trial Court with costs here and in the lower appellate Court on the defendants.

(2) (1901) 24 Mad. 449 (461.)

1923 BOMBAY. 228

FAWCETT. J.

The Indian Hotels Company, Ltd—Plaintiffs.

v.

Phiroz Sorabji Contractor—Defendant.

O. C. J. Suit No. 1279 of 1921 dated the 10th April 1922.

(a) *T. P. Act S. 105—Easements Act S 52—Distinction between license and lease*

It is essential to the creation of a tenancy of a corporeal hereditament that the tenant should have tho right to the exclusive possession of the premises. A grant under which the grantee takes only the right to use the premises without exclusive possession operates as a license, and not as a lease. Having regard to the rights of a lessee, which are specified in S. 108 of the Transfer of property Act, in particular the rights to growing crops and to put up structures, it seems difficult to say that there could be a valid lease not of a definite area of immoveable property but of an area the position of which varies from time to time. On the other hand, it may be said that "immoveable property" "(as defined in the General Clauses Act) includes not only land but benefits to arise out of the land so that there can be a lease of the benefit of keeping chattels, such as a car and a carriage, within certain special limits. although the place occupied by the chattels might vary from time to time. Ordinarily the law takes it that a case of that kind is not one of a demise, but that of a license. The mere fact that a person has had the exclusive use of a particular cubicle for two years and that it was the intention of the parties that no one else should use that cubicle so long as the person kept his car on the premises is not in law sufficient to show that the agreement was a demise or a lease and not a license. [P. 229 C. 2, P. 230 C. 1, P. 231 C. 2]

(b) *Bombay Rent Act (1918)—Interpretation.*

The deftnition of "premises" excludes the case of lodger, it must prima facie also be taken to exclude the analogous case of a single cubicle reserved not for the occupation of a human being but for the occupation of a chattel, viz. a motor car; and provided of course that the owner of the premises does exercise a general right of control.

Campbell, with Slangman—for the Plaintiff.

Mulla—for the Defendant.

Fawcett J.-The plaintiffs, the Indian Hotels Co. Ltd., are the owners of the immoveable property known as the "Wellington Mews" This consists of a ground floor and one upper floor and is used as a mews and motor garage. The ground floor provides stabling accommodation for about one hundred and ninety horses in stalls and loose boxes shown in blue in the Plan. It also provides accommodation for about one hundred and fifty carriages, which are kept on open spaces shown in pink in the Plan.

The evidence of the plaintiffs' representative, Dr. Vakharia. which is not disputed, is that no definite space is allotted to any particular carriage, but that carriages are placed as they happen to come in, so that they are not in variably on the same spot but change their position from time to time.

Then, on the ground floor, there are nine single cubicles or lock up rooms, each of which is able to contain one motor car. These are shown in green in the Plan. Each cubicle has a door with a lock, the key of which is supplied to the chauffeur of the car kept inside. The upper floor is entirely used for motor cars. About eighty cars are accommodated on the open spaces, which are shown brown on the Plan; and the same rule applies to the position of cars on these open spaces as I have mentioned in the case of the carriages on the ground floor. Then there are seven cubicles shown in yellow in the Plan, each of which accommodates more than one car varying in number from four to ten cars. The key of each of these cubicles is kept by a supervisor employed by the plaintiffs; and here, again, no particular portion of the cubicle is allotted to a particular car, but the cars kept inside take up their position as they happen to come in. Then there are about forty single cubicles for cars, shown in green in the Plan. Each of these contains one car. The chauffeur has the key as in the case of single cubicles on the ground floor

The defendant has, since February 1920, kept a horse in a stall on the ground floor and a carriage on the open space there. He has also three cars, one of which is kept on the open space on the upper floor, the second is kept in one of the bigger cubicles shown in yellow in the Plan, and the third car has been kept in the same single cubicle throughout.

The question between the parties is whether their relationship is that of landlord and tenant, or merely of licensor and lisensee.

The defendant pleads that the former is the relationship: the plaintiff's say it is the latter.

From the correspondence, Exh. A to the plaint, it appears that in 1920 the Rent Controller in Bombay took action under the Bombay Rent (War Restrictions) Act (No. 11 of 1918) and fixed standard rents in respect of the accommodation provided by the Mews. The plaintiffs sent out a circular in October 1920 saying that they were advised that the action of the Controller was *ultra vires* and contrary to law. They, therefore, proposed to have his decision set aside by filing an action for the purpose. The present suit is a test case which raises this point.

The figures given in the plaint are not disputed. The plaintiffs claim to be entitled to charge the defendant for one horse and carriage Rs. 18 a month as against Rs. 14-5-0 fixed as standard rent; for one car in the open space Rs. 25 as against Rs. 16-8 0; and for each of the other two cars Rs. 30 as against Rs. 22. The difference for the months of August 1920 to January 1921 amounts to the sum of Rs. 137-2-0, and the plaintiffs claim to recover this from the defendant, and also ask for declaratory and consequential reliefs.

The substantial facts alleged by the plaintiffs and deposed to by Dr. Vakharia are not disputed; but the contention raised by the defendant is that he is a tenant of the plainriffs, and, that, therefore, the premises, in question are premises to which the Bombay Rent Act applies under the definition contained in s. 2, sub-section (1), clause (b). of that Act.

The issues raised are:—

(1). Whether the premises in suit are premises as defined by the Bombay Rent Act?

(2). Whether the relation between the plaintiffs and the defendant is that of licensor and licensee, as alleged by the plaintiffs, or that of landlord and tenant, as alleged by the defendant?

(3). Whether any actual space of the ground floor or upper floor of the premises was exclusively reserved for the defendant?

(4). Wehther payments made by the defendant for the spaces actually occupied by him are "rent" within the meaning of the Bombay Rent Act?

(5). Whether the plaintiffs are entitled to claim from the defendant the sums of Rs. 18, Rs. 25 and Rs. 30 mentioned in the plaint?

The case really turns upon whether the agreement between the parties is one of lease or merely of license. This follows from the definition of "premises' in the Bombay Rent Act, to which I have already referred. That definition says that "premises" means any building or part of a building let separately for any purpose whatever including any land let therewith. And, therefore, to constitute such premises the part of the Wellington Mews, for which the defendant pays, must have been let to him.

Now, the ordinary distinction between a lease and a license is laid down as follows in Halsbury,s Laws of England, Vol. XVIII, p. 337, Art. 770:—

"It is essential to the creation of a tenancy of a corporeal hereditament that the tenant should have the right to the exclusive possession of the premises. A grant under which the grantee takes only the right to use the premises without exclusive possession operates as a license, and not as a lease."

The test, therefore, is whether there is a right to exclusive possession. In India we must of course first refer to the statutory definitions of lease and license. That of lease is contained in S. 105 of the Transfer of Property Act, under which a lease of immoveable property is a transfer of a right to onjoy such property, etc. A license is defined in S. 52 of the Indian Easements Act, viz.,

"Where one person grants to another, or to a definite number of other persons, a right to do, or continue to do, in or upon the immoveable property of the grantor, something which would, in the absence of such right, be unlawful, and such right does not amount to an easement or an interest in the property, the right is called a license."

Having regard to these definitions

there is no substantial difference between the Indian and the English law on the subject. The words "right to enjoy" in S. 105 of the Transfer of Property Act, when read with the rights of the lessee laid down in S. 108 of the same Act, clearly show that there should also be a right to exclusive possession to constitute a lease under the Transfer of Property Act. Therefore, I take it that the test of exclusive possession is the main one to be applied in deciding this case.

I first take up the case of the defendant's carriage and car which are kept not in the separate cubicle but on the open spaces I have mentioned. In regard to these, Mr. Wadia for the defendant contends that though the particular portion of space that is occupied by his client's car and carriage from time to time varies, yet he does have exclusive possession of some portion of this area, and the fact that that portion varies is immaterial. The ordinary case of a lease of immoveable property is, of course, one where a defined piece of land or a defined building, or part of a building, is transferred to the lessee; and having regard to the rights of a lessee, which are specified in S 108 of the Transfer of Property Act, in particular the rights to growing crops and to put up structures, it seems difficult to say that there could be a valid lease not of a definite area of immoveable property but of an area the position of which varies from time to time. On the other hand, it may be said that "immoveable property" (as defined in the General Clauses Act) includes not only land but benefits to arise out of the land so that there can be a lease of the benefit of keeping chattels, such as a car and a carriage, within certain specified limits, although the place occupied by the chattels might vary from time to time. That would correspond to a lease of an incorporeal hereditament such as is referred to in Halsbury's Laws of England, Vol. XVIII, p. 340, Art. 774. A careful conveyancer might, no doubt, draw out an agreement which would constitute such a lease, although the particular portion of space occupied varied in the same manner as it does in this case. Consequently I am not prepared to say that there cannot be a lease of that description, but at the same time it seems obvious that the burden of showing that there has been such a lease in a case of this kind lies upon the lessee, and ordinarily the law takes it that a case of that kind is not one of a demise, but that of license. I think there is clear authority for this afforded by the case of *London and North Western Railway Co* v. *Buckmaster* (1). That was a case of rating; but it is pertinent to the present point, because the question whether a person is to be rated or not in England raises the question of exclusive occupation in the same way that it arises in the distinction between a lease and a license. In that particular case the plaintiffs, the Railway Company, were rated in respect of certain lines of railway and certain stables. The facts as regards the lines of railway will be found at pp. 72 and 73 of the report as follows, omitting immaterial matter:—

"The twelve lines of rails and sidings...were and are... used exclusively for the reception of trucks and the storage of coal, stone, etc., belonging, not to the plaintiffs, but to various coal-owners and merchants, and to a stone merchant. In these trucks are brought coals from collieries connected with the plaintiffs' system of railways...The space appropriated to one coal-owner, when not fully occupied by him, is appropriated by the servants of the plaintiffs to other coal-owners."

It is, therefore, a case somewhat similar to the present case, where no car-owner can say any definite space is allotted to him alone. The stables were also used by coal-owners under a certain agreement in writing. In the judgment of Blackburn J., he says (p. 76):—

"The occupier of any property is the person who has the sole and exclusive possession of it, and he is the person who ought to be rated. Whenever the owner of property demises it to another giving him the exclusive possession and occupation, so as to make him tenant of it, it is

(1) (1874) L. R. 10 Q. B. 70 and 444.

the tenant who should be rated and not the landlord. In this case, however, I do not think what was done did amount to a demise of any portion of this property, but merely to a giving of a license to have the easement and use of it, analogous to the case of a lodger. The more important part of the case consists of the lines of rails and portions of property adjoining which are part of the company's premises, and it appears that it has been the practice of the company to let them out to coal-owners and stone merchants to store their coals and their stone on particular spots there. It does not appear from the case that there is the slightest ground for saying that these spots are irrevocably appropriated to the particular persons; on the contrary, it appears when one spot is not occupied by a particular person, and his coals or goods are not there, that the company's servants move the boundaries and allow another to occupy the spot. Therefore there is no pretence for saying that there is any more than an easement, and on that part of the case the plaintiffs fail."

The word "easement" is, of course, here used not in its strict sense but in the sense of a license. There was an appeal from that decision, in which the two other Judges concurred; and this is reported in the same volume at p. 444 This appeal was heard by a Bench of six Judges, who were equally divided in regard to the question of the stables, which I need not go into here, but who were unanimously of opinion, on hearing the appellants' counsel only, that so far as related to the lines of railway, the plaintiffs were liable to be rated (p. 445). Therefore, the argument in Blackburn J.'s judgment was unanimously approved.

Following that view, I hold that, so far as the open spaces are concerned, in the absence of any documentary or reliable evidence to the contrary, it must in the circumstances be taken that the defendant had a license simply to keep his carriage and car on such open spaces; and, therefore, the relationship is not one of landlord and tenant.

I may here refer to Mr. Wadia's contention that the nature of the case was such that exclusive possession could not be given. I do not think that is true. It would be possible for the plaintiffs, if they were so minded, to mark out by whitewash or otherwise, particular strips or spaces and to number them and definitely assign them to each particular car or carriage.

I next take the other extreme, viz., the case of a car being kept in the same single cubicle, of which the chauffeur had the key. Here, at first sight it certainly does seem that there is clear ground for saying that the defendant has a right to exclusive possession. The giving of a key is generally the symbol of this. I was at first inclined to take that view, but further consideration has altered my opinion. There is this important point to be borne in mind that the mere fact that the defendant has had the exclusive use of this particular cubicle for two years and that it was the intention of the parties that no one else should use that cubicle so long as the defendant kept his car on the premises, is not in law sufficient to show that the agreement was a demise or a lease and not a lincense. As authority for this, I think perhaps the most relevant case is that of *Watkins* v. *Overseers of Milton-Next Gravesend* (2). This is another rating case. The conservators of the Thames were owners of the soil and bed of the river, and of moorings fixed to the soil of the river. W. used the moorings to moor his hulk, as a floating coal depot, under a document in writing. It was held that the document was not a demise but only granted to W. a license to use the moorings, and that he was therefore not the occupier, and not liable to be rated. I need not go into the terms of the particular document in that case. What I wish to refer to is the portion of the judgment of Blackburn J. at pp. 356 and 357. After giving his opinion that *prima facie* the agreement would not be a demise, but merely a license, he goes on as follows:—

(2) (1867) L. R. 3 Q. B. 350.

"Against that contention it is said the appellant has the sole and exclusive possession of the moorings. It seems, during five years, the appellant has been the sole person who has used them, and I think if any rival hulk were moored there it would have been contrary to what the parties intended, but it does not from this follow that the appellant is liable to be rated as the sole occupier. There may be a grant of many easements which are conveyed solely to one person, and yet do not confer any occupation, such as a way to carry coals from a colliery to the seashore; an important right confined to that colliery alone; that does not make the person who has the sole use of a private way over the land rateable; or in the more familiar case of a lodger, who has the sole right to the use of certain rooms in a house, he is not made by that means rateable if the agreement is that the tenant of the house shall retain the possession, as in the general case of a lodging he does, for the purpose of looking after the menagement of it; the lodger is merely the inmate."

And the case of the lodger there referred to is certainly a very striking one. The lodger has, we will say, a separate room to himself. He has the key of that room, and yet in the case where the lodging house keeper retains the general control of the house, he is not a tenant but is merely a licensee. And that particular aspect of the law is recognised also in the definition of "premises" in the Bombay Rent Act. For it concludes by saying that the expression does not include a room in an hotel or boarding house. The law in regard to the case of a lodger is summarised in Halsbury's Laws of England, Vol. XVIII. p. 339. Art. 772:—

"A lodgor who has no separate apartment, is only a licensee, and, even though he has a separate apartment, he has not in law an exclusive occupation, and is therefore in the position of a licensee, if the landlord retains the general control and dominion of the house, including the part occuped by the lodger." The Rent Act of 1918 is an encroachment upon the ordinary property-owner's right to freedom of contract, and, therefore, it is an enactment which must be strictly construed, I, therefore, think that if, as is plainly shown, the definition of 'premises" excludes the cases of lodger, to which I have referred it must also be taken to exclude the analogous case of a single cubicle reserved not for occupation of a human being but for the occupation of a chattel, viz, a motor car: at any rate in absence of some document or reliable oral evidence, showing that the agreement between the parties was otherwise, and provided of course that the owner of the premises does exercise a general right of control such as I have referred to. In this particular case there is no document or other evidence, which would rebut the presumption that, I think, arises. And another thing that favours the plaintiffs' case is that it is not suggested that any body else but the plaintiff is liable to execute repairs of the premises. That is a circumstance, which is of some importance in a case of this kind, for, as was said by Blackburn J. in the judgment that I last referred to, *prima facie* the person who repairs is the person in possession (see p. 356)' So that where you get such a position, it favours the relationship of licensor and licensee, rather than that of landlord and tenant. Therefore, on the facts of this case, I think that the law favours the plaintiff's contention.

It is, no doubt, true that the form of the bill used by the plaintiffs, Exh. B. mentions the word 'rent' in regard to the charges for stalls for horses, carriages or motor cars. But that is at most an admission which is not conclusive. It is, also, natural that the word rent should be used under such circumstances, and there are many cases where the same expression has been used in the agreement between the parties and where, notwithstanding that, it has been held that the relationship between them under the document was merely that of licensor and licensee. Two such cases are: *Wilson* v. *Tavener* (3) and *Taylor* v. *Caldwell* (4). Therefore, in my opinion Exh. B does not affect the view I take.

Then, there are the two intermediate

cases: first of the defendant's horse, which is kept in a stall or loose box, and secondly, of the car, that is kept in one of the bigger cubicles. In the first of these cases, there is no basis for saying that there is exclusive possession from such symbols as a lock and key; and Dr. Vakharia deposes that as a matter of fact the defendant's horse was shifted from the stall it occupied to another. On the other hand, he admits that that is rarely done, and it is natural that that should be the case for the syce in charge of the horse would be likely to keep his things in the stall for grooming the horse etc, and would, therefore, generally go to the same stall. In the second case, the key of the cubicle did not remain with the defendant's chauffeur but with the supervisor, and the spaces the car occupies vary. It is obvious that if the plaintiffs succeed as to the single cubicle, these two cases must fall with that. Therefore. I think that in all the cases that arise, the plaintiffs' contention is correct.

I may perhaps add that I certainly sympathise with the defendant, and should have been glad if I could have come to a contrary decision for I believe that there has been considerable profiteering with regard to motor garages in Bombay. But I have come to the conclusion that the law is with the plaintiffs.

There must, therefore, be a decree for the plaintiffs in terms of prayers (*a*) and (*b*) of the plaint.

In regard to prayer (*c*). I am not disposed to declare that the plaintiff's were entitled to demand from the defendant "such consideration as they think fit per month in respect of the premises in the occupation of the defendant". That is, in my opinion, far too wide. But there will be a declaration that the plaintiffs are entitle to demand from the defendant at the monthly rates of Rs. 18 Rs. 25 and Rs. 30 mentioned in the plaint and to continue to demand such payments till such time as the license is legally revoked or surrendered, or other terms are agreed upon by the parties.

The defendant must also pay the plaintiffs the sum of Rs. 137-2-0 plus the difference between the rates actually paid and the rates I have referred to in prayer (*c*) from February 1,1921, till March 31, 1922.

Interest on jndgment at six per cent per annum.

The plaintiffs do not pray for costs, so I pass no order as to costs.

1923 BOMBAY. 233

MACLEOD C. J., AND CRUMP. J.

Moses Menahim—Appellant.

v.

Ahrain Solomon—Respondent.

Civil Ref. No. 2 of 1922 D/- 27th November 1922, made by Major Genral, Political Resident, Aden.

Provincial Insolvency Act (V of 1920)-Aden Settlement — Receiver appointed under the Act—Receiver's rights and duties.

A receiver, appointed by the Residents Court at Aden, not under the provisions but under the spirit of the Provincial Insolvency Act, cannot make an order against the debtor's of the Insolvent. He can only call upon them to pay what they owe to the insolvent but if they do not obey the demand, he must seek his remedy by suit. If such a receiver makes an order against the debtors of the insolvent, the aggrieved party may appeal to the Court appointing the receiver or to the higher Court against the order. The party cannot file a suit. [P 234 C 1]

Kemp (instructed by Crawford, Bailey & Co.,)—for the Appellant.

Macleod C. J.—This is a reference under the Aden Jurisdiction Act in the matter of three suits filed by three different plaintiffs against the same defendant Ahrain Solomon to set aside an order passed by the Court of the Registrar dated July 27, 1920. The facts are peculiar. A decree having been passed against Ahrain Solomon in Suit No. 97 of 1920 he was arrested in execution. He submitted to the Court that he was unable to pay his debts and asked for relief. On that application the Court made an order as follows:—"The Insolvency Act not being in operation in Aden but the Court being enjoined to act generally on the spirit of Indian laws, it is ordered that the Registrar be appointed Receiver in

this case and take all action essential to the settlement of applicant's affairs."

I presume the Court thought that it was making an order which was something in the nature of an adjudication order with the appointment of a receiver with powers which a receiver would have under the Provincial Insolvency Act. Then, on July 27, 1920, the Registrar purported to make the order which is now in dispute. I may say at once that the proceedings taken by the Registrar bear no analogy to any proceedings that a receiver could take under the Provincial Insolvency Act. Such a receiver cannot make an order against debtors of the insolvent. He can call upon them to pay what they owe to the insolvent, but if they do not obey the demand, he must seek his remedy by suit. The proper course then for the plaintiffs to have followed was to appeal to the Court which appointed the receiver, or to the District Court asserting that the receiver had no powers under the order appointing him to take the action which he had done. Whatever the proper course to follow may have been, we think that the present suits were not competent, filed as they were against the execution creditor and the judgment-debtor. There was no cause of action against them, unless these proceedings could be considered as proceedings taken in execution under Order XXI, Civil Procedure Code. But that is a supposition which is excluded by the terms of the order passed by the Assistant Resident. We send back the papers with this expression of our opinion that the Resident was right in thinking that the plaintiffs' suits were not competent. We also point out that the action of the Registrar was not warranted by the provisions of the Indian Provincial Insolvency Act, and that if the Resident's Court passes orders based on the spirit of the Indian laws, then it ought to consider what are the provisions of these laws. For instance, if a receiver is appointed, he should be given such powers as are given to receivers under the Provincial Insolvency Act. We think that the present plaintiffs should be allowed to appeal either to the Assistant Resident, or to the Resident against the action of the Registrar, and no doubt effect will be given to our expression of opinion that the action of the Registrar was *ultra vires*. No order as to costs.

1923 BOMBAY 234

MACLEOD C. J., AND CRUMP, J.

Government Pleader, High Court, Bombay— Applicant.

v.

G. K. Tatke— Opponent.

Civil Appl. No 574 of 1922, dated 18th Dec. 1922.

(a) Legal Practitioner's Act S. 13—Threat to Magistrate.—Conditianl apology.

Letter by a pleader which contains vulgur abuse of the Magistrate, and a demand for an apology, apparently followed by a threat of further proceedings is highly improper, Instructions from a client are no excuse whatever for a pleader exceeding what is his duty towards the Courts; as it is presumed that a pleader knows what his responsibilities are in addressing Magistrates and Judges. A conditional apology is valueless. [P. 236 C. 1]

Government Pleader—In person.

H.C. Coyajee, (with S. R. Bakhale and P. S. Bakhale)—for Opponent.

MACLEOD, C. J.—One Janai filed a complaint in the Court of the second Class Magistrate of the Patan Taluka against two persons accusing them of having committed the offence of wrongful confinement. On August 31, 1921, the Magistrate delivered judgment acquitting the accused. The papers were sent up to the District Judge by the Magistrate in consequence of the view which the Magistrate had formed of the evidence given before him on behalf of the accused. The District Judge called for a report from the Subordinate Judge and passed orders on March 6, 1922. He said in conclusion:

"I do not agree with the Magistrate's view of the evidence and consider that his strictures are unwarranted. His remark that the Sub-Judge's order is a fraud, presumably means that it was obtained by a fraud, but I have already said that there was absolutely no reason for any one connected with the Court to approach the complainant except for the purpose of serving the process

upon her. It is therefore unnecessary to take any departmental action and the papers are returned."

Mr. Bhatye was the pleader concerning whom the Magistrate in his judgment had passed certain stricture on August 31, 1921. After Mr. Baker's order Mr. Tatke the present respondent, wrote a letter on behalf of Mr. Bhatye to the Magistrate, which is the subject-matter of the present complaint by the Government Pleader. The letter begins :

"Please take notice of the following. My client Mt. P. G. Bhatye was examined as a witness for the defence before you in your Court in Criminal Case No. 40 of 1921 of the file of the Second Class Magistrate, Patan, on 30th July 1921. In the judgment of the said case, while you acquitted all the accused you have made certain remarks against my client, and my client being a Municipal Councillor, a land-holder and a Pleader of status and position, is lowered in estimation and reputation in the eyes of the public and thereby is likely to suffer in his profession. You had also sent a copy of the said judgment to the District Judge, Satara, with your report for inquiry and action. You knew that my client as a Pleader was an officer of the Court and liable to be punished by the District Judge under the Disciplinary Jurisdiction and Legal Practitioners Act. The tenor, tone and mould of your judgment clearly shows that you had a grudge and personal enmity against my client who is Brahmin by caste and you thought that as the best opportunity to attack the character of my client under the garb of a judicial officer. My client still sincerely and honestly believes that you had no material to make objectionable remarks against him in your judgment. Before proceeding to take any action against you, my client thinks it his humble duty to draw your attention to the judgment and objectionable remarks therein and to give you sufficient opportunity to withdraw them."

The objectionable passages were then set out and the letter contained a general demand for an apology. A copy was sent to the Collector of Satara for his information. It is not suggested that this was a notice to the Magistrate under S. 80 of the Civil Procedure Code. The Magistrate complained to the District Judge about this letter. The District Judge who was then Mr. Percival, held an inquiry into the conduct of the opponent, and made a report to this Court on August 16, 1922. Exhibit 13 is the answer of the opponent dated August 12, 1922 He said there :

"By writing the words charged against him the opponent begs to state that he did not give or intend to give any insult or threat to anybody : nor was there any idea of extorting any alteration in the judgment or extorting any apology. Whatever was said was said under clear instructions from the client of the opponent. The object of the client was simply to get a redress for the wrong done to him. The opponent was not actuated by any personal motives in the matter. If the language in the letter is considered too strong I have no hesitation in expressing regret for the same. The notice was given no publicity whatever. The notice was given in the form of a letter to Mr. Daduskar who was the party concerned and to the Collector who is the superior of Mr. Daduskar. The opponent honestly believes that there was no excess of previlege in the matter at all."

Now it is perfectly clear that that letter was a most improper letter for any pleader to write to a Magistrate with regard to the disposal of a particular case by that Magistrate; and if this explanation of Mr. Tatke was really expressive of what he believed to be the right course to take, then it is obvious that he has no knowledge whatever of what are the duties of a pleader with regard to Magistrates and Judges in this Presidency. It was perfectly open to him on instructions from his client to send a notice under S 80 of the Civil Procedure Code. But whatever his instructions were, it would have been his duty as a pleader to send the notice strictly in accordance with the terms of that section. But this letter, which is now before us, merely contains vulgar abuse of the Magistrate and a demand for an apology, apparently

followed by a threat of further proceedings. Instructions from a client are no excuse whatever for a pleader exceeding what is his duty towards the Courts; and as it is presumed that a pleader knows what his responsibilitie are in addressing Magistrates and Judges, it is difficult to believe that the respondent did not know that the language in this letter was far too strong, judged by the ordinary standard with which he should have been acquainted. Indeed there are too many cases in these Courts where notices have been issued against pleaders for misconduct, in which we have been told that if we think that the line which divides proper and improper conduct has been crossed then an apology would be tendered. The point I wish to make clear is that in most cases it is not for us to say whether the line is crossed or not, because it is absolutely plain on the record that the line has been crossed, certainly in this case it is too obvious, and a conditional apology of this character is valueless. If the Magistrate was of opinion on hearing the evidence that there had been an attempt to get up a case which was false in order to save the accused from being convicted, then he was certainly entitled to say so, and an aggrieved party had a remedy if he considered that the conclusions arrived at by the Magistrate were wrong. But in no circumstances would it be proper for a pleader after judgment to write to the Magistrate in the terms which are contained in this letter. We think that there was absolutely no justification for that letter and that the writing of that letter amounts to misconduct. The only question before us then is whether we should content ourselves with administering a reprimand or whether we should deal with the respondent's Sannad. We content ourselves with a reprimand, hoping that the remarks that have fallen from the Bench will be carefully considered by the respondent with regard to the future.

Rule made absolute.

1923 BOMBAY. 236

MACLEOD C. J. AND CRUMP J.

Tukaram Mahadappa Rajmane—(Original Plaintiff) Appellant.

v.

Jaganath Savlaram Kathle and others—(Original Defendants) Respondents.

F. A. No. 231 of 1921 D. 9th Jan. 1923, against the decision of Sub. J. of Sholapur in suit No. 595 of 1920.

Evidence Act S. 92—Agreement complete in itself.

A contract for sale of land was entered into on 15th Jan. 1920 by means of a writing appearing in the books of one Chanbasappa. It was signed by both parties and witnessed. The defendant said that the agreement appearing in the book did not contain the whole of the agreement arrived at between the parties but there was an oral agreement that if anybody else per chance offered more than Rs. 500 to the 1st defendant above the agreed amount before the expiry of the period in the agreement, the agreement with the plaintiff was to be treated as null and void. *Held* the evidence about the oral agreement is not admissible. It may very well be that a writing may be an imperfect agreement of which a Court cannot decree specific performance, but if on the face of it it contains all the terms which would entitled it to be considered as a perfect agreement which could be enforced, then undoubtedly no parol evidence could be adduced so as to alter or add to its terms unless they came within one of the provisos of section 92. (P 237 C 1)

P. V. Kane—for the Appellant.

H. C. Coyajee with A. V. Gokhale—for the Respondent No. 1.

H. G. Kulkarni—for Respondents No. 2 to 5.

Judgment.—This was a suit for specific performance of a contract entered into by the 1st defendant with the plaintiff for the sale of certain land for a sum of Rs. 7,000 besides the amount due on a mortgage. The contract was entered into on 15th January 1920 by means of a writing appearing in the books of one chanbasappa. It was signed by both parties and witnessed. The 1st defendant had after the contract sold the property to Defendants 2 to 5 who were accordingly made parties to the suit. In the written statement the Defendant said that the agreement appearing in the book did not contain the whole of the agreement arrived at between the parties, but there was an oral agreement that if any-body else perchance offered more than Rs. 500 to the 1st defendant above the agreed amount before the expiry of the

period in the agreement, the agreement with the plaintiff was to be treated as null and void.

The plaintiff called Chanbasappa as his witness, and in cross-examination he said that it had been agreed before that in case defendant got a customer to offer him more than Rs. 200 above the price fixed between the plaintiff and defendant 1, he was free to sell it to him for it was then talked that Rs. 7,000 was not quite an adequate price for the land.

Then as the Judge remaks no farther evidence was called and we may assume for the purposes of this judgment that the plaintiff was prepared to accept the statement made in cross-examination by Chanhasappa. The question is whether this evidence is admissible to alter or add to the terms of the written contract. The learned Judge thought that Section 92 of the Evidence Act had no application because he was satisfied that the parties never intended that the entry made in the book should contain the whole agreement between them. I do not think that is a correct view to take. It may very well be that writing may be an imperfect agreement of which a Court cannot decree specific performance, but if on the face of it it contains all the terms which would entitle it to be considered as a perfect agreement which could be enforced, then undoubtedly no parol evidence could be adduced so as to alter or add to its terms unless they came within one of the provisos of sections 92 of the Evidence Act. No attempt has been made to bring this evidence within the 1st proviso. No fraud intimidation illegality, want of due execution, or want of capacity in any contracting party or want or failure of consideration is suggested. Nor can it be said that this statement comes within proviso 2, as the agreement is that the defendant should not be obliged to perform his agreement with the plaintiff if he got a higher offer within the period of the contract. It is certainly inconsistent with the terms of the contract which is an absolute contract for sale of the land.

Lastly it was urged that there was an oral agreement contemporaneous with the written agreement constituting a condition precedent to the attaching of any obligation under the Contract. But it must be remembered that Rs. 200 were paid as earnest money when the agreement was signed in Chanhasappa's books, so that there was part performance of the contract and it could not be said that it was intended by the parties that there should be no contract in existence until the period mentioned in the contract had expired, without the 1st defendant receiving a higher offer for the property. It seems to me, therefore that under the rules of evidence the oral agreement could not be proved to vary, add to or subtract from the terms of the written contract. In any event the Judge was wrong in not directing a return of the Rs. 200 deposited by the defendant as earnest money. The appeal must be allowed with costs throughout. Judgment must be given for plaintiff as prayed by him in his plaint.

It is not disputed that defendants 2 to 5 had notice of the agreement, therefore, they entered into their contract with the 1st defendant subject to its being set aside on the plaintiff taking steps to enforce his agreement.

1923 BOMBAY 237

SHAH Ag. J. C., AND CRUMP, AND MULLA, JJ.

The Superintendent of Stamps,—Bombay.

v.

Chimanlal Lalbhai.

Civil Ref. No. 7 of 1922, D. 26th September 1922, made by Superintendent of Stamps, Bombay, under S. 57 of the Indian Stamp Act 1899.

(a) *Co-owners—Position and rights of*—The position of a co-tenant or a co-partner holding the property in his own name, is not that of a trustee for the other co-owners or co-partners; and if he has certain obligation in respect of the property so held by him towards the co-owners or co-partners the co-owners or co-partners would have the right to enforce in a proper manner their right of ownership to that property.

(b) *Stamp Act S6 45, and 62 (c)—Distinction between.*

Where in form instruments are simple transfers and in substance they have the effect of dividing the property which was first a part

of the joint family property and thereafter held as property bolonging to the tenants-in-common, the instruments are instruments of partition in respect of the shares which were kept in fact undivided at the time of the oral partition (P. 239 C. 1)

Kanga, with J. C. Bowen,—for the Petitioner

Jinnah with Manilal & Kher, — for Opponent No. 2.

Thakor with Manilal & Kher, — for opponents Nos. 1 & 3.

SHAH, AG. C. J.—This is a reference under S. 57 of the Stamp Act of 1899. The question referred to us is:—With what stamp duty is each of the instruments referred to in paragraph 1 of the reference chargeable. The instruments are Exhibits A and B. They are in form transfers of shares signed by one of the three brothers in favour of each of the other two brothers respectively. Exhibit A is in respect of 960 shares and Exhibit B is in respect of 830 shares. We have heard arguments on this question on behalf of the Crown and on behalf of the parties interested. We are of opinion that these two istruments Exhibits A and B are chargeable under article 45 of Schedule I to the Stamp Act, as instruments of partition.

It appears that a partition among these three brothers was effected in November 1918. There was no deed of partition and the shares in question continued in the name of the eldest brother Chimanbhai. They were in his name before the family was divided in interest, and continued in his name after the severance of interest in 1918. It appears that in 1920 the brothers reduced to writing the terms of the partnership, which apparently was formed soon after this partition, and these shares are referred to in that deed as partnership property.

Thereafter in 1922 by means of the two instruments in question, the eldest brother Chimanbhai, in whose name the shares stood, sought to effect the transfer of the shares assigned to the share of each of the two other brothers. We are not concerned with 130 shares representing the difference between 960 and 830 shares as appearing in these instruments, because it may be that the value of these shares was otherwise made available at the time of the partition to that brother.

On the one hand it is contended that Chimanbhai was in the position of a trustee, and that when he sought to transfer these shares to his brothers, he did so as a trustee to the respective beneficiaries, and that the instruments are liable to be stamped under article 62, clause (e).

On the other hand it is urged on behalf of the Crown that the position of the three brothers after the oral partition in November 1918 was that of tenants-in-common, that the property with which we are concerned continued in the name of one of the tenantes—in—common, that when Chimanbhai executed these instruments with a view to transfer the shares, he really meant to divide the shares and that the two instruments are in substance instruments of partition. In the alternative it is argued on behalf of the Crown that the instruments are liable to be charged under article 62, clause (a), as simple transfers of shares in an incorporated company, and not transfers by a trustee in favour of the beneficiaries.

We have come to the conclusion that the theory of Chimanbhai being a trustee for his brothers in respect of these shares cannot be accepted. His position was that of a tenant-in-common holding the property for the benefit of the other tenants-in-common after the partition of 1918. There is nothing to show that these shares were specifically divided at the time of that partition. It is suggested on behalf of the two brothers, Kasturbhai and Narotambhai, that the shares were in fact divided and that their brother Chimanbhai was in effect constituted a trustee in respect of their shares from the date of the partition. This plea is not consistent with the recitals in the instruments themselves. The instruments contain the following recital:—

"Whereas I am not the absolute owner of the said shares but am only the owner of 960 shares out of the said shares and in respect of the remaining shares, I am only a trustee as a separated co-owner (the separation having been effected by taking the dividends on the said shares in three equal parts) as well as a partner

on behalf of the other two partners of the firm of Messrs. Lalbhai Dalpatbhai & Co. which was before the said separation a joint family firm."

When we turn to the partnership deed it appears from the schedule attached to that document that there is a list of the shares given which refers to full number of 2880 shares and in clause 4 of that document there is a provision that the dividends on the shares in question shall be divided in equal shares between the parties. The fact of equal division of the dividends after the partition, is consistent with the theory of tenancy-in-common among the three brothers or of their being partners. But these recitals do not support the theory that the shares were in fact divided at the time of the partition. No authority has been cited for the proposition that the position of a co-tenant or a co-partner holding the property in his own name, is that of a trustee for the other co-owners or co-partners. It may be that he has certain obligations in respect of the property so held by him towards his co owners or co-partners and that the co-owners or co-partners would have the right to enforce in a proper manner their rights of ownership to that property. But I am unable to hold that Chimanbhai held the shares in his name as a trustee and that his two brothers were beneficiaries within the meaning of article 62, clause (*e*). In spite of the arguments urged in support of the theory of actual partition of the shares at the date of the partition in 1918 and of the creation of trust in favour of Kasturbhai and his brother, I have no hesitation in rejecting that theory on the facts as appearing in the documents themselves, and on the reference. The next question is as to whether these instruments are properly chargeable under article 62, clause (*a*), or article 45. It is by no means easy to decide whether these instruments are properly chargeable under article 45. In form they are simple transfers and in substance they have the effect of dividing the property which was first a part of the joint family property and thereafter held as property belonging to the tenants in common. Having regard to the facts of the case we can treat these instruments fairly as instrument of partition in respect of the shares which were kept in fact undivided at the time of the oral partition between the three brothers.

CRUMP J.—I concur.

MULLA J.—I concur.

1923 BOMBAY 239

MACLEOD C. J. AND CRUMP. J.

Genesh Narhar Joshi-(Original Plaintiff)—Appellant.

v.

Dattatraya Pandurang Joshi—(Original Defendant)—Respondent.

S. A. No. 111 of 1922, D. 15th December 1922, against the decision of Dt. J. of Satara in Appeal No. 216 of 1921.

Limitation Act S. 19—Acknowledment, meaning of.

The 2nd defendant signed the promissory note on the 12th November 1913 for Rupees 1500 with interest at 6 percent Payments were made of rupees 90 on the 2nd Feb. 1915, rupees 200 on the 11th Jan. 1916 and rupees 381-12-0 on the 21st April 1916. Oh the 6th November 1916 the 2nd defendant endorsed on the note the 3 payments which had been made on the previous dates, added up the total and signed underneath. *Held* this is an endorsement by which the promissor recorded that he had paid rupees 671, 12, 0. against the liability which stood against his name on the promissory note, and consequently he admitted his liability to pay the balance, and that as a matter of common law an endorsement on a promissory note by the promissor is an acknowledgment of liability, which will start a fresh period of limitation from the date on which it was made, and it makes no difference that such endorsement is below an account showing what has already been paid on the promissory note. (P. 240 C. 2)

A. G. Desai—for the Appellant.

K. N. Keikar—for the Respondent.

Judgment:—The plaintiff sued to recover rupees 1445-11-0 from the defendant being the balance on two promissory notes with future interest and costs. The lower Court passed a decree for Rupees 580-6-6 from the 2nd defendant and the estate of defendants 1, 3 and 4 on the one note, and Rupees 865-4-6 from the 2nd defendant on the other note. The chief contest was with regard to the liability on the note of the 12th November 1913 on which it was said the balance due was rupees 865-4-6.

An issue was raised whether the claim on the promissory note of 1913 was in time. The learned Judge held that the claim was in time as against the 2nd defendant and not against defendants 1,3 and 4 In appeal the claim on this note as against the 2nd defendant was also rejected. Now it is admitted that the 2nd defendant signed the promissory note on the 12th November 1913 for rupees 1500 with interest at 6 per cent. Payments were made of rupees 90 on the 2nd February 1915, rupees 200 on the 11th January 1916 and rupees 381-12-0 on the 21st April 1916. On the 6th November 1916 the 2nd defendant endorsed on the note the 3 payments which had been made on the previous dates, added up the tolal and signed underneath.

It is contended by the plaintiff that this was an acknowledgment of liability within the meaning of section 19 of the Limitation Act. On the part of the defendant 2, it is contended that there was no sufficient acknowledgment. It may be admitted that the 2nd defendant had not written in so many words that he admitted his liability for the balance due. But we must read the whole endorsement made by him, taken in conjunction with the words on the face of the note. It is difficult to say that that endorsement can mean anything else than this, 'I have paid so much on account of my liability on the note, and in consequence I am only liable for the balance remaining due.

We have been referred to the case of *Pamulapati Venkatakrishniah* v. *Y. Kondamudi Subbarayudu* (1) where it was held that where a payment was made by a mortgagor, who was able to write, and was recorded on the back of the mortgage bond by a servant of the creditor and signed by the debtor, that the endorsement amounted to an acknowledgment of liability within the meaning of section 19 of the Limitation Act, though the payment was not good as a part payment within the meaning of section 20 of the Act. Mr. Justice Napier said "I adhere to the opinion expressed by me in *Jaganadha Sahu* v. *Rama Sahu* (2) on the same words as are in this document. I have no doubt that there is in this endorsement an acknowledgment," and Mr. Justice Shrinivasa Ayyangar said "I have no doubt that the terms of the endorsement in this case, amount to an acknowledgment of liability. The debtor states in terms that he pays Rupees 378 towards the amount due on the bond and on the same day, made another payment of rupees 22 and made another endorsement. I construe the endorsement as meaning that the debtor made a part payment of the amount due on the bond (on that day over Rupees 1500 was due as shown on the bond) which is certainly an acknowledgment that more money was due.

Following that decision, I think this is an endorsement by which the promissor recorded that he had paid rupees 671-12-0 against the liability which stood against his name on the promissory note, and consequently he admitted his liability to pay the balance. It seems to me that as a matter of common law an endorsement on a promissory note by the promissor is an acknowledgment of liability, which will start a fresh period of limitation from the date on which it was made, and it makes no difference that such endorsement is below an account showing what has already been paid on the promissory note. I think, therefore, that this appeal must be allowed, the decree of the lower appellate Court Set aside, and that of the subordinate Judge restored with costs in this Court and the Court below.

(1) [1917] 40 Mad. 698-3 L. W. 576.-(1916) 2 M. W. N. 256-36 I. C. 240.

(2) [1914] 17 M. L. T. 80-27 I. C. 747.

1923 BOMBAY 241

MACLEOD C. J. AND CRUMP. J.

Muller Maclean and Co — Appellant,

v,

Kaderbhoy Mulla Esmailji—Respondent.

O. C. J. Appeal No. 30 of 1922 dated the 4th December 1922

Deed—Construction—Date of payment.

Where according to the terms of the bills they were to be paid at the current rate for Bank Demand Drafts at date of payment *Held* the rate of exchange should be calculated at the due date.

Strangman and Coltman — for the Appellant.

Kanga with Desai—for the Respondent.

MACLEOD C. J.—The plaintiffs brought this suit against the defendants as acceptors of two Bills of Exchange drawn by the plaintiffs in New York upon the defendants and payable thirty days after sight.One. of the Bills of Exchange was for 1568. 51 dollars, dated July 2.1920, and was accepted by the defendants on august 4, 1920. The other was for £ 261 19-3, dated September 8, 19 0, and was accepted by the defendants on October 12.1920.

The defendants raised various defences with which we are not concerned in this appeal. The only question in appeal is at what rate of exchange should the amount due to the plaintiffs by the defendants on their acceptances be calculated. According to the terms of the bills they were to be paid at the current rate for Bank Demand Drafts at date of payment. It was contended by the plaintiffs that these words meant that the rate of exchange should be calculated when the bill was actually paid. It was contended by the defendants that the rate of exchange should be calculated at the due date. The learned Judge was of opinion that the defendants' contention was right and from that decision the plaintiffs have appealed.

It seems to me that the question can be answered by considering what was the plain meaning of the contract entered into by the defendants when they accepted these bills. They agreed to pay the amount appearing on the face of the bills thirty days after sight. These amounts were stated in the one in dollars and in the other in sterling, and it was agreed that defendants should not pay these amounts in foreign currency, or by foreign bills, but that they should pay to the plaintiffs such an amount in rupees as would enable the plaintiffs to buy foreign bills themselves, for the respective amounts. Then as it was stated in the Bills that they must be paid at the current rate for Bank Demand Drafts at date of payments that date could only mean the day on which the acceptors agreed to pay and not some other date, at which, if the contract had been broken, the defendants might either choose to tender the money, or might be forced to pay by an order of the Court. It was argued that the same result would follow if nothing had been stated in the Bills with regard to the current rate for Bank Demand Drafts and therefore these words on the defendant's contention would be mere surplusage, so that some other meaning should be attached to them in order to avoid that result. It appears to me clear that these words have been inserted as a matter of common form in these bills so as to make it certain how the amount in rupees was to be calculated at the due date. There is no necessity to speculate what would have happend if the words had not been there, or how the acceptors would have met their obligations at the due dates. Nor is it necessary to consider the cases which were cited in the Court below, as counsel for the appellants did not rely on any authorities before us. It seems to me that the question can be decided on the terms of the contract, and on the terms of the contract. I think the decision of the learned Judge is right. The appeal is dismissed with costs.

CRUMP J.—I agree.

Appeal dismissed.

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1923 BOMBAY 242

MACLEOD C. J AND CRUMP, J.

Emperor—

v.

Marmaduke Pickthall (Editor, Bombay Chronicle.)

Cr. App. No. 320 of 1922, dated 6th December 1922.

Contempt of Court-Repetition—Apology; effect of

An apology does not remedy the evil caused by publication of objectionable matter. If High Court acts in the interests of the administration of justice, it is clear that while an apology may be to some extent repaaration on the part of the offender; it cannot overtake and and counteract the mischief already done by the original publication. Where the publication is due to a repetition of negligence which has been condoned in the past, an apology becomes little more that an idle form. (p. 244 c. 1)

Kanga, (*wit S. S. Patkar*)-for the Crown.

Thakor,-for the Respondent.

Macleod C. J.-On November 13, 1922, a rule was issued at the instance of the Government of Bombay against the respondent as Editor, Printer and Publisher of *The Bombay Chronicle* to show cause why he should not be committed for contempt of Court in respect of the publication of an article headed 'En Passant' containing the paragraph "Long live our Judges" in the Sunday issue of the paper of October 8, 1922.

The respondent published an apology in the issue of the paper of october 11 characterizing the paragraph as highly objectionable and apologizing to the Chief Justice and Judges of the High Court for the offensive expressions it contained and for the appearance of such a paragraph in his paper as the result of defective supervision due to illness. A copy of the paper containing the apology was sent to the Prothonotary for the information of the Chief Justice and Judges and came before us in due course. In his affidavit filed in showing cause against the rule, the respondent said he knew of the publication of the article in the paper after it was printed therein. On Saturday, October 7, he was in his office till about 8 P. M. until when the proofs of the article were not received by him for perusal. He left office for dinner and in the ordinary course he could have returned to office about 10 P. M. As he felt tired and exhausted he did not go back to office He had had a serious illness. The suggestion in the affidavit that if we had seen the apology we would not have granted the rule was singularly ill-advised, as a copy of the apology was annexed to the petition of the Government Pleader. The offensive and objectionable nature of the allegations against the Judges in the paragraph referred to in the petition having been admitted, the only question which ramains is what order should be made on the rule. We demur entirely to the veiled suggestion in the respondent's affidavit that the publication of an apology must necessarily be sufficient satisfaction for the contempt committed. In this case, at any rate, it was necessary that the respondent should be called upon to appear before us. Then it was unfortunate for the respondent that this was the fifth occasien during the last three and a half years on which we have had to complain of matter published in *The Bombay Chronicle*. On the first two occasions we were satisfied with apologies without ordering the then Editor to appear before us in Court.

On June 9, 1922, a rule was issued against the present respondent with regard to an article headed 'The Malegaon Appeals'; and on June 10, another rule was issued with regard to an article headed "British Justice" In his affidavit on the first rule the respondent contended that he had done nothing beyond offering reasonable criticism of the judgment of the Division Bench and pointed out what the public opinion in the country expected of the High Court for whom he never intended to show disrespect. The acting Chief Justice in his judgment of September 20, described the article in question in the following words: (*In re Pickthall* (1))

"We have considered the article and the affidavit in the light of the arguments before us. I am prepared to concede that the article does not constitute a personal abuse of the Judges such as we find for instance in *Reg. v. Gray* (2) or *In re Narasinha*

(1) [1922] Bom. 8—25 Bom. L. R. 15, 20.

(2) [1900] 2 Q. B. 36.

Chintaman Kelkar (3) nor does the article contain such a comprehensive condemnation of Courts including this Court and British Justice as is to be found in the recent case of *In re Satyabodha* (4)...Taking the article as a whole and making due allowance for the style, the view point and the possible political bias of a journalist, I find it difficult to avoid the conclusion that the article does attribute improper motives and political bias to the Judges in upholding the several convictions—The article would as a whole leave on the mind of an ordinary reader the clear impression that injustice had been deliberately done on political grounds to some of the accused who were apparently innocent. In other words it attributes judicial dishonesty to the Judges."

The Court then imposed a fine of Rs 200 without costs.

In his affidavit on the second Rule the respondent said he knew of the publication in the *Chronicle* of the article complained of after it was printed therein. It was impossible for him as Editor of the paper personally to supervise everything that went into the paper every day. If he had seen the article in question he would not have passed it for publication. It was published through a mistake of the Assistant Editor and he was sorry for the publication. Neither he nor the Assistant Editor meant any disrespect to the Court. When the rule came on for hearing the Court considered that the statements in the affidavit afforded under the circumstances a reasonable explananation of the manner in which the extract came to be published without his knowledge and discharged the Rule.

It cannot be suggested for a moment that the Court has not treated the Editor of the Chronicle with the every greatest leniency,which appears to me, 1 must regret to say, to have been entirely misunderstood.The respondent charged with commenting on pending proceedings says "you can't expect me to supervise everything that goes into the paper' and he is discharged. The respondent accuses the Judges of judicial dishonesty and he is fined Rs. 200 without costs. The paragraph now before us evidently refers to these two proceedings for contempt, for it begins, "Speaking of contempt of Court", though there was no previous reference to the subject. The object of the writer was to convey to his readers the idea that the Judges were the creatures of the Executive. This is not a criticism on a pronouncement of the Judges in a particular case, it is a sweeping assertion of the vilest character against all the Judges in India. Entirely accepting the respondent's statement that the article in question was very far from being in accordance with his policy or views with the remark that he could hardly have said less and might well have expressed himself more directly, still the responsibility for the publication of the objectionable matter must rest with him. The same excuse which secured his discharge in September will hardly avail again. He had had his warning that it was eminently necessary either that he should revise the paper himself before it went to press, or that he should have some responsible person on his staff whose duty it was to put before the Editor any objectionable matter. If the impression is abroad that the grossest libels on the Judges can be published with impunity provided an apology is offered, then it is time that such an impression should be removed. An ignorant public is far more likely to believe the imputation and discard the apology.

As was said by Crump J, on the last Rule against the respondent;

"It is impossible to permit the public to be poisoned with such a calumnies as these. In a country such as this where more importance is attached to the printed word than it perhaps at times deserves, it would be difficult for the average reader to read the language used without conceiving grave doubts as to the

(3) [1908] 33 Bom. 240 10 Bom. L. R. 1040-4 M. L. T. 259-8 Cr. L. J. 426-2 I. C. 288.

(4) [1912] 24 Bom L. R. 928-69 I. C. 84.

integrity and impartiality of the Judge of the Court. Therefore in the interests of the admistration of justice the Court cannot overlook this contempt"

The imposition of a nominal fine has been found to be useless, The ink was hardly dry on that judgment before the offence was repeated. If an individual had been libelled a substantial sum would have been awarded for damages on the principle that a newspaper should not be tempted to increase its profits by encrocahing on private rights. We are now acting in defence of public rights. The respondent must pay a fine of Rs. 5,000 and the costs of the Rule, We allow a week for the payment of the fine.

CRUMP J. So far as principles go I have nothing to add to what I have said in my judgment of September 20,1922. The article now in question is plainly a contempt and in view of the past record of this paper I agree that the time for leniency is gone. In the last case we dealt leniently with the offence because it was apparent to us that the true limitation on criticism of this nature were imperfectly understood, and we hoped that the result of our order would be that such criticism would be confined within its proper limits. The result has not been achieved. The apology in the present case cannot be accepted. It is not the first instance of careless supervision, and an apology does not remedy the evil caused by publication of the objectionable matter. If, as I have already pointed out, we act in the interests of the administration of justice, it is clear that while an apology may be to some extent a reparation on the part of the offender, it cannot overtake and counteract the mischief already done by the original publication. Where the publication is due to a repetition of negligence which has been condoned in the past, an apology becomes little more than an idle form. I agree in the order proposed.

Rule made absolute.

1923 BOMBAY. 244

MACLEOD C. J., AND CRUMP. J.

Vithalrao Sheshgirrao Moktesar—Appellant.

v.

Vithalrao Sondekar—Respondent

S. A. No. 47 of 1922, D-19th November 1922, from the decision of Dt. J., of Kanara, in Appeal No. 25 of 1921.

Hindu Law-Joint family-Manager-Suit on pro-note by manager-Decree against members,

A suit which is primarily a suit on a promissory note cannot be treated as a suit for the debt for which the promissory note was passed. If that were permissible difficulties would arise because the issues in a suit on a promisrory not would be entirely different from the issues which would be raised in a suit against the whole family to recover debt. Defences which would be open to members of the family when sued for a debt would not be open to the peison who passed the note.

Y. N. Naakarni—for the Appellant.

G.S. Mulgaonkar—for the Respondent

Macleod C. J.—The plaintiff sued to recover Rs. 532-6-5 from the defendants as balance still due on a promissory note dated October 17, 1917, passed by defendant No. 1 to plaintiff with future interest and costs. In the trial Court a decree was passed in favour of the plaintiff against all the defendants. Defendant No. 2 appealed. By the directions of the District Judge his name was scored out of the decree. The question at issue was whether in a suit on a promissory note signed by the first defendant alone in his own name the second defendant could be joined as a party. Various cases have been cited in which questions have arisen whether a member of a joint Hindu family could be held liable in a suit filed on a promissory note signed by one of the members of the family as manager in his own name. Reliance was placed by the appellant on the case of *Krishna Ayyar* v. *Krishnaswami Ayyar*, (1). Though it was held that all the members of the undivided family were liable on a promissory note signed by the manager of the family, it seems to me that the judgments of Shephard J. and Subrahmania Ayyer J. were based on the fact that all the members of the family were liable for the debt which was due under the promissory note in suit. Therefore they could be taken as being

(1) (1900) 23 Mad. 557.

sued on the debt and not on the promissory note.

Then in *Krishnanand Nath Kare* v. *Raja Ram Singh* (2) it was held that there was no inherent reason why the managing member of a joint Hindu family could not in that capacity execute in his sole name a promissory note which should be binding on the family as a whole and the property owned by it.

It seems to me, with all due respect, that the judgment was based mainly on the difficulties which might arise if a Hindu joint family could not be sued on a promissory note unless all the members had signed it. The real point is whether a suit which is primarily a suit on a promissory note and therefore a suit to which particular rules of procedure apply, could also be treated as a suit for the debt for which the promissory note was passed. If that were permissible, difficulties would arise, because the issues in a suit on a promissory note would be entirly different from the issues which would be raised in a suit against the whole family to recover debt. I think an application should have been made in the first instance for amendment of the pleadings when the point was taken that only the party signing the note could be liable in a suit bassed on the note itself. It is obvious that defences which would be open to members of the family when sued for a debt would not be open to the person who passed the note, so that with regard to other members of the family the trial would take an entirely different course from the trial against the original maker of the note. It seems to me, therefore, that in this suit if the plaintiff seeks to make other members of the family liable the plaint is defective, and he ought to have asked for amendment of his plaint at the earliest opportunity, when evidnce could have been led on the proper issues which would arise between the plaintiff and the other members of the family as debtors. I do not think, therefore, that in second appeal we could passibly say that the learned District Judge was wrong in striking out the second defendant's name from the decree on the ground that this was a suit on a note, and not a suit on any pre-existing debt. No injustice will result as the plaintiff has a decree against five defendants and if any of them on paying the debt desire to seek contribution from the second defendant, they can do so in a separate suit. The appeal, therefore, will be dismissed with costs

Appeal dismissed.

(2) (1922) All. 116-44 All. 393-20 A. L. J. 233-66 I. C. 150.

1923 BOMBAY. 245

MACLEOD C. J., AND CRUMP.J.

Panachand Nansy—Appellant.

v.

Stanley Dobson—Respondent.

O. C. J. Appeal No. 65 of 1922 dated the 5th December 1922.

Presidency Towns Insolvency Act (III of 1909). Sec. 106 (a)—Leave to appeal - Refusal. Special Leave to appeal - Leave can be granted by Appeal Court under inherent juisdiction—Civil P. C. (Act V of 1908). Sec. 151.

Where leave to appeal, under S. 106 (*a*) is refused by the Insolvency Court, the unsuccessful party can apply to the Court of Appeal for special leave to appeal. If a question of principle is involved, the Appeal Court can hear the appeal under its inherent powers.

Jinnah—for the Appellant.

The Respondent appeared in person.

MACLEOD C. J This is an appeal which is on the face of it not competent. The facts are that one Stanley Dobson filed a petition on September 12, 1921, in this Court praying that he might be adjudged insolvent. On that petition an order for adjudication was made on the same day. On September 19, 1921, the Official Assignee reported that the property of the insolvent was not likely to exceed in value Rs. 3,000 and applied that the Court might order the estate to be administered in a summary manner, pursuant to S. 106 of the Presidency Towns Insolvency Act. The order which I presume was made on that application does not appear on the record. On April 4, 1922, a creditor of the insolvent obtained a rule calling upon the insolvent to show cause why the order of adjudication made on September 12, 1921, on his petition should not be annulled for want of jurisdiction, or in the alternative, why he should not be

ordered to pay Rs. 175 per month to the Official Assignee for the benefit of his creditor. The insolvent filed an affidavit against the rule in which he stated that he, as well as all persons working on the Rutlam section of the Bombay Baroda and Central India Railway were engaged and dismissed from Bombay by that Railway which had its head-quarters at Bombay, their pay sheets were submitted to and sanctioned in Bombay and they received orders from Bombay. He further stated that leave was sanctioned at Bombay and occasionally he was booked to run from Rutlam to Bombay and also from Bombay to Rutlam. The rule was discharged by the learned Judge. He was of opinion that the work which the insolvents did came within S. 11 (c) of the Act, that, in other words, they worked within the limits of the Ordinary Original Civil Jurisdiction of this Court, and that they did that work personally, and they did it for gain.

Now, under S. 106 (a) of the Presidency Towns Insolvency Act (III of 1909) in a summary insolvency no appeal is allowed from any order of the Court except by leave of the Court. The creditor applied for leave and this was refused by the learned Judge. He said:—

"I confess that the question does not seem to me to be of that importance to the petitioning creditor or to anybody else which would justify me in prolonging this litigation. Mr. Davar says that somewhere about 1904, the position of Engine-drivers was considered with reference to this point and certain conclusions were arrived at; but these authorities, if any, are not produced before me, and although this is the third time this case has come before me, I am still without any definite authority in insolvency to support the petitioning creditor's application."

As leave to appeal was refused, no appeal to this Court was competent. The only course open to the creditor was to apply to this Court by petition for special leave to appeal. If this appeal were dismissed summarily on the ground that it was not competent, it might still be open to the creditor to file such a petition, and so we think it desirable to look upon this appeal as a petition praying for special leave. Then we can consider the question whether an appeal should be admitted from the original order of the lower Court. It might be said that at first sight the wording of the S. 106 (a) excludes entirely the jurisdiction of this Court to question the dicision of the lower Court. But I should not like to go so far as to hold that our inherent powers are altogether ousted and, if authority were necessary, a reference can be made to the decision in *Ex parte Gilchrist: In re Armstrong.* (1) That was a case under the English Bankruptcy Act of 1882. An order had been made by the County Court Judge. It was reversed by the order of the Divisional Court. Under S. 104 of the Act of 1882 leave would have to be granted by the Divisional Court before an appeal could be filed to the Court of Appeal. Leave was refused and special leave was granted by the Court of Appeal. Lord Esher said at p. 527:—

"The Divisional Court refused an application for leave to appeal from their decision, but leave to appeal was given by this Court. The jurisdiction which the Judges of the Divisional Court have to give or to refuse leave to appeal from their own decisions is a very delicate one. Merely to say, that they are satisfied that their decision is right, is not, I venture to suggest, a sufficient reason for refusing leave to appeal, when the question involved is one of principle and they have decided it for the first time. If that was carried to its legitimate conclusion, they ought to refuse leave to appeal in every case."

In most cases where an order has been made that the estate should be administered in a summary manner it would be unlikely that any important question of principle would arise in the course of the administration. But if such a question did arise the Judge in all probability would not refuse leave to appeal.

However, in this case the only question was whether the petitioner did work personally and did it for gain

(1) (1886) 17 Q. B. D. 521 (527)

within the limits of the Ordinary Original Civil Jurisdiction of the Court and that was a question which was to be decided on the evidence before the Court. Though it might be a mixed question of law and fact, it was mainly a question of fact. Therefore, we see no reason why we should hold in this case that the Judge was wrong in refusing leave to appeal. The appeal is, therefore, dismissed with costs.

Appeal dismissed.

1923 BOMBAY. 247

MACLEOD C. J., AND CRUMP, J.

(*Bai*) *Balagavri*—Applicant.

v.

Motilal Ghelabhai—Opponent.

Civil Extraordinary Application No. 65 of 1922, D. 7th November 1922, against the order passed by Sub. J., at Surat, in Pauper Application No. 111 of 1921.

Civil P. C. O 33 R. 1—Part of claim paid into Court cannot be considered—No fee prescribed.

In a suit where no fee is prescribed by the law for the plaint, no admission or even payment into court by the defendant can be taken into consideration. (1886) 10 Bom. 207 Dis. (1909) 34 Bom. 638, 12 Bom. L. R. 102. Foll. Whether a fee is prescribed or not the subject matter of the suit cannot be taken into consideration in calculating the plaintiff's means. But that protection continues during the whole course of proceedings, so that an application to sue as a pauper in either case cannot be rejected merely because the opponent pays in or deposits in Court part of the claim. The subject matter of the suit is in no case at the disposal of the applicant for payment of fees. If, however, at any point of time afterwards it is alleged that the applicant has become possessed of sufficient means to pay the fees, then no doubt, when the fact is brought to the notice of the Court, the question of pauperism would be reconsidered, and the party once held to be a pauper might be directed to pay the Court fees. [*P. 248 C. 1*]

G. S. Mulgaonkar—for the Applicant.

H. V. Divatia—for the Opponent.

Judgment :—The applicant presented a petition to the Court to be allowed to file her suit in *forma pauperis*. Objection was taken by the respondent that the applicant was a minor. If she was a minor, then she could not make any application, and the question whether she was a pauper or not could not arise. Unfortunately the Judge having come to the conclusion that the applicant was a minor also went on to deal with the question whether she was a pauper. Although we think that part of the order which directs that the applicant might bring a suit by her next friend was perfectly correct, we think that the Judge ought not to have directed that proper court-fees must be paid on such suit and thereby determine the question of pauperism. It is, therefore, necessary for us to express an opinion on the question whether in that decision the Judge was wrong. Under the Explanation to Order 33, rule 1, a person is a "pauper" when he is not possessed of sufficient means to enable him to pay the fee prescribed by law for the plaint, or, where no such fee is prescribed, when he is not entitled to property worth Rs. 100 other than his necessary wearing apparel and the subject matter of the suit. In this case a fee was prescribed for the plaint. The defendant in order to get rid of the contention of the applicant that she was a pauper, produced certain ornaments and cash which he admitted belonged to the applicant worth about Rs. 600, and said that he was willing to give them to the applicant, and therefore, she was possessed of sufficient means to pay the fees. The applicant intended to claim in her suit a much larger amount than what was admitted to be due by the defendant. I do not think it can be said that owing to the defendant's offer the plaintiff was possessed of sufficient means to pay the prescribed fee. In a suit where no fee is prescribed by law for the plaint, no admission or even payment into Court by the defendant can be taken into consideration.

In *Dwarkanath v. Madhavrao* (1), the defendant produced in Court on an application by the plaintiff to sue as a pauper certain of the articles which were claimed, and the learned Judge seemed to be of opinion that it made no difference whether a fee was prescribed for the plaint or not. If any part of the subject-matter of the suit was paid into or deposited in Court it ceased to belong to the subject-matter of the suit and became the property of the plaintiff.

(1) (1886) 10 Bom. 207.

In *Fatmabai* v. *Dosabhoy* (2) while sitting on the Original Side, I declined with all due respect to follow that decision. To this extent I can agree with the learned Judge that whether a fee is prescribed or not the subject-matter of the suit cannot be taken into consideration in calculating the plaintiff's means. But in my opinion that protection continues during the whole course of the proceedings, so that an application to sue as a pauper in either case cannot be rejected merely because the opponent pays in or deposits in Court part of the claim. The applicant is not obliged to take out of Court what is deposited or paid in, and cannot, therefore, if he chooses to allow the deposit or payment made in Court to remain there, be said to be possessed of means to pay the Court fees as if the deposit or payment were actually in his poseession. The time when the application is made to institute a suit as a pauper, is the point of time which the Court has to consider when the application comes to be dealt with, and the subject-matter of the suit is in no case at the disposal of the applicant for payment of fees. If, however, at any point of time afterwards it is alleged that the applicant has become possessed of sufficient means to pay the fees, then no doubt when that fact is brought to the notice of the Court, the question of pauperism would be re-considered, and the party once held to be a pauper might be directed to pay the Court fee. In this case, therefore, we direct that it is open now to the applicant, through her next friend, to make an application to file a suit as a pauper, and that application must be dealt with on the lines we have now laid down. If no further application is made, the applicant must pay the costs of this application. If the application is filed through her next friend, and if the application is admitted, then the costs will be costs in the suit.

Crump, J.—I concur.

(2) (1910) 34 Bom. 638-11 Bom. L. R. 102-. I. C. 688.

1923 BOMBAY 248

MACLEOD C. J. AND CRUMP, J.

Emperor v *Nasarvanji Bomanji*

Cr. Ref. No. 70 of 1922, D 28th November 1922, made by Sess; J., of Poona, to reverse the conviction and sentence passed by Mag. of Poona.

Public Conveyances Act S, 2—Playing for hire ;meaning of—

There seems to be a difference between "letting for hire" and "plying for hire". If A keeps motors at Poona in order to let them out to clients who wish to go to Mahabaleshwar the motors would not become on that account public conveyances, it would be otherwise if A kept a motor bus which plied regularly between Poona and Mahabaleshwar.

S. S. Patkar, (Government Pleader)—for the Crown,

MACLEOD C, J —This is a reference under S. 438 of the Code of Criminal Procedure by the Sessions Judge of Poona in the matter of the conviction of one Naservanji Bomanji by the Cantonment Magistrate of Poona under S. 22 of Bombay Act VII of 1920.

The offence charged was that the accused had let his tonga for hire without a license. It would appear from the judgment that the only evidence against the accused was that Lieut. Flitcroft was found driving in a tonga belonging to the accused and that he stated that he had hired it several times before. The accused said that he had three conveyances which he hired out to such persons as he wished, but contended that they did not become by reason of such user public conveyances. The learned Magistrate had no doubt that the tonga was a public conveyance and required a license, but he ignored entirely the definition of a public conveyance in S: 2 of the Act and based his opinion on grounds which can only be considered irrelevant.

Under the Act a public conveyance is a vehicle which is used for the purpose of plying for hire for the conveyance of passengers and goods.

The word 'ply' has many meanings From the Oxford Dictionary I find that the word can be used of a vessel or its master as meaning to go more or less regularly to and fro between

certain places, and in the same sense it is used of a land-carriage. It is also used of a boatman, porter hackman to mean to wait or attened regularly, to have one's stand at a certain place for hire or custom. Although it may be said that a ship, a boat or conveyance plies between two named ports or places, it seems that the expression "ply for hire" is more correctly used only with reference to the act of the individual who controls the ship, boat or conveyance. However that may be the essential idea of a conveyance being used for the purpose of plying for hire is that it should be available at some public place or on some regular route for any one who wishes to hire it or travel by it. This is made clear by S. 26 (ii) which says that the driver of a public conveyance cannot refuse without reasonable cause to carry any person desiring to hire the conveyance. There seems to be a very distinct difference between "letting for hire" and plying for hire." If A keeps motors at Poona in order to let them out to clients who wish to go to Mahabaleshwar, the motors would not become on that account public conveyances, it would be otherwise if A kept a motor bus which plied regularly between Poona and Mahablaeshwar. If it is considered desirable that conveyances which are kept for letting out on hire should be licensed, then the Act must be amended. In my opinion, the Sessions Judge was right, the conviction must be quashed and the fine, if paid, refunded.

CRUMP J. I agree.

Conviction set aside.

1923 BOMBAY. 249

MACLEOD C. J., AND CRUMP. J.

The Eagle Star & British Dominions Insurance Company—Appellant.

v.

Dinanath & another—Respondent.

O. C. J. Appeal No; 79 of 1922 dated the 4th December 1922! in S. N. 639 of 1922.

(a) Deed - Construction - Fire Insurance Policy.

The plaintiffs claimed under a policy, the conditions of which provided (1) that if the claim was made and rejected and an action or suit was not commenced within three months after such rejection all benefit under the policy would be forfeited, and (2) that if any difference arose as to the amount of any loss or damage such difference should, independently of all other questions, be referred to arbitration and that it should be a condition precedent to any right of action or suit upon the policy that the award of the arbitration or umpire of the amount of the loss if disputed should be first obtained.. *Held* that when the defendants rejected the claim, the plaintiffs had a right of action in order that it might be decided by the Court whether such rejection was right or wrong and it was only in the event of that question being decided in favour of the plaintiffs that it would become necessary that the amount of loss or damage should be ascertained. [P. 252 C. 2]

(b) Civil P. C. O 14 R. 2-Procedure.

When it is necessary, before an order for discovery can be made, that certain questions in the suit should be first decided, the proper order to make is that the suit should be set down for the settlement of the issues. The Judge will then be in a position to decide which of the issues are necessary to be determined before the question of inspection or discovery can be decided. The same procedure should be followed when one party suggests that the suit can be decided on the hearing of a preliminary issue. [P. 251 C. 1, 2]

Binning with Jinna—for the Appellant.

Taraporevalla with Kanga and Inverarity—for the Respondent.

Macleod C. J.—The plaintiffs filed this suit to recover from the defendant Insurance Company the amount of loss or damage, which they suffered in consequence of the fire, which had occurred to the godown at Bapty Road, in which there were goods, belonging to the plaintiffs, which had been insured with the defendant company for Rs. 2,50,000.

The relevant clauses in the policy for the purpose of this appeal are clauses 13 and 18.

Clause 13 says:—

"If the claim be in any respect fraudulent or if any false declaration be made or used in support thereof, if any fraudulent means or devices are used by the insured or one acting on his behalf to obtain any benefit under this policy or if the loss or damage be occasioned by the wilful act or with the connivance of the insured, or if the insured or any one acting on his behalf shall hinder or obstruct the Company in doing any of the acts referred to in condition 12, or if the claim be made and rejected and an

action or suit be not commenced within three months after such rejection, or (in case of an arbitration taking place in pursuance of the 18th condition of this Policy) within three months after the Arbitrator or Arbitrators or Umpire shall have made their award all benefit under this policy shall be forfeited."

Clause 18 is set out as follows.—

"If any difference arises as to the amount of any loss or damage such difference shall independently of all other questions be referred to the decision of an arbitrator, to be appointed in writing by the parties in difference or if they cannot agree upon a single arbitrator, to the decision of two disinterested persons as arbitrators, of whom one shall be appointed in writing by each of the parties within two calendar months after having been required so to do in writing by the other party. In case either party shall refuse or fail to appoint an arbitrator within two calendar months after receipt of notice in writing requiring an appointment, the other party shall be at liberty to appoint a sole arbitrator and in case of disagreement between the arbitrators the difference shall be referred to the decision of an umpire who shall have been appointed by them in writing before entering on the reference and who shall sit with the arbitrators and preside at their meetings. The death of any party shall not revoke or affect the authority or powers of the arbitrator, arbitrators or umpire respectively, and in the event of the death of an arbitrator or umpire, another shall in each case be appointed in his stead by the party or arbitrators (as the case may be) by whom the arbitrator or umpire so dying was appointed. The costs of the reference and of the award shall be in the discretion of the arbitrator, arbitrators or umpire making the award. And it is hereby expressly stipulated and declared that it shall be a condition precedent to any right of action or suit upon this policy that the award by such arbitrator, arbitrators or umpire of the amount of the loss or damage if disputed shall be first obtained."

The fire occurred on March 21, 1921 and notice was given by the plaintiffs on the 22nd. Correspondence ensued, but I need not refer to it beyond pointing out that it continued from March 1921 until January 1922. Clearly it was the defendants' case that there were disputes between the parties other than disputes with regard to the amount of loss or damage which the plaintiffs had suffered owing to the fire. On January 6, the plaintiffs wrote as follows.—

"We beg to draw your attention to condition 18 of the Policy which provides that in case of difference as to the amount of loss or damage suffered by our clients, such difference should be referred to arbitration. Our clients are prepared to go to arbritration if you intimate to our clients that the difference has arisen between our respective clients as to the amount of loss or damage suffered by our clients. If we do not receive any intimation from you within three days from the receipt hereof by you that the difference is as to the amount of loss or damage our clients will have no alternative but to file a suit against your clients at their risk as to costs."

In reply to that the defendants wrote on January 7, 1922, as follows.—

"If you will again refer to the condition you will see that each party must appoint an arbritrator within two calendar months having been required to do so in writing by the other party and in case either party shall refuse or fail to appoint an arbitrator within two calendar months after the receipt of the notice in writing requiring an appointment the other party shall be at liberty to appoint a sole arbitrator. It appears that under the above condition our clients are entitled to a period of two calendar months from the time when they are called upon to appoint an arbitrator within which to consider such appointment. We agree that there is a difference as to the amount of any loss or damage but we think there may also be other questions involved.

On January 10, 1922, the plaintiffs wrote.—

"We shall thank you to let us know what other questions your clients say

are involved in the matter in addition to the dispute as to the amount of loss or damage."

The defendants replied on Junuary 12, 1922.—

"We are in receipt of your letter of the 10th instant and in reply we have to say that our clients do not agree upon the amount claimed and further that it is their carefully considered opinion that under the conditions of the policy they cannot yet admit liability on the policy and they also point out that under condition 18 of the policy the ascertainment of the amount of loss by arbitration is precedent to any suit being filed against them."

The defendants filed a very contentious written statement. Their main defence was that under the terms of the policy it was a condition precedent to suit that there should be an award. Then the plaintiffs took out a summons on July 17, 1922, asking for reliefs of so varied a nature that the greatest care was necessary in passing orders upon it. The plaintiffs asked (1) that the defendant company should disclose and produce for inspection of the plaintiffs the report made by the surveyors appointed by the defendant company, (2) that the suit might be set down on board for trial of preliminary issues whether the defendant company by their solicitors' letter of January 12, 1922, did not reject the plaintiffs' claim, and whether in the events that had happened the plaintiffs were not entitled to file the suit without obtaining the award as to the amount of loss or damage sustained by them, and (3) that the defendant company should give particulars for the other questions which they alleged were involved in addition to the dispute as to the amount of loss or damage. As I have so often pointed out, when it is necessary, before an order for discovery can be made, that certain questions in the suit should be first dicided, the proper order to make is that the suit should be set down for the settlement of the issues. The Judge will then be in a position to decide which of the issues are necessary to be determined before the question of inspection or discovery can be decided. The same procedure should be followed when one party suggests that the suit can be decided on the hearing of a preliminary issue. On the summons an order was made that the suit should be set down for trial of the preliminary issues (1) whether the defendant company by their solicitors' letter of January 12, 1922, rejected the plaintiffs' claim under the policy, and (2) whether in the events that had happened the plaintiffs were entitled to file the suit without obtaining an award as to the amount of loss or damage sustained by them, and, on the defendants stating through their counsel that there were no other questions involved except as to the amount of loss or damage sustained by the plaintiffs, no directions were considered necessary as to the particulars asked for with reference to the allegation in paragraph 8 of the written statement. On the trial of these issues the Judge came to the conclusion (1) that the defendant company did reject the claim of the plaintiffs by their letter of January 12, 1922, and (2) that the suit was maintainable.

On reading the correspondence which lasted from March 21, 1921, to January 12, 1922, it is obvious that the defendants were extremely unwilling to go to arbitration so that tha amount of loss or damage which had been suffered by the plaintiffs might be ascertained, and had been all along endavouring to find out some ground on which they might dispute their liability on the policy. Even when they were asked to go to arbitration on the question of loss, they pointed out that they had two months under the policy to appoint an arbitrator. Then they said that besides the question as to the amount of loss or damage other questions were involved which could not be tried by arbitration. Then, finally, when they were asked what those questions were, they could only say that it was their carefully considered opinion that under the conditions of the policy they could not admit liability on the policy. The defendants then clearly stated that there were questions involved in the case which had to be decided before they

would admit that they were liable to pay the amount of loss which would be ascertained by arbitration. And, in my opinion, the defendants by that letter of January 12, 1922, rejected the plaintiffs' claim.

The next question is whether such rejection gave to the plaintiffs a right of action, or whether as now claimed by the defendants no right of action could accrue to the plaintiff's until the amount of loss had been ascertained by arbitration. The appellants relied on *Woodall* v. *Pearl Assurance Co.* (1). In that case condition 11 was ;

"If any question shall arise touching this policy or the liability of the company thereunder or the extent or nature of such liability or otherwise howsoever in connection herewith then the assured...may refer and shall be bound to refer the same to arbitration...and no person shall be entitled to bring or to maintain any action or proceeding on this policy except for the sum awarded under such arbitration."

It was there held that the making of an award was a condition precedent to a right of action. But the terms of the policy in this case are entirely different and are almost identical with the terms of the policy in *Jureidini* v. *National British and Irish Millers Insurance Company, Limited* (2) in which it was held that the repudiation of the claim on a ground going to the root of the contract preculuded the company from pleading the arbitration clause as a bar to an action to enforce the claim. The words in clause 12 of the policy in that case were, as far as I can see, the same as the words in clause 13 in the suit policy. It is true that the defendants there resisted the claim on the ground of fraud. But in clause 13 there are various contingencies set out which if established entitle the insured to bring an action without an award having been made by arbitrators. One of these contingencies is "if the claim be made and rejected" which if established gives a right of action, the period of limitation provided for the suit being fixed at three months from the date of the rejection. While it is also provided that where arbitration takes place in pursuance of condition 18 of the policy, three months' time should be allowed for a suit to be brought after the award has been made. Therefore it is quite obvious that a right of action accrued after the company rejected the claim Naturally that question would have first to be decided by suit as under clause 18 that question could never have been referred to arbitration. Therefore when the defendants had rejected the claim, the plaintiffs had a right of action in order that it might be decided by the Court whether such rejection was right or wrong, and it was only in the event of that question being decided in favour of the plaintiffs that it would become necessary that the amount of loss or damage should be ascertained. The only question that might then arise would be, whether, after the Court had decided that the rejection of the plaintiffs' claim by the defendant company was wrong, the amount of loss or damage would have to be ascertained by the Court or by means of arbitration or whether the arbitration clause had gone with the repudiation as Lord Haldane thought it would ; [see *Jureidini* v. *National British and Irish Millers Insurance Company, Limited* (3)]. That is not a question before us now. The suit was only set down for hearing for trial of the two issues which were contained in the summons, and as a result of the findings on those issues the hearing of the suit would continue in the ordinary course. We do not quite understand how the learned Judge came to make an order that the suit should be stayed, the parties being referred to arbitration as provided in clause 18 of the policy, because it was not competent for the Judge to deal with the question of arbitration on the summons. No doubt, when the order was made on the summons, the defendants stated through their counsel that there were no other questions involved except as to the amount of loss or damages sustained by the plaintiffs, but that was on the question whether an order

(1) [1919] 1 K. B. 593.
(2) [1915] A. C. 499.
(3) [1915] A. C. 499 506.

should be made for particulars. Whether the defendants could raise any other questions now in the face of that statement need not be considered. The appeal with regard to the decision on the issues set down for trial must be dismissed, but we set aside the order of the Court below that the suit should be stayed.

Appellants to pay the cost of the appeal.

Proceedings must continue in the ordinary course.

Appeal dismissed.

1923 BOMBAY. 253 (1)

MACLEOD C. J., AND CRUMP. J.

Ganesh Mahadev Sahasrabudhe—Applicant.

v.

Yeshwant Mahadev Phadke—Opponent

Extra Civil Application No 104 of 1922, D-19th December 1922 against the order passed by the J., of the Court of Sm. Causes at Poona, in Civil Suit No. 3485 of 1920.

Civil P. C, O, 21 R. 2-Separate suit lies if double payment is recovered.

If the creditor by taking out a Darkhast recovered the decretal amount over again that would not bar the judgment-debtor from seeking to recover the amount which he had paid to his creditor without its being certified. The fact that in the execution proceedings judgment debtor failed to get credit for the amount does not bar the suit.

D. G. Virkar—for the Applicant.
P. V. Kane—for the opponent

Macleod C. J.—The Rule must be made absolute and the case sent back for trial on its merits. The plaintiff alleged that he had made a payment of Rs. 300 to his pleader who had paid the amount to the judgment-creditor. As it was not certified under Order XXI, rule 2. the Court executing the decree could take no cognizance of that payment, but if the creditor by taking out a Darkhast recovered the amount over again that would not bar the judgment-debtor from seeking to recover the amount which he had paid to his creditor without its being certified. Costs will abide the result.

Rule made absolute.

1923 BOMBAY. 253 (2)

MACLEOD C. J. AND CRUMP. J,

Maruti Balaji Patil—Appellant.

v.

Dattu Mukunda Savant—Respondent.

S. A. No. 105 of 1922, D-1st December 1922, from the decision of Asst. J., A. P. at Sholapur, in Appeal No, 62 of 1921.

Registartion. Act S.60.Registration endorsement-Evidentiary value,

The certificate of the registering officer is admissible for the purpose of proving only that the document had been duly registered in the manner provided by this Act, but not that the facts mentioned in the endorsements referred to in S. 59 have occurred as therein mentioned. (1907) 9 Bom. L R 401 Exp,) The Certificate might go so far as to show that the person purporting to sign admitted his signature before the Registrar. In the absence of any further evidence that would not be evidence of the necessary link in the chain that the person who admitted execution before the Registrar was the person who could give title to the plaintiff, From the endorsement that a certain person admitted execution one is entitled to presume that the person who admitted execution was the person who signed the deed. But that, does not of itself prove who signed the deed. [P. 254 C 1]

P. B. Shingne—for the Appellant.
P. V. Kane—for the Respondent was not called upon.

Macleod C. J.—The only question in this appeal is whether Exhibit 29 A has been proved. The plaintiff's title to the suit property would stand or fall on that document which is a sale-deed. As the lower appellate Court says:

"It purports to have been passed by defendant No. 1 but defendant No. 1 has not been examined nor has the signature alleged to be his been verified, nor has the writer of the document or any of the witnesses who purport to have attested it, been examined. In these circumstances can it be said that the document has been proved.

The answer at first impression to that question would certainly be in the negative. When the appeal came up for admission before me, it was urged that under S. 60 of the Indian Registration Act the certificate of the registering officer was admissible for the purpose of proving not only that the document had been duly registered in the manner provided by this Act, but also that the facts mentioned in the endorsements referred to in S. 59

have occurred as therein mentioned. Reference was made to *Thama* v. *Govind* (1). In that case the learned Judges said (p. 404):

"On the document here are endorsements made in accordance with the provisions of section 58 and in those endorsements it is stated that the executants admit execution of the document and receipt of money. We are unable sitting here in second appeal to say that these endorsements prove the execution and the receipt of consideration money, but we are able to say that the endorsements may be admissible for that purpose. We must therefore reverse the decree of the lower appellate Court and send back the case for re-determination in the light of these remarks. At the same time we desire to make it clear that though the certificate is admissible for the purpose of proving that the facts mentioned in the endorsement occurred as therein mentioned, we do not wish to fetter the discretion of the Court, or to suggest that by reason of those endorsements the Judge is bound to hold that there has been such execution and payment as the endorsements suggest."

The only effect of that decision is that the certificate can be considered as proving certain facts within the meaning of S. 60 of the Indian Registration Act. These facts might go so far in this case as to show that the person purporting to sign Ex. 29 A admitted his signature before the Registrar. In the absence of any further evidence and no evidence was led in the Courts below, that would not be evidence, of the necessary link in the chain that the person who admitted execution before the Registrar was the person who could give title to the plaintiff. The only facts which are mentioned in the endorsement are that a certain person admitted execution, and one is entitled to presume that the person who admitted execution was the person who signed the deed. But that, as I have tried to point out, does not of itself prove who signed the deed. It is useless, therefore, in my opinion to send down the case for further examination by the Court below. It is unfortunate for the plaintiff that he was unable to prove his document, but as the evidence stands he was bound to fail. The appeal, therefore, will be dismissed with costs.

Appeal dismissed.

(1) (1907) 19 Bom. L. R. 401.

1923 BOMBAY 254

MACLEOD C J., AND CRUMP J.

Digambar Govind Deshpande—Appellant.

v.

Lahyadeo Bhau Deshpande—Respondent.

S. A. No. 170 of 1922 D. 19th December 1922, from the decision of Asst. J., Satara, in appeal No. 284 of 1920.

Civil P. C. S. 100 New Plea.

Although questions of limitation being questions of law are not excluded from being heard in second appeal when they have not been raised in the Lower Courts still where a question of law depends upon a finding of fact on evidence and that evidence has not been led in the trial court, High Court in second appeal will not deal with the question of law.

S. R. Bakhale—for the Appellant

P. B. Shingne,—for the Respondent.

Macleod C. J.—The plaintiff sued to obtain a declaration that he was the owner of the plaint lands, and that the tenants in actual cultivation of the lands were his own tenants, and for an injunction restraining the defendants from recovering rent of the lands from the tenants or otherwise interfering with them in any way. The suit was brought in the Court of the Second Class Subordinate Judge at Wai, although the lands were situate within the jurisdiction of the Court at Rahimatpur. No objection, however, was taken to the jurisdiction of the Wai Court, presumably because the suit asked for personal relief respecting immoveable property held by or on behalf of the defendant within the proviso to S. 16 of the Civil Procedure Code, and it may be admitted that the suit is not one for possession of land, in which case the Wai Court could have had no jurisdiction. So we need not consider the question whether the point of jurisdiction had been raised too late under S. 21 of the Civil procedure Code. But although it is not a suit for possession, the issues which were raised in the trial Court were

the same issues as would be raised in a suit for possession, and it was found by the Court that the plaintiff was in possession of the suit. lands within twelve years of the suit. In the first appeal Court the decree in favour of the plaintiff was confirmed.

For the first time in second appeal it is suggested that the period of limitation for such a suit is six years, not twelve. It may very well be that the period of limitation for the plaintiff's suit was six years. But it would be a question of fact when time began to run against the plaintiff for the suit which he brought; and although questions of limitation being questions of law are not excluded from being heard in second appeal, when they have not been raised in the lower Courts, we have always maintained that where a question of law depends upon a finding of fact on evidence and that evidence has not been led in the trial Court, then this Court in second appeal will not deal with the question of law. The defendants have not proved that the plaintiff was not in possession within six years of the suit, and they have not put the plaintiff to the proof that he was. We cannot, therefore, remand the case to the trial Court for a finding on an issue of fact which was never raised in the trial Court, and as we cannot consider the question of law without that finding, we now decline to deal with it. It follows the plaintiff's suit was rightly decreed. The appeal must be dismissed with costs.

Appeal dismissed.

1923 BOMBAY 255

SHAH C. J. AND CRUMP. J

Emperor—

v.

T. K. Pitre and others—Accused.

Cr. Rev. Nos. 206 to 208 of 1922, D. 18th October 1922 from an order passed by Dt. Mag. of Dharwar.

(a) Criminal P. C. S. 108—Prosecution to prove their case,

The procedure applicable to proceedings unnder S. 108 is that prescribed for warrant cases except that a charge need not be framed. The prosecution has to establish the truth of the information and the person against whom an order requiring security for good behaviour is sought, is entitled to keep quiet and expect prosecution to prove their case.

(b) Press and Registration Act. S. 78,4 —Presumption.

Per Shah A. C. J.—There is no presumption as regards a book that the person whose name appears as the author is the author thereof. The statement from the Manager of the Press cannot be treated as evidence of the facts stated therein. The declaration under S. 4 of the Act is not evidence of his knowledge of the contents, though it is a fact which along with other evidence in the case must be considered in deciding the question of fact. The fact of a person's being the keeper of the Press and the printer of the pamphlet by itself does not imply any knowledge of the contents. Some evidence which would indicate a knowledge of the contents on his part is necessary. There is no provision in the Act as to the presumption to be drawn from a declaration made under S. 4 and the names of the printer and publisher printed under S. 3 as there is under S. 7 as regards declaration made under S. 5 of the Act. The knowledge of the contents so far as necessary has to be proved like any other fact.

Per Crump J. A printed book of itself proves nothing relevant to the present enquiry. There is no presumption that it is written by the man who is described as the author. unless it is one of that limited class of books covered by S. 87 of the Indian Evidence Act. The written information given by the Manager of the Press is not given in the discharge of any duty, for neither the Act nor the Rules under the Act as those now stand impose any such obligation. A keeper of a considerable Press may not know the contents of each and every book printed at his Press. Without details as to the connection of the keeper which the actual business it is impossible to make any such presumption. The declaration under S. 3 or the written information supplied by the Manager carries the matter no further. Without knowledge a man cannot be guilty of abetment.

G. S. Rao and G. S. Mulgaonkar—for the Appellants.

Kanga; with S. S. Patkar, (Government Pleader)—for the Crown.

SHAH AG. C. J.-These are three revisional applications arising out of proceedings taken against three persons (1) T. K. Pitre, (2) Y. B. Jathar and (3) N. K. Powar under s. 108 of the Code of Criminal Procedure in respect of the Marathi pamphlet marked Ex. 1 C. These proceedings were initiated with the necessary sanction of the Local Government. The opponents were stated to be the author, printer and publisher of the pamphlet in question respectively. As regards No. 3, it was further alleged that he was also the publisher of a similar pamphlet in Canarese (Ex. 1 D). It was alleged that the pamphlets con-

tained matter, the publication of which would be punishable under S. 124 A or S. 153 A of the Indian Penal Code. The first two opponents are not concerned with the Canarese pamphlet. The subject-matter of both the pamphlets is substantially the same: and it is not suggested that Ex. 1 D can be differentiated from Ex. 1 C, so far as the nature of the contents is concerned. It is, however, contended that the Marathi pamphlet does not contain any matter obnoxious to Ss. 124 A and 153 A. It was further contended on behalf of these persons that the prosecution should prove that the persons alleged to be the author, printer and publisher were really the author, printer and publisher of the pamphlet Ex. 1 C. The prosecution relied on the printed pamphlet itself and upon the statement of the Manager of the Press (Ex. 2 A) submitted to the Collector under s. 18 of the Press and Registration of Books Act XXV of 1867, in proof of the statements as to the authorship, printing and publishing of the pamphlet. The declaration made by Jathar (opponent No. 2) under s. 4 of the Act of 1867 was proved. It was admitted on behalf of the opponents by a purshis that the statement, Ex. 2 A, was signed by the Manager of the press, and that he was in fact the Manager. The opponents did not expressly deny the allegations as to their being the author, printer and publisher of the pamphlet, but denied being liable under s. 103, Criminal Procedure Code, and put the prosecution to the proof of the allegations. The learned Magistrate found on the materials that the pamphlet contained seditious matter or matter the publication of which would be punishable under S. 153 A, that the opponents were the author, printer and publisher of the pamphlet and as such responsible for the dissemination of such matter. He ordered them to furnish security for good behaviour and the opponents complied with the order. A further order was made against the opponent No. 3 as regards the pamphlet Ex. 1 D.

The opponents appealed to the District Magistrate, but the learned District Magistrate did not allow the argument as to the burden of proof and insufficiency of evidence and held the document in question to contain seditious or otherwise objectionable matter; he accordingly dismissed the appeals. In the applications before us among other things, it has been argued that the pamphlet does not contain any matter referred to in clauses (a) and (b) of S. 108, Criminal Procedure Code. But we have not considered it necessary to hear the learned Advocate General on this point. Making due allowance for the avowed object of the pamphlet, the occasion for the publication and for the style and exaggeration which may be expected in poetry and taking the pamphlet as a whole, bearing in mind that each song is complete, though undoubtedly forming part of the whole series composed for the occasion, I do not think that there is any reason to doubt the correctness of the conclusion of the lower Courts on this point. It will serve no useful purpose to discuss the question in detail.

This brings me to the further points raised by Divan Bahadur Rao on behalf of opponent N. 1. It is urged that there is no evidence to show that he disseminated, or attempted to disseminate or in anywise abetted the dissemination of the objectionable matter and that he was the author of the pamphlet. In connection with these points, I may at once state that the fact of his being the author of "Swadeshi Paden" Parts I and II, which were proscribed in 1911 is no evidence of his being the author of this particular pamphlet. I mention this as the learned Advocate General relied upon it in the course of his argument.

There is no direct evidence of dissemination in this case: but the songs were composed for the Ganpati festival and it is a fair inference that the agency which arranged for its publication did so with a view to disseminate the matter. The pamphlet itself contains a preface purporting to be written by the Secretary of the 'Bal Maruti Sanstha'. Whether this is a real or an imaginary institution we do not know: there is no

evidence on the point: and looking at the pamphlet as well as the statement of the Manager (Ex. 2 A) it would appear that that was the agency for the dissemination of this matter. I shall presently deal with the question as to opponent No. 1's authorship: but assuming him to be the author, I think something more than mere authorship was necessary to establish his connection with the dissemination, which it is the object of S. 108 to prevent. In the absence of any evidence as to any attempt on his part to disseminate, we have to consider whether he in anywise abetted the dissemination of it. I am not sure that mere writing of the matter is sufficient to bring him under the section. Having regard to the view which I take of the point as to his being the author of the pamphlet I do not record any definite finding on this point At least the prosecution should have given some evidence as to his connection with the actual publication or subsequent dissemination.

As regards the question whether he composed these songs, I think it is a circumstance against him that he has not expressly denied the authorship. But the procedure applicable to these proceedings under S. 108 is that prescribed for warrant cases except that a charge need not be framed: this is clear from S. 117 (2). The prosecution has to establish the truth of the information and the person against whom an order requiring security for good behaviour is sought, is entitled to take up the position which the opponent No 1 has taken up. It may not be frank or fair on his part to do so: and it is possible that it might have been avoided in the trial Court if sufficient attention had been paid to the importance of the point. But I am unable to say that the argument urged by Mr. Rao is not open to him on these proceedings. There is practically no evidence that the opponent No. 1 is the author of this pamphlet, His name appears as the author on the title page and the first and the last songs show that one Trivikram is the ostensible author thereof as that name occurs there. Whether that Trivikram is an assumed name or represents the opponent as Trivikram does not appear. The pamphlet is relied upon as evidence of the fact that he is the author but there is no presumption as regards a book such as we have before us that the person whose name appears as the author is the author thereof. Further, the statement of the Manager, Ex. 2 A, which is relied upon as evidence, is no evidence of the fact. It is doubtful whether this statement is made in pursuance of any rules under Act XXV of 1867. In 1868 a provision was made for it under the rules: but the rules of 1868 and 1871 are now superseded by Notifications published in 1891, which were issued after the amending Act X of 1890. (See Local Rules and Orders under Enactments applying to Bombay, Vol I, pp. 54 and 55). The practice, however, of getting the statement from the Manager of the Press seems to have been continued thereafter. Assuming, without deciding, that the statement was made under the rules framed under the Act, it is clear that S. 18 only provides for keeping a separate catalogue of books showing, so far as may be practicable, the particulars mentioned in the section. The object is not to get any independent proof of the facts but to show in a separate register certain information which would be and could be gathered from the publication itself. The use of the expression 'so far as may be practicable' shows that it is not necessary that in all cases the information as to all the particulars should be available. The effect of getting the statement from the manager would be merely to facilitate the keeping of a catalogue of books, which the officer mentioned in the section is required to keep and to reduce the ministerial work of the officer concerned. But the section does not provide for such a statement and I do not see how such a statement can be treated as evidence of the facts stated therein. The name of the author would be published by the Press on information furnished to the Manager by the publisher: and his statement cannot carry the case any further even taking it as evidence in the case. The Manager should

have been examined to show whether he had any knowledge of the fact. The statement by itself would be insufficient to indicate such knowledge.

It seems to me, therefore, that on the present record it is not possible to hold it proved that the opponent No. 1 is the author of the pamphlet. There is no statutory obligation on the Press to publish the name of the author as there is to publish the names of the printer and the publisher under S 3 of the Act. The finding of the lower Court appears to me to be based upon materials which must be held to be insufficient for the purpose of establishing the fact. It may be a technical point in a sense but it is one, the benefit of which cannot be reasonably denied to the opponent.

As regards opponent No. 2, he is the keeper of the Press and his name appears as the printer of the pamphlet as required, by S. 3 of the Act. In view of the statement of the Manager, it is clear under the circumstances that he is rightly held to be the printer of the pamphlet. In the absence of any evidence on his part to show that the name of the printer has been wrongly printed, the statement of the Manager would be sufficient. The Press has to comply with the statutory requirements of S 3 and the Manager of the Press would have direct personal knowledge as to whether it was printed in his Press or not. I have no hesitation in rejecting the argument urged on behalf of opponent No. 2 that he is not shown to be the printer. I also reject the argument urged on his behalf that he is not shown to have disseminated this matter. By printing the matter he undoubtedly abetted the dissemination of it. The point, which presents difficulty in his case, is that he is not shown to have any knowledge of the matter published. He has stated as follows:—"Mine is a big press in the Karnatik and it is managed by an independent staff such as a Manager, clerks and others, and it is not possible for me to scrutinize personally every detail of the concern." Both sides have relied upon the observations in *Emperor v. Shankar Shrikrishna Dev* (1) the opponent No. 2 contending that some proof of his knowledge of the contents is necessary, the Crown contending that the declaration under S. 4 of the Act is *prima facie* proof of his knowledge, and that it was for opponent No. 2 to prove the contrary. I have read the judgment in *Emperor* v. *Shankar* carefully and I think that the point must be decided on the facts of this case. I do not think that the declaration under S. 4 of the Act is evidence of his knowledge of the contents, though it is a fact which along with other evidence in the case must be considered in deciding the question of fact His name appears as the printer, as representing the Press under S. 3 of the Act. I am unble, however to accept the view that the fact of his being the keeper of the Press and the printer of the pamphlet by itself implies any knowledge of the contents. In *Emperor* v. *Shankar* the printer was charged under S. 124 A, Indian Penal Code. Here he is proceeded against under s. 108, Criminal Procedure Code. But that makes no difference as to the necessity of proof of the knowledge of the contents. Here the pamphlet is small: and any one actually seeing it would not find it difficult to know its contents, as was the case in *Emperor* v. *Shankar*.

The Manager, who must have undoubtedly known of this having been printed in the Press, would know its contents having regard to the nature, size and subject-matter of the pamphlet. The keeper of the Press and the printer, however, may not know the contents. I think that some evidence which would indicate a knowledge of the contents on his part was necessary. The examination of the Manager might have settled this matter one way or the other. But as it is I am not satisfied that there is any evidence to support a finding as to his knowledge of the contents which seems to me to be necessary. There is no provision in the Act as to the presumption to be drawn from a declaration made under S. 4 and from the names of the printer and publisher printed under S. 3, as there is under S. 7 as regards declarations made under S. 5 of the Act. The knowledge of the contents so far as

(1) (1910) 35 Bom. 55; 12 Bom. L. R. 675-11 Cr. L. J. 546-7 I. C. 937.

necessary has to be proved like any other fact.

As regards accused No. 3 it is clear that his name appears as the publisher this is in accordance with the requirements of s. 3. The Manager would have to inquire as to who the publisher is, in order to comply with the provisions of S. 3: and under the circumstances his statement (Ex. 2A) may be taken as sufficient proof of the fact that he is the publisher.

If he is the publisher he disseminated or at least abetted the dissemination of the objectionable matter; and in the case of publisher, there is no reason to think that he would not have the necessary knowledge of its contents.

I would, therefore, make the rule sbsolute and set aside the order so far as it relates to original opponents Nos. 1 and 2, (Pitre and Jathar), and discharge the rule as to opponent No. 3 (Powar).

This is not a satisfactory result as the persons, who may be far more responsible than opponent No. 3 are not reached, while a young and poor student suffers probably for the acts of some other porsons: but on the evidence as it stands it seems to me to be unavoidable. It is not unlikely, however, that the proceedings may have the desired effect on the persons connected with the dissemination of the objectionable matter contained in this pamphlet.

CRUMP J. I am constrained to say that in this case matters which might and ought to have been established by direct evidence have been allowed to rest on dubious presumptions, and to this alone is attributable the difficulty we have experienced in coming to a decision. That the two pamphlets before us contain matter punishable under S 124 A or S. 153 A is to me clear and the point is whether each of these accused is shown to have disseminated or attempted to disseminate or to have in anywise abetted the dissemination of these pamphlets. There is no evidence of dissemination. We do not know what was done with the pamphlets. No one is called who purchased one or saw one purchased, or even saw one in the hands of any member of the public. But in my opinion it is reasonable to presume that they were printed for the purpose of dissemination, and any one who knowingly assisted in the printing of these pamphlets, or indeed in their publication may well be held to be within the words "or in anywise abets the dissemination of such matter."

The learned Advocate-General relies on the following matters:—

(i) The pamphlets themselves.

(ii) The declaration under S. 3 of Act XXV of 1867.

(iii) The declaration under S. 4 of the said Act.

(iv) The written information furnished by the Manager of the Press for the purposes of S. 18.

It is necessary to consider how far these matters establish the connection of each of these three persons with the objectionable matter and how far such connection goes to show that each of them disseminated, or attempted to disseminate or abetted the dissemination of the seditious matter.

A printed book of itself proves nothing relevant to the present enquiry. There is no presumption that it is written by the man who is described as the author unless it is one of that limited class of books covered by S. 87 of the Indian Evidence Act. Were the manuscript before us, it would require proof (vide S. 67 of the Act). The process of printing does not, so far as I can see, remove that necessity. The declarations under Ss. 3 and 4 of Act XXV of 1867 may be presumptive proof of these matters which must by the statute be set out in those declarations, but the authorship of the book is not one of those matters. Whether such declarations are evidence against any person other than the person making them may be doubted, but this point need not be considered. The written information given by the Manager of the Press is not given in the discharge of any duty, for neither the Act nor the Rules under the Act, as those Rules now stand, impose any such obligation. It is further open to doubt whether this written information contains anything more than what can be gathered from the book itself. The admission

in Ex. 59 that the Manager's signature is genuine does not carry the matter further. I fail, therefore, to find anything in the case to prove that accused No. 1 wrote the Marathi pamphlet. His connection with these publications or their dissemination is not sought to be proved in any other manner. Whether authorship alone would bring a man within the ambit of S. 108 of the Code of Criminal Procedure is a matter on which I reserve my opinion until it is necessary to decide that point.

Accused No. 2 is proved to be "the keeper of the Press." That may be presumed from the declaration under S. 4 but from that alone I should hesitate to presume that he was aware of the nature of these two publications. In *Emperor* v. *Shankar Shrikrishna Dev* (1) this Court refused to make this presumption. The facts there were that the accused was shown to be a friend of the writer. On the other hand the Court relied on the difficulty of detecting the seditious matter in the work there in question. Here we have the bare declaration. No attendant circumstances are proved to assist our decision. I am not prepered to presume knowledge merely from the fact that accused No. 2 is the keeper of the Press. Such a presumption does not necessarily arise from the ordinary course of business. A keeper of a considerable Press may not know the contents of each and every book printed at his Press. Without details as to the connection of the keeper with the actual business it is impossible to make any such presumption. I cannot see that the declaration under S. 3 or the written information supplied by the Manager carries the matter any further Without knowledge a man cannot be guilty of abetment.

As regards accused No. 3 I am prepared to take the declaration under S. 3 of Act XXV of 1867 as proof that he is the publisher and a man who assumes that position with reference to seditious matter may fairly be presumed to have abetted the dissemination of such matter even though there is no independent proof of dissemination.

On these grounds I agree with the orders proposed by the learned Chief Justice.

Rule made absolute.

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MACLEOD C. J., AND CRUMP. J'

Bhagubai Tukaram Jogdunde--Appellant.

v.

Appaji Sitaram Charathe— Respondent.

S. A. No. 210 of 1922. D/- 1st December 1922, from the decision of Dt. J., of Ahmednagar, in Appeal No. 238 of 1920.

(a) Will—Soldier's will—Oral will.

Kindred Roll, whatever other effect it might have, cannot be treated as a will. Even supposing a soldier informed the Military Authorities that he considered a certain person to be his heir, that statement would not be taken as meaning that the soldier intended to make an oral will disposing of property which would not come into the hands of the Military Authorities after his death. [P. 261 C. 1]

Y. V. Bhandarkar,-for the Appellant.

J. G. Rele,—for the Respondent.

Macleod C. J.—The plaintiff is the sister of one Bala Narayan who died while serving with the regiment of 121st Pioneers. He left a widow called Sugandha. Purporting to exercise her widow's rights she sold the plaint property to the second defendant. The plaintiff's suit is to recover this property. The plaintiff mainly relies on the "Kindred Roll and Names of Heirs" appertaining to the deceased. A true copy has been produced signed by the Officer Commanding the Depot, and we are entitled to accept that as evidence of the Kindred Roll of the deceased. But the question really is whether by virtue of that document, or any other evidence in the case, the suit property has passed to the plaintiff. The trial Court held that the Kindred Roll was a will embodying the legal declaration of the intentions of the testator with respect to his property which he desired to be carried into effect after his death. The District Judge held that the document was not proved. I think there he was wrong. But he was right in refusing to accept the view of the Subordinate Judge that Exhibit 23 was a will.

He then considered whether there was any evidence which proved an oral will of the deceased, and considered that the evidence of Husseinkhan, the only witness on behalf of the plaintiff, was not sufficient to prove an oral will. Accordingly the decree of the trial Court was reversed and the suit was dismissed. It is quite clear that the Kindred Roll, whatever other effect it might have, cannot be treated as a will. At the most it is evidence that Bala made a declaration before the Military Authorities that Bhagu was his heir or was the person to whom his estate should be made over on behalf of the heir. It is not very clear for what purpose the Kindred Roll is prepared execpt that the Military Authorities wish to know who are the next-of-kin in case the soldier dies. They want to know to whom the family pension should be paid, and to whom any of the effects of the deceased which may remain in their hands after his death should be handed over. The Military Authorities have nothing whatever to do with the landed property which a soldier may have, and I do not think that even supposing a soldier informed the Military Authorities that he considered a certain person to be his heir, that statement would be taken as meaning that the soldier intended to make an oral will disposing of property which would not come into the hands of the Military Authorities after his death. The Kindred Roll, therefore, in my opinion, could only be used for a limited purpose. I do not think there is any evidence in this case that Bala made an oral will disposing of the suit property in favour of his heirs. The decree, therefore, of the District Judge dismissing the suit was correct and the appeal must be dismissed with costs.

Appeal Dismissed.

1923 BOMBAY 261

MACLEOD C. J., AND CRMUP. J.

Emperor v. *Imam Hasan.*

Cr. A. No. 572 of 1922 D. 8th Feb. 1923 from conviction and sentence passed by Sess. J., of Dharwar.

Criminal P. C. S. 471—Report not necessary.

In view of the amendment of S. 471, Cr. P. C., there is now no longer any necessity for a Court which acquits a person on the ground of insanity to report the case for the orders of the Local Government. Clauses [2] and [3] of that section were repealed by Act IV of 1912, mainly with the object of relieving the Local Government from the necessity of dealing with the cases of such persons.[P. 262 C. 1]

20 Bom. L. R. 629. Not Foll.

MACLEOD C. J. In this case the accused was found guilty by the Sessions Judge of two offences under S. 302, Indian Penal Code, and sentenced for each offence to transportation for life'

On appeal, we came to the conclusion that the evidence showed that the man was not of sound mind at the time when he committed these acts in the sense either that he knew the nature of his acts, or that he knew that they were wrong or contrary to law, We held that he was entitled to an acquittal on the ground of insanity. Under S. 471, Criminal Procedure Code, we directed that he should be kept in safe custody in the place where he was then confined, and that the papers of the case should be sent to the Local Government to pass such orders as might to them seem expedient. We followed the procedure laid down in *Emperor* v. *Somya Hirya Mahar* (1).

We have since received a letter from Government, dated January 12, 1923. pointing out to us that under S. 471. Criminal Procedure Code, as amended by Act X of 1914, it is for the High Court to pass the necessary orders, or direct the Sessions Judge, Dharwar to pass them under Government Resolution Home Department, No. 8512, dated August 30, 1921.

In the above-mentioned case it appeared to the Court that the omission of the words

(1) (1918) 43 Bom 134--20 Bom. L. R. 629--19 Cr. L. J. 771--46 I. C. 691

"and shall report the case for the orders of the Local Government" in S. 471, Criminal Procedure Code, directed by Act X of 1914, made no substantial change in law relating to lunatics under the Code, and that the powers of the Court and of the Government were not altered by the repeal of those words. But as the section now contains no direction that the Court should report the case for the orders of the Local Government, with all respect, I cannot see any necessity why the Courts should continue to follow the old procedure.

Apart from the question whether as a matter of fact the Courts have now any power to make such a report it seems to me that the intention of the Legislature, when amending S. 471 by leaving out those words, was that the Court, in a case where it has been found that an offence has been committed by a lunatic, should confine itself to making on order that he should be kept in safe custody in such place and manner as the Court thinks fit. Then it is for the Government under their own powers to decide the future fate of the person concerned. Instructions have been given to judicial and Executive officers in dealing with criminal lunatics, by a Government Resolution of August 30, 1921 in the Home Department, No. 8512; and the officers concerned will no doubt follow those instructions as soon as an order is made by the Court under S. 471, Criminal Procedure Code.

Therefore we set aside order we passed on the previous occasion, dated November 30,1922, and we direct that the accused should be kept in safe custody in the place where he is now kept.

CRUMP J. I agree that in view of the amendment of S. 471 Criminal Procedure Code, there is no longer any necessity for a Court which acquits a person on the ground of insanity to report the case for the orders of the Local Government. Clauses (2) and (3) of that section were repealed by Act IV of 1912, mainly with the object of relieving the Local Government from the necessity of dealing with the cases of such persons. But after that was done, it was found that the last twelve words in the first clause of S. 471 had remained unrepealed, and the position was that the Courts were bound to report the case for the orders of the Local Government while the Local Government had ceased to have power to act on such report. Therefore the last twelve words in S. 471, clause (1), were repealed by Act X of 1914. The position is now in my opinion, clear, and there in so longer any ground for supposing that any report is necessary in such cases. With all deference I am unable to agree with the decision in *Emperor* v. *Somya Ariya Mahar* (1) in so far as it lays down that there has been no alteration in the law.

Order set aside.

1923 BOMBAY 262

MACLEOD C. J. AND CRUMP, J.

Emperor,

v.

Hanmappa Rudrappa.

Cr. A. No. 637 of 1922, D. 15th Jan. 1923, from the conviction and sentence by Sess. J. of Bijapur.

Penal Code S. 201, 302,-Alternative charge.

A person can be charged first with having committed a murder; secondly, in the alternative, if the evidence does not show that he has committed the murder, for causing evidence to disappear with the intention of screening the offender; in other words, of having been an accessory after the fact. The real test is whether the accused has been prejudiced by the alternative charge made in one trial. [P 253 C 1.2].

S. S Patkar, Government Pleader,—for the Crown.

MACLEOD C. J. The three accused were tried before the Sessions Judge of Bijapur on a charge of murder as well as on an additional charge framed by the Sessions Court under s. 201. Indian Penal Code, of causing disappearance of evidence of the commission of the offence of murder in order to screen the culprits. The second and third accused were acquitted on both charges. The first accused was acquitted on the charge of murder, but convicted under s. 201, Indian penal Code. It was argued for the accused that a conviction under S. 201, Indian Penal Code

could not be legal as he was suspected to be one of the murderers. I do not see myself any reason why a person should not be charged first with having committed a murder; secondly, in the alternative, if the evidence does not show that he has committed the murder, that he has been guilty of causing evidence to disappear with the intention of screening the offender; in other words, of having been an accessory after the fact.

In *Bucha* v. *King Emperar* (1) it was held that when an accused person has been acquitted of a charge of committing a crime, the fact that he had been suspected and tried of the principal offence would not prevent his conviction under S. 201, Indian Penal Code, if there is clear proof that he has caused evidence to disappear in order to screen some unknown offender from legal punishment. In that case the appellants were charged only under S. 302, Indian Penal Code but the Sessions Judge having acquitted them of the offence of murder convicted them under S. 201, Indian Penal Code. In appeal the learned Judges very carefully discussed all the authorities on this point, and we need say no more than that we agree with the conclusions at which they arrived as set out at p. 6 of the report:—

"The evidence was, however, held to be sufficient to prove that a murder had been committed. The evidence against two, of the appellants, was held to be sufficient to establish an offence under s. 201 to have been committed by them, in respect of the murder. We see nothing in the law, or in any of the rulings we have discussed, which lays down that such a conviction as the present is not a proper one, provided always that the prisoner has not been prejudiced in his defence. The appellants were charged only under S. 302, but the evidence they had to meet clearly included the concealment of the body of the murdered man, and we think that they have been in no way prejudiced, that the case was covered by S. 237 of the Criminal Procedure Code, and that the appellants have been properly convicted."

In *Queen-Empress* v. *Limbya* (2) it was held that a conviction on a charge of having been an accessory to an offence under s. 201, Indian Penal Code, is not illegal merely because it is suspected, but not proved or admitted, that the accused committed, or was one of the several persons who committed, the principal offence.

In this case, the mere fact that it was believed at first that the first accused was concerned in the actual murder would not debar the Court from excluding all the evidence against the accused on the charge of murder, and convicting him of the charge under S. 201, Indian Penal Code.

To the same effect is the decision of the Calcutta High Court in *Teprinessa* v. *Emperor*, (3) where it was held that although there might be circumstances of grave suspicion that a person was the murderer, his conviction under S. 201, Indian Penal Code, would not be vitiated by the existence of such circumstances.

If the accused had been charged with murder alone and had been acquitted, there would be no legal obstacle in the way of his being charged again with an offence under S. 201, Indian Penal Code. As pointed out by the learned Judges of the Chief Court of the Punjab the real test is whether the accused has been prejudiced by the alternative charge made in one trial, I do not think in his case there was any such prejudice and, therefore, the appeal will be dismissed.

Appeal dismissed.

(1) 1 P. R. (Cr.) 1904.

(2) [1895] Unrep. Cr. C. 799.

(3) [1918] 46 Cal. 427-19 Cr. L. J. 903-47 I. C. 275.

1923 BOMBAY. 264 (1)

MACLEOD C J., AND CRUMP. J.

Gambrao Manyaba Bhoite—Appellant

v.

Vinayak Bapusaheb Kadam—Opponent.

Civil Application No. 505 of 1922 D. 15th December 1922.

Civil P. C. O. 41 R. 10-Poverty could not be a ground for barring order.

Where the Court has been given absolute discretion to make an order for security for costs, no Bench of Judges can lay down rules which purport to fetter the discretion of other Judges in any similar application which may be made thereafter. It is quite true that as a general rule a Court is loath to prevent an appellant from pursuing the remedy allowed to him by law merely on the ground of poverty. But each case must stand on its own facts, and there may be cases in which a party should be directed to give security at any rate for the costs of the appeal, before he is allowed to go further. Where a minor suing through next friend failed and the costs could not be recovered from him, the appellate Court at respondent's instance ordered security for costs of appeal.

D. C. Virkar—for the Applicant.

V. D. Limaye—for the Opponent.

Macleod C. J.—This is an application by a successful party in the Court below that this Court should demand from the appellant security for the costs of the appeal and of the original suit. The applicant proved that an attempt was made to execute the decree in his favour for costs, but without success Undoubtedly under Order XLI, Rule 10, the appellate Court may in its discretion demand from the appellant security for the costs of the appeal or of the original suit, or of both. We were referred to the decision in *Maneckji* v. *Goolbai* (1) in which a similar application was made, under the corresponding section 549 of the then Civil Procedure Code (Act X of 1877). The Court declined to make the order, the Chief Justice saying "The poverty of the defendant is no ground for depriving him of his right to appeal" That was a decision on the facts of the case. It was reported, because, I presume, it was considered that a rule of guidance for the exercise of the Court's discretion was thereby laid down. But where the Court has been given absolute discretion to make an order for security for costs, then in my opinion no Bench of Judges can lay down rules which purport to fetter the discretion of other Judges in any similar application which may be made thereafter. It is quite true that as a general rule a Court is loath to prevent an appellant from pursuing the remedy allowed to him by law merely on the ground of poverty. But each case must stand on its own facts, and there may be cases in which a party should be directed to give security, at any rate for the costs of the appeal, before he is allowed to go further. In this case the appellant is a minor who filed a suit through his next friend, his natural father, asking for a declaration that he had been validly adopted. He has lost in the trial Court, and we think that, as the costs in the Court below of the successful party could not be recovered, security should be given for the costs of the appeal. To that extent, therefore, we make the rule absolute. One month is allowed to give the security. What the nature of that security should be is for the lower Court to decide. It does not matter where the security comes from so long as it is sufficient. Costs, costs in the appeal.

Rule made absolute.

(1) (1878) 3 Bom 241

1923 BOMBAY. 264 (2)

MACLEOD C. J., AND CRUMP. J.,

Devendra Marappa Jingowda—Applicant.

v.

Shettappa Hooleppa Ventagatti—Opp. Party

Cr. Rev. No. 24 of 1923 D-1st Feb. 1923, from an order passed by Sub. Mag., Belgaum.

Cr. P. C S 423-Want of notice-Revision Judgment of acquittal.

In the absence of notice to the District Magistrate on appeal from conviction, the order of acquittal is revisable but not at the instance of the complainant.

S. B. Jathar—for the Petitioners.

Macleod C. J.—This is an application in revision made by the complainant against an order of acquittal. The three accused were charged before the Third Class Magistrate of Khandesh for having committed offences under Ss. 352and 504, Indian Penal Code.The

Magistrate discharged the accused Nos 2 and 3, and after carefully considering the evidence convicted accused No. 1 under Ss. 352 and 504, Indian Penal Code, and ordered him to pay a fine of Rs. 30. In appeal the Sub-Divisional Magistrate reversed the conviction and acquitted the accused. We are told that no notice was sent by the appellate Court to the District Magistrate as should have been done under S. 422, Criminal Procedure Code. This no doubt was an irregularity, and had the District Magistrate moved in the matter, we should certainly have interfered, as was done by this Court in *Emperor* v. *Shivlingappa Basappa* (1) but it is different matter when we are asked by the complainant to interfere; and no objection has been raised by the District Magistrate to the proceedings of the appellate Court. Therefore we decline to pass any order on this application.

(1) (123) Bom. 74-24 Bom. L R. 1150

1923 BOMBAY. 265 (1)

MACLEOD C. J., AND CRUMP, J.

Gangadhar Naryan Pandit—Appellant

v.

Ibrahim Bava Dingankar—Respondant

S. A No. 875 of 1918, D-15th December 1922 from the decision of Acting D. J., of Ratnagiri, in A. No. 118 of 1917.

Hindu Law-Succession-Mitakshara School-Separate sons and grandsons succeed per stripes,

The right of divided sons grandsons and great grand-sons of the last male owner to succeed to his divided property is the same as in the case of undivided family property i. e. per stirpes,

P B. Shingne—for the Appellant

Macleod C. J.—The question in this appeal is whether Gangadhar as the surviving son of Naro succeeded to Naro's property to the exclusion of the sons of his deceased brothers. Naro and his four sons had become separated. Gangadhar contended that after the death of Naro he was entitled to one-fifth share in the Khoti which had come to Naro on the partition. The question was considered in *Marudayi* v. *Doraisami Karambian* (1). It was there held that the right of divided sons, grand-sons and great-grandsons of the last male owner to succeed to his divided property, is the same as in the case of undivided family property. Their Lordships said (p. 351):—

"It must however be conceded that to allow a rule of succession *per stirpes* in a separated family is to admit an exception to the rule of Hindu Law by which the inheritance devolves on the nearest sapinda; but the exception is one which in our opinion necessarily follows from the exposition given by Vijnaneswar (Mit. 1. 1. 3) of the rights of sons and grandsons in the estate of the grand-father."

With respect I agree. Moreover, speaking for myself, I should not be inclined to differ from a decision on a question such as the present one, by a Division Bench of another High Court unless it could be established in argument before me that there were very good grounds for tinking that we were justified in coming to a different conclusion. In this case applicant's pleader has not been able to put before us any reasons why we should differ from the decision of the Madras High Court except that it would be against the interest of his client.

There is a further reason why we should follow it, as this case is cited in the 8th Edition on Mayne's Hindu Law, para 6540, at page 755, and no exception whatever has been taken to the law as laid down therein. We, therefore, follow that decision and dismiss the appeal. As the respondent has not appeared, there will be no costs.

Appeal dismissed.

(1) (1907) 13 Mad. 348; 17 M. L. J. 275.

1923 BOMBAY. 265 (2)

MACLEOD C. J., AND CRUMP, J.

Vithal Yeshvant Gavde—Appellant.

v.

Shivappa Mullappa Hosmani—Respondent.

F. A. No. 51 of 1921, D-3rd Jan. 1923 from the decision of Fist Class Sub. J. at Belgaum in Suit No. 195 of 1918.

Hindu Law-Joint family-Mortgage Karta for business-Presumption.

When the manager of a joint Hindu family mortgages joint estate, it must still be incumbent on the parties supporting the mortgage to prove that the money raised on the mortgage was required for family purposes, No doubt if the family is carrying on trading business, it would be very much easier to prove that the money was required for the purposes of that

trade, and so for family purposes, than if the family were mere agriculturists. But it is not necessary inference that because manager was carrying on business and because he raised moneys by mortgaging family property, that the money was necessarily required for the purpose of the joint family business.

H. C. Coyajee with D. R. Mancrikar—for the Appellant.

Nilkant Atmaram—for the Respdts.

Macleod C. J.—The plaintiffs sued to recover on a simple registered mortgage bond Rs. 9,400 principal and Rs. 9,400 as interest, with costs and future interest at twelve per cent The original mortgagor was one Krishnappa Annappa. The pedigree of the family is as follows:—

Annappa

- Yeshwant (Died. 1903)
  - Vithal (Deft. 2)
  - Kashinath (Deft. 3)
- Krishnaji (Died 1910)
  - Vaman (Deft. 1)

When the mortgage was executed Kashinath, the son of Yeshwant, the brother of Krishnaji, was separated from the family. The members who remained joint were Krishnaji, his son Vaman, and Vithal, the brother of Kashinath. A decree was passed in favour of the plaintiffs for Rs. 18,800, with costs and future interest at twelve per cent per annum on Rs. 9,400 from the suit date till the expiry of six months from the date of the decree and at six per cent. thereafter until satisfaction. On failure to so pay, the mortgaged property excepting the interests of defendant No. 3, if any in it, or a sufficient portion of it, was to be sold towards satisfaction of the mortgage. The personal remedy was held to be time-barred. The principal issue in the case was whether the mortgage was executed for a joint family necessity. The Judge found that issue in the affirmative. The second defendant, Vithal, has appealed. In 1909, Krishnaji was the sole adult member of the family. He carried on an iron shop and a grocery shop, which undoubtedly were businesses belonging to the family, From 1906 to 1909 Krishnaji had also carried on an oil shop. But that was a new business, and so the other members of the family would not be liable for any debts which were due by that shop. In 1909. Krishnaji entered into a partnership with some other persons to deal in mirabolams, and there can be no doubt that that could not be treated as a family business, and that Krishnaji would be liable for any debts which were incurred for that business.

The law regarding mortgages of joint family property made by the manager of a joint family governed by the Mitakshara, who is not the father of the other members, is laid down in *Ananut Ram* v. *The Collector of Etah*, (1) a decision of the Privy Council. Such a mortgage, it was held, could only be justified so far as it was wanted for the joint family purposes. If the necessity could not be established by direct evidence, it might be assumed, if it could be shown that reasonable care was taken to ascertain if such circumstances existed and the transferee acted in good faith. In either case the burden of proof was on the person who claimed the benefit of the mortgage. It was further held that if the mortgage debt was not incurred for necessity, not even the mortgagor's own interest could be sold in enforcement of such a mortgage.

In the suit mortgage deed, with regard to the amount taken from the mortgagee it was stated as follows

(1) (1917) 40 All. 171-34 M. L. J. 291-27 C. L. J. 363-20 Bom L. R. 524-(1918) M. W. N 446-7 L W. 323-4 Pat. L. W. 226-16 A L. J. 245-23 M. L. T. 228-22 C. W. N. 484-44 I. C. 290 (P. C.)

"The amount of rupees taken from you by us for our needs arising out of some pecuniary difficulties, i. e., for the necessity of the business of the shop belonging to the family of Krishnaji Annappa Gavde, and the said minors is as follows —Rs 2,000: Krishnaji Annappa Gavde, one of us has taken from you on Jaunary 11, 1909, by passing in writing a promissory note Rs. 2000 in cash and Rs 7 400 have been received from you now."

That statement in the mortgage bond would not be binding on the second defendant, nor would it avoid the necessity of the mortgagee proving that the mortgage money was required for joint family purposes. There is no evidence whatever that at the time when the mortgage was executed either the iron shop or the grocery shop was in need of funds. There is no evidence that the mortgagee took any steps to ascertain whether or not the money was required for the family business, and therefore, it is difficult to see how the mortgagee has satisfied the burden of proof which lay upon him. But reliance was placed on the decision in *Raghunathji Jarachand v. The Bank of Bombay* (2). The plaintiff in that case filed a suit on certain promissory notes signed by the only adult male member of a joint Hindu firm carrying on an ancestral trade, and it was held that the minor defendant's share in the firm was liable. Mr. Justice Chandavarkar at p 81 said:—

"Assuming that the minor is governed by the principle of Hindu law, what is the Hindu law on the subject? Where a minor is a coparcener in a joint family, his *share* in the family property is liable for debts contracted by his managing coparcener for any *family purpose* or any purpose incidental to it. If the family is a trading firm, the same rule must apply with this difference that the term *family purpose* or *purposes incidental to it* must here give way to the expression *trading purpose or purposes incidental to it* having regard to the nature and objects of the family business. The circulating of a negotiable instrument is in the case of a joint family trading as a firm, necessary for its existence and its purposes. It is a necessary incident of the carrying on of the trade Without it the firm could not gain credit in the market and prosper."

With the greatest respect I should say that assertion was far too wide. Although in the case of some joint family firms the circulating of a negotiable instrument may be a necessary incident of the business, it still must be shown that it is a necessary incident of the business carried on by the Hindu joint family whose members the plaintiff seeks to be made liable. I think it is most probable that from the evidence which was before the learned Judge it did appear that in that family it was incidental to its business to circulate negotiable instruments. But I do not think that the argument holds good that an exception can be grafted to the rule laid down by the Privy Council. When the manager of a joint Hindu family mortgages joint estate, it must still be incumbent on the parties supporting the mortgage to prove that the money raised on the mortgage was required for family purposes. No doubt if the family is carrying on a trading business, it would be very much easier to prove that the money was required for the purposes of that trade, and so for family purposes, than if the family were mere agriculturists. But it is not a necessary inference, that because Krishnaji was carrying on two shops dealing in iron and groceries, and because he raised moneys by mortgaging, that the money was necessarily required for the purposes of the joint family business There is no direct evidence as to what was the capital involved in the iron and grocery shops in 1909, but there is also no evidence whatever that they were in need of so much money as was raised by Krishnaji on the said mortgage. On the other hand' it has been proved that Krishnaji in 1909 was entering upon an entirely new venture with several outside partners which required, as the accounts show, considerable capital,

It was suggested that before 1909 Krishnaji had been dealing in mira-

(2) (1910) 34 Bom. 72–11 Bom. L. R. 255–2 I. C. 173.

bolams. That suggestion is based on a statement made in the plaint in the suit filed by Kashinath, the third defendant, for partition, in which he claimed a share in the mirabolam business. That by itself would not be evidence that as a matter of fact Krishnaji was carrying on mirabolam business as a part of the family trade. Even if he was doing so, it would not be an ancestral business any more than the oil shop was. It seems to me, therefore, that the onus which lay on the mortgagee to prove that Krishnaji was entitled to mortgage in his favour joint family estate for family purposes has not been satisfied. The Judge says at page 7 "I fully believe that the suit debt was borrowed by Krishnaji for joint family necessity, i.e., trade necessity as stated in suit bond. It is not shown that Krishnaji had no necessity to borrow at the time of the suit bond. Krishnaji was a man of business and I do not hence disbelieve the statement in suit bond about the amount being taken for family trade necessity." I have endeavoured to show that the learned Judge has not appreciated, even if he considered, the decision of the Privy Council, which shows that it is not sufficient for a mortgagee to prove by evidence that the mortgagor was carrying on a family business. He must show that the money was required for that business It follows that the appeal must be allowed, and that the interest of the second defendent in the suit property must be excepted from the sale.

The third defendant Kashinath was made a party to the suit and although the suit was dismissed against him, he was ordered to pay his own costs. In his Appeal No 93 of 1921, it has been argued for the respondents that no appeal lies on the question of costs. In this particular case we think a principle is involved. But apart from the question whether any principle is involved, since the second defendant has appealed, the whole decree of the lower Court is before us, and we can make any alterations we think fit in it. The principle involved is due to the rule that costs follow the event, and that the successful party is entitled to get his costs, unless it has been shown that there is some very good reason why he should bear his own costs. This has not been done. The plaintiffs, therefore, will have to pay the costs of the second and third defendants in the Court below and of their respective appeals.

Appeal allowed.

1923 BOMBAY. 268

PRATT AND MARTEN JJ.

Thana Zalaji Shet Marwadi—Appellant.

v.

The shop "Dhana Jawhrji — Respondent.

No. 60 of 1921 dated 29th Sept. 1922, from S. A. 444 of 1921 against the decision of the Dt. Judge of Thana.

(a) Civil P. C. O. 20 R. 12 (1) (c) nature of application under.

An application for mesne profits to be ascertained under the inquiry under order XX rule 12 (1) (c) is not an application made under the Code of Civil Procedure nor an application in execution. It is an application to the Court to proceed from the stage of preliminary decree to a final decree and Art 181 of the Limitation Act does not apply. [P 269 C 1]

(b) Lim. Act Art 181—applicability.

The limitation Act does not apply to all applications. The applications specifically described in the 3rd division of the first schedule of the Indian Limitation Act are all the applications under the Civil Procedure Code and under those Article 181 must be so limited. [P 269 C 1]

S. Y. Abhyanker—for the Appellant.

G. S. Rao—for the Respondent.

PRATT J.—The only point that arises in this appeal is one of limitation. On the 16th June 1915 the plaintiff in this suit got a decree for possession and mesne profits since the institution of the suit. As to mesne profits the actual words of the decree were:—" And the defendant should give to the plaintiff the subsequent mesne profits under Order XX, rule 12, (1) (c)". This rule provides that the Court may pass a decree directing an inquiry as to rent and mesne profits from the institution of a suit. The decree was in effect a preliminary decree directing an inquiry as to future mesne profits. The decree was confirmed in appeal on the 30th November 1916 and the plaintiff

applied for execution as regards possession of the immoveable property on 6th June 1918. Subsequently he applied for mesne profits to be ascertained under the inquiry under Order XX, rule 12 (1) (c) and this application was made on 1st February 1920.

It is contended that this last application was barred under article 181 of the Limitation Act as it was not made within three years of the time when the right to apply accrued *i. e.* on 16th June 1915 when the decree order was made. The short answer to this objection is, I think, that the application was not an application made under the Code of Civil Procedure nor was it an application in execution. There were conflicting decisions under the old Code as to whether the mesne profits should be ascertained in a suit or in execution proceedings. This point has now been set at rest by Order XX, rule 12 (2) under which there is a preliminary decree directing an inquiry as to mesne profits and a final decree in respect of the mesne profits after that inquiry. The application was not by way of execution but an application to the Court to proceed from the stage of preliminary decree to a final decree.

Moreover, the Code does not provide for such an application. Order XX, rule 12 (1) (c) provides that the Court should hold that inquiry and should pass a final decree. There are no words such as those in Order 34, rule 5, sub-rule 2 under which a final decree for sale of the mortgage property cannot be made except on application made in that behalf by the plaintiff.

The Limitation Act does not apply to all applications. The applications specifically described in the 3rd division of the first schedule of the Indian Limitation Act are all applications under the Civil Procedure Code and under those article 181 must be so limited. This has been expressly decided in this Court in the case of *Bai Manekbai* v. *Manekji Kavasji* (1) where Sir M. R. Westropp Kt. C. J. said: "An examination of all the other articles in the second schedule relating to 'applications' that is to say, of the third division of that schedule shows that the applications therein contemplated are such as are made under the Civil Procedure Code. Hence it is natural to conclude that the applications referred to in article 178 are applications *ejusdem generis* i. e. applications under the Code of Civil Procedure." This was followed in Calcutta High Court in *Tiluck Singh* vs. *Parsotem Proshad* (2) where it was held that an application under section 89 of the Transfer of Property Act, to have a mortgage decree for sale made absolute, was not governed by article 178, Schedule II of the Limitation Act 1877. There is a more recent decision in *Datto Atmaram* v. *Shankar Dattatraya* (3) where it was held that a similar application for decree absolute for sale of mortgage charge being now governed by Order 34, rule 5 of Civil Procedure Code was not subject to limitation under article 181 of the Limitation Act. Scott C. J. expressly based his decision on the fact that since the transfer of certain sections of the Transfer of Property Act to Order 34 of the Code of Civil Procedure the application was governed by article 181.

Mr. Abhyankar refers to a judgment of this Court in *Bhagawan* v. *Ganu* (4) where one of the Judges expressed his opinion that an application by plaintiff mortgagor for an order for sale under section 89 of the Transfer of Property Act would be governed by limitation under the Limitation Act. But this is only an *obiter dictum*. Parsons J. said that the application would not be time barred even if that article were held to apply. This case therefore is not an authority for the proposition that article 181 would apply to applications which are not made under the Code of Civil Procedure.

Lastly Mr. Abhyankar refers to a recent case of *Vasudev Vishnu* v. *Gopal Parashram* (5) But there is no-

(1) (1883) (7 Bom. 213).

(2) (1995) 22 Cal. 925.

(3) (1914) 38 Bom. 32–15 Bom. L. R. 841–21 I. C. 318.

(4) (1899) 23 Bom. 644.)

(5) (1919) 43 Bom. 689–21 Bom. L.R. 687–51 I. C. 924.

thing in that case which assists his contention. There the plaintiff mortgagor applied for further time for the payment of the mortgage debt and Shah J. held that the application could not be considered as an application in suit to extend time and then to execute the decree on such extended time but must be treated as an application falling presumably under Order 34, rule 8 and that being so, article 181 applied.

Another case which illustrates the same point is *Rahimat Karim v. Abdul Karim* (6) where it was held that article 181 did not apply to an application made by a mortgagee for a supplemental decree against the personal estate of the mortgagor as it was an application made not under the Code of Civil Procedure but under section 90 of the Transfer of Property Act.

I would confirm the decree and dismiss this appeal with costs.

MARTEN J.—I agree. Under the preamble of the Limitation Act it appears that the Act is only intended to apply to "certain applications." Then when one turns to the third division of the First Schedule of the Act one finds that the applications set out there under articles 158 to 180 are what I will call specific applications, that is to say, applications expressly provided for under the Code. It has accordingly been held—and if I may say so with respect rightly so held—that article 181 which is in general terms only applies to applications *ejusdem generis*. In other words, one must find some specific provision in the Code for the application in question.

Turning next to the order made by the Court of first instance I agree with my Brother Pratt that it must be construed as a decree directing an inquiry as to mesne profits under Order XX, R. 12, (1) (c), and directing the defendants to pay what should be found due on making such inquiry. The order has not been drawn up in the proper form, but in substance that is what it amounts to. It should also be borne in mind that under the new Code there is a substantial alteration made in the procedure. Under the Code of 1882 the amount of mesne profits was to be determined in execution proceedings. But under the present Code mesne profits must be determined by the decree and not in execution proceedings. That being so, under the present Code there is no express provision for any application to be made by any of the parties for an inquiry or for payment It is really the duty of the Court to hold the inquiry, and one may compare it to a part-heard suit. That being so, it seems to me that there is no "application" here, within the meaning of article 181 of the Indian Limitation Act.

I am not familiar with the procedure actually adopted in the mofussil Courts, and therefore I am unable to say whether the appellant's counsel is correct in telling the Court that normally when an inquiry of this nature has been directed, it would be the duty of the Nazir or the Special Commissioner appointed under decree to ask the Court to issue the necessary summons. If that is so, then it emphasises what I have already pointed out, that this matter is really in the nature of a part-heard case, and is not an application by any of the parties to do any particular matter.

Counsel for the appellant has argued that if we hold, as we do hold, that the application is not barred by the Limitation Act, then there is no limit of time whatever to taking proceedings in a case like this. Whether that is so under the mofussil procedure I do not know. But on the Original Side there is an express provision in the Rules for what is to take place when an inquiry has been directed before the Commissioner, namely, that it is the duty of one of the parties to take out a warrant before the Commissioner to fix a day and so on for hearing the inquiry. (See New Rule 393: old Rule 390). In substance that is the same procedure as in the Chancery Divison, where normally it is the duty of a person having the conduct of the suit to take out a summons to proceed, when there has been a decree ordering an inquiry. On the Original Side delay

(6) (1907) 34 Cal. 672-6 C. L. J. 119-11 C. W. N. 674.

is provided for by Rule 409 which is as follows:—"In any case in which no proceedings have been taken in the office of the Commissioner for a period of one year in any reference pending before him, he shall certify the same to the Prothonotary, and remove the reference from his file, and the reference shall not be restored without an order of the Court or a Judge." So if there is any flaw, as to which I say nothing, in the mofussil procedure that is a matter to be provided for by their rules, and it affords no reason why we should put a false construction on the Limitation Act.

As regards *Vasudev* v. *Gopal* (5) with which we are pressed, I need only say that Mr. Justice Shah who gave judgment in that case is the same learned Judge from whose order this present appeal under the Letters Patent is made. I regret we have not had the advantage of any judgment from him in the present case; but I think it stands to reason that he would not have summarily dismissed the present second appeal, if he had thought the present suit in any way depended on his decision in XXI Bom. L. R. 687 That case, as my Brother Pratt points out, has no application here, ond I will draw attention to what Mr. Justice Heaton said at page 688. "But even before the end of 1910 three years after the date fixed for payment, a final decree had become impossible, an application for a final decree having become time-barred to both parties." It is clear to me that the existing authorities are entirely opposed to the appellant's contention. I agree that this appeal must be dismissed with costs..

Appeal dismissed

★1923, BOMBAY. 271

MACLEOD C. J. AND CRUMP J.

Chhotabhai Lalachand—(Plff) Appellant.

v.

Maganbhai Naginbhai—Deff No. 1 Respondent.

F. A. No. 243 of 1921, dated 9th Feb. 1923 against the decision of the additional first class Subordinate Judge at Surat in suit No. 146 of 1920.

Specific Relief Act—S. 14—Agreement to sell immoveable property—Property charged before sale—Rights of purchaser.

In a suit for specific performance of a contract to sell, even if the plaintiff knows that there was a claim against the defendant for maintenance there would be nothing in that fact to put the plaintiff on notice that there was an incumbrance on the suit property, and even if the defendant sold the property defendant would still be liable to provide maintenance out of the sale proceeds which would in spite of the sale retain the character of the ancestral property. The case comes within the section 14 of the Specific Relief Act and the plaintiff is entitled to compensation for the burden which is imposed upon the property he contracted to buy owing to the decree passed for maintenance. (P 272 C 1)

G. N. Thakor with R. J. Thakor—for the Appellant.

M. B. Lave—for the Respondent.

Judgment:—On the 22nd January 1918 the plaintiff entered into an agreement with the first defendant to buy certain property. Rs 201 were paid as earnest money and the sale deed was to be executed within two months Owing to various circumstances which it is not necessary to mention in detail, the time for the execution of the sale deed was extended Meanwhile the widow of the first defendant's brother filed a suit to establish her right to maintenance against the first defendant and her step-son and obtained an injunction in that suit against the first defendant absolutely restraining him from selling the suit property to the plaintiff. Eventually it was decided in that suit that the widow had the right to maintenance against her step-son and her husband's brother and the maintenance was made a charge on the immoveable property. The result was that when the plaintiff called upon the first defendant to execute the sale deed in respect of the suit property it was charged with the maintenance in favour of the widow. The widow was originally a party to this suit filed by the plaintiff for specific performance, but defendant No. 1 thought that she was not a necessary party and she was ordered to be struck off. For what reasons we do not know. but although the second defendant the widow was struck off certain issues were raised on the question (1) whether plaintiff entered into the plaint agreement with

notice of the widow's right, (2) whether the plaintiff purchased the property subject to the widow's right, and (3) whether the plaintiff's claim for specific performance was with a variation. The learned Subordinate Judge found that the plaintiff had notice of Bai Ratan's right when he entered into the agreement and that he purchased the property subject to Ratan's right. He passed a decree for the plaintiff ordering defendant No. 1 to pass the sale deed of the suit property to the plaintiff and give him possession thereof the first defendant being entitled to the money deposited by the plaintiff in that Court. The result of that decree would be that the plaintiff took the property subject to the burden of the charge in favour of the widow while the first defendant would be entirely free from any liability to maintain her.

We cannot agree with the learned Judge's conclusion that the plaintiff entered into the agreement for the purchase of property subject to Ratan's right of maintenance. Even if he knew that Bai Ratan had a claim against the first defendant for maintenance, there would be nothing in that fact to put the plaintiff on notice that there was an incumbrance on the suit property, and even if the first defendant sold the property he would still be liable to maintain the widow of his brother out of the sale proceeds, which would, in spite of the sale, retain the character of ancestral property. It seems to us that this case now comes within section 14 of the Specific Relief Act, and that the plaintiff is entitled to compensation for the burden, which is imposed upon the property he contracted to buy owing to the decree passed in favour of the widow. What the amount of compensation would be must be decided by the trial Court. The plaintiff is entitled to be indemnified against any claim the widow may make against him for maintenance, and the compensation in the ordinary course would take the form of a sum of money sufficient to purchase an annuity equal to the amount of annual maintenance awarded to her.

The appeal must be allowed and directions should be given that the first defendant cannot be paid the amount deposited by the plaintiff in Court. The lower Court is to decide what sum should be set apart out of that money in order to compensate the plaintiff for the burden that is cast upon him of satisfying the charge on the property in favour of the widow.

Appellant is entitled to his cost.

1923 BOMBAY. 272

MARTEN AND FAWCETT, JJ.

Nilkanth Devrao Nadkarni — Appellant.

v.

Murari Govind Mhale—Respondent.

S. A. No. 21 of 1922 D. 8rd December 1922, from the decision of Dt. J., of Kanara in Appeal No. 146 of 1918.

Practice - Adjournment of meeting for want of quorum without notice invalid-Religious Endowments Act.

There is being no quorum, the assembled members have no power to adjourn the meeting unless at any rate notice of the adjournment is given to all the members. If no notice of the adjournment is given to all the members the adjourned meeting held afterwards is invalid. There being no special rule the case must be decided on general principles. The mere fact that the notice states that some very important matters were to be transacted does not give one an express notice that appointments of new trustee of the suit Temple were to be made and is not sufficient. With certain very limited exceptions where a special meeting of a Committee or any other body has to be specially convened for a particular purpose, every member of that body ought to have notice of the meeting and its proposes

S. V. Palekar and D. K. Ugrankar—for the Appellant.

G. P. Murdeshwar—for the Respondent.

Marten, J.—The question on this appeal is whether defendants Nos. 1 to 4 have been properly appointed trustees of the suit temple. That in its turn depends on whether they were validly appointed trustees on November 15, 1913, by the Temple Committee. This Temple Committee is one appointed under the Religious Endowments Act 1863, and at the date in question it consisted of some ten or eleven members. A notice, Exhibit 39, is alleged to have been given for this Committee to meet at eight o'clock in the morning on November 15, 1913. At that hour only two members of the

committee were present, and according to the minutes, Exhibit 34, as there was not present a sufficient number of members to form a quorum for the commencement of the business of the Committee, it was decided that the work of the Committee be deferred and that the Committee should meet at 3 P. M. that day. Then at three o'clock that day, three members were present. They then proceeded to transact certain business and incidentally to elect the defendants I have mentioned.

Now the real point of the dispute is this: that away back in 1884 or thereabouts the Collector had settled a dispute between the Vaishnava and the other branch the Smarth sect as to the proportions in which their respective sections should be appointed Muktesars of various temples. As set out in para 3 of the plaint, it was decided that the Muktesars of the first three temples there mentioned should be in the hands of the Smarths only, and that of the other three temples should be in the hands of the Vaishnavas. The plaintiffs allege that by means of the 1913 election the Vaishnavas have got their nominees elected Muktesars of the suit temple, which under the 1884 agreement was to be in the hands of the Smarths. That is what is at the bottom of this dispute.

It will be seen, therefore, that the question of the appointment is no mere technical matter. In the first place, the appointment of trustees is, generally speaking, a matter in which the terms of the appointment have to be properly complied with. In the second place, particularly when religious feelings are aroused, it is to my mind important that any election should be properly conducted. The learned trial Judge found that the elections were invalid. On appeal, the lower appellate Court set aside this judgment and dismissed the suit holding that the whole suit was bad, because it was within S, 92 of the Civil Procedure Code, and the requisite consent of the Collector had not been obtained. That decision was reversed by the High Court, and the case remanded.

On remand, the learned appellate Judges's judgment really comes to this: that the meeting was continuous from 8 A. M. to 3 P. M., and that there was really no adjournment or postponement. What he says is: "In strictness of speech it should be said that there was no postponement; there was a waiting for the third member to come. The meeting was convoked at 8. The members were late. Business did not begin till 3. This is easy going. But there are many committees which must go easily if, they are to go at all." On the facts here, I do not think the Judge could fairly infer that the members waited at the place of meeting from 8 to 3. The minutes do not say so, and the evidence of the recorder Santaya does not say so. What he says is: "The time fixed for the meeting was 8 A. M. Defendants Nos. 8 and 10 were present at that time. So we waited for the arrival of the other members. But as nobody turned up, the meeting was adjourned till the afternoon of that day."

So that brings one to this point. Admittedly there was no quorum, for the quorum is three. Could then the two members adjourn the meeting either to a later hour that day or to some subsequent day, and in any event would such an adjournment be valid unless notice of the adjournment was given to all the members? Now there are no special rules of this Committee which have been framed, or at any rate which have been brought to our attention, and we must therefore decide the case on general principles. There being no quorum, I fail to see what power the two members had to adjourn the meeting to three o'clock that day or to three o'clock say two days afterwards, unless at any rate notice of the adjournment was given to all the members. *Ex hypothesi* no such notice of the adjournment was given, and it seems to me, therefore, that the adjourned meeting at three o'clock was invalid.

This seems to me to be no mere technicality. If, for instance, some member had come at nine o'clock and found nobody present, he would naturally assume that either the meeting had been held and was over: or that it had failed for want of a quorum, and that in any event he had come too late, and might go away. He would

not necessarily know without some express notice that the meeting was to be held at three o'clock, I do not say that that happened in the present case. But one has to consider the matter on general principles.

It seems to me, therefore, with all deference to the learned appellate Judge that the view he took cannot be sustained. One argument was addressed to us to the effect, that in India and in particular in the Districts, the various communities are easy-going people, especially as regards time, and that accordingly it would be a hardship to lay down any hard and fast rules about time. I am not laying down any such hard and fast rules. It is open to the Committee to frame any special rules they like within reason for the conduct of their own business. But it seems to me on the whole that the evils of allowing an indefinite delay in business are likely to outweigh the alleged hardships of reasonable punctuality, and to lead possibly to irregularities of a kind which it is very desirable to avoid.

There is one other point, and that is, that the notice convening the meeting did not specifically state that the meeting was called for the election of new trustees, nor was the notice given to all the members. The notice, Exhibit 39, does say that one member of the Committee had died. So possibly one might infer that his place on the Committee was to be filled up. But that is different from the trusteeship of the suit temple, and the mere fact that the notice states that some very important matters were to be transacted does not give one an express notice that appointments of new trustees of the suit Temple were to be made. It would also seem from the judgement of the lower appellate Court that notice was not served on one member of the Committee, Dewan Bahadur Yennemadi, and that the notice on one other man was doubtful, for only word was left at his house, he being away from home.

Having regard to the view I take on the other part of the case, I do not think it necessary to decide this point about the sufficiency of the notice nor as to whether it was properly served. But as the point has been raised, I may refer to *Young* v. *Ladies Imperial Club* (1) where Lord Sterndale M. R. lays down some general principles governing meetings for special purposes. He says; "I cannot entertain any doubt that with certain very limited exceptions where a special meeting of a Committee or any other body has to be specially convened for a particular purpose, every member of that body ought to have notice of and a summons to the meeting." Then he refers to a case of *Smyth* v. *Darley*, (2) which was the case of an election and not as in *Young* v. *Ladies Immperial Club* (1) of an expulsion from a club, and quotes Lord Campbell as saying: "The election being by a definite body on a day of which, till summons, the electors had no notice, they were all entitled to be specially summoned, and, if there was any omission to summon any of them, unless they all happened to be present, or unless those not summoned were beyond summoning distance (as for instance, abroad) there could not be a good electoral assembly." Then he cites another case of *In re Portuguese Consolidated Copper Mines, Limited* (3) and quotes Lord Esher as saying: "All the directors should have had notice of the meeting of the 24th." Then Lord Sterndale proceeds. "That was on general principles I think, and not any special provision in the articles that notice should be sent to every member." Next he again quotes Lord Esher—"If they had not, then the meeting of the 24th was no valid meeting, and being an invalid meeting could not adjourn itself to the 26th." Then Lord Sterndale continues "therefore as to the general principle, I think, there can be no question," and he points out that there are or may be exceptions where it is physically impossible for a member to attend, he being abroad, or possibly dangerously ill; but that he does not know of any other exception.

As I have said, I do not propose to decide whether in this particular case

(1) [1920] 2 K. P. 523, 527, 528.
(2) [1849] 2 H. L. C. 789, 803.
(3) [1889] 42 Ch. D. 160, 167.

the notice sent was sufficient, or, whether it ought to have stated expressly that new trustees were to be appointed. I have no doubt that the latter course is far preferable, but whether its omission would invalidate the appointment is a question that I leave open.

There is one further point. It is said that even if the election of 1913 was invalid, it was ratified by a subsequent resolution in 1916. It appears that the custom was for the persons who had been elected Muktesars to be entered in a particular book belonging, I gather, to the Collector. Some hitch arose about this, and consequently the Collector suggested that the matter should be reconsidered by the Temple Committee. Accordingly they purported to meet again and to re-elect these particular persons.

This point is not dealt with by the lower appellate Court. But the learned trial Judge points out that the persons who purported to make these new elections were only three, of whom one was defendant No. 11, who quite clearly had not been validly appointed a member of the Committee. He had only been co-opted by the members of the Temple Committee, which is clearly invalid under the Act regulating the appointments of new members of the Committee.

It, however, appears that this point was not relied on in the written statement of the defendants, nor did they make it a ground of their appeal to the lower appellate Court. That no doubt is a reason why the lower appellate Court did not deal with the point. One can understand that in any event there would be the greatest difficulty in upholding this alleged confirmation, having regard to the illegality of the appointment of defendant No. 11. Under the circumstances, I do not think it is open now to the respondents to rely on the validity of that confirmation.

In the result, therefore, I would allow this appeal, and restore the judgment of the learned Subordinate Judge.

As regards costs, the appellants had to amend their memo of appeal by specifically raising the points on which they eventually succeeded, and an adjournment of the appeal became necessary for their opponents to meet these points.

On the whole we think the justice of the case will be met by letting the judgment of the trial Judge as to the costs of the trial stand. As regards the costs of the proceedings before the District Court, both on the first occasion and on remand, we will direct that each party should bear his own costs. As regards the costs of this appeal, we direct they be paid by defendants Nos. 1 to 4 including the costs of the remand Appeal No. 269 of 1920 decided by this Appellate Court on June 7, 1921.

FAWCETT J.–I agree. I am certainly indisposed to be too technical in dealing with meetings in the mofussil of bodies like this Temple Committee, whose appointment of defendants Nos. 1 to 4 is in question. I quite agree with the learned District Judge that practice must to a large extent be considered as sufficient authority for the mode of transacting business. But at the same time, I think, it is clear that the view he has taken in treating the adjourned meeting as merely a continuation of the first meeting is one that contravenes a very necessary and reasonable principle of justice and equity, viz, that every member of a committee or other body should have due notice of the time when he may attend the meeting, if he wants to. This is a principle which has been laid down very strongly by the Courts in England, as is shown by the cases to which my learned brother has referred. It is also, I think, recognised very plainly by the Legislature both in England and in India, for the Companies Acts of both countries contain provisions in the model articles enacted in a Schedule, under which due notice of a general meeting is to be given to all persons concerned.

It is obvious, as my learned brother has pointed out, that even in this particular instance, it might have happened that some member attended late, and not knowing of the time to which it had been adjourned, did not take part in the proceedings at the adjourned meeting. No doubt it is true that that is not alleged in this case, and that it probably did not happen

But that does not, in my opinion, affect the principles of law, on which, in dealing with a case of this kind, we must act, especially as the business which was transacted is of a very important kind, viz, the appointment of trustees, a matter concerning which the Courts are scrupulous to see that ordinary principles regulating the validity of election, &c., have been properly complied with.

The assumption of the District Judge that the second meeting was a mere continuation of the first is opposed to the actual facts, and I do not think that it can be properly justified by a reference to dilatory habits and easy-going ways. If we are to accept that as a sufficient excuse for a departure from the ordinary principles regarding meetings of Committees, then it would be very difficult to draw the line; and I think that, as my learned brother has pointed out, it would lead to far greater confusion and injustice than the opposite view.

The learned Judge has cited an instance which, he considers, is in favour of his view, viz., that at the first session of a newly constituted House of Commons, two University Members (no one else appearing) adjourned the House until His Majesty's pleasure be further known. But in my opinion that does not really support the view of the matter that he has taken. In that case there would necessarily be notice to all the Members of the House as to the time when they were to meet again, for His Majesty's pleasure would be signified in a form that would reach all members concerned in due time. Then again, there is an arrangement in the House of Lords in England, by which if there is not a quorum of members at the proper time, there is automatically an adjournment to a definite hour later on. So also in the case of companies, there is usually a provision under which if within half an hour from the time appointed for the meeting a quorum is not present, the meeting shall stand adjourned to the same day in the next week at the same time and place. But that is quite a different case, for there is a definite time fixed for the adjourned meeting, which is known to all the members, so that they have an opportunity of attending at the proper time. In the present case no evidence was adduced that there was any similar practice in this case, and it is too late now to ask us to consider that point In any case the time fixed, viz., 3 P. M., is not alleged to have been a time fixed according to such a practice but it happened to be the particular time selected by the two members.

Therefore I agree with my learned brother that the appeal should be allowed and the order of the Subordinate Judge restored.

Appeal allowed.

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MARTEN AND FAWCETT. JJ.

Bassngow a Virupaxgowda—Appellant.

v.

Irgowdati Kallangowda—Respondent.

F. A. No 266 of 1921, D.-14th November 1922, from the decision of Asst. J. of Dharwar in Darkhast No. 82 of 1920

(a) *Civil P. C. S. 60 - Restriction on disposing power - Deed of compromise by a Hindu widow*

Document of compromise between a widow and a minor ran as follows :-I have taken for myself the property for the period of my lifetime. I alone shall pay Judi and I shall go on making Vahiwat. I shall not sell or mortgage or give it on self reducing mortgage or give it as present or in any manner give it into the possession of others. If I do so, it will not be valid. After my death, the said minor alone is owner of the said property." *Held* this restriction on alienation prevents the judgment-debtor from having a disposing power within the meaning of S 60 and consequently as that restriction is valid, the property cannot be attached. P. 277 Col. 1, 2.

(b) *T. P. Act. S. 6* (d)--*Scope.*

S. 6 (d) recognises that an interest in property may be validly created which is restricted in its enjoyment to the owner personally.

P. 277 Col, 2

(c) *T. P. Act S. 10-Deed of compromise-Land maintenance - Family settlement-Not a transfer*

The deed of compromise did not expressly purport to transfer or convey anything. The widow was to have the lands for a certain limited interest. This interest was less than that of a Hindu Widow's estate, which she claimed, but it was more than the bare right to maintenance which was all the minor was prepared to allow her. *Held* there was no such "transfer" here as is mentioned in S 10 P, 278 Col, 1.

Nilkant Atmaram—for the Appellant.

R. A. Jahagirdar—for the Respondent.

Marten J.- The question on this first appeal is whether the interest of Irawa, a Hindu widow, under the agreement Exhibit 28 can be attached in execution of the decree against her and others in this suit. The learned Judge following the decision of Sir Charles Sargent and Mr. Justice Nanabhai in *Diwali* v. *Apaji Genesh* (1) has held that it cannot be attached. The appellants seek to distinguish that decision, because it was before the Transfer of Property Act came into operation in this Presidency. Alternatively they say it was wrong.

Now S 60 of the Civil Procedure Code states what property is liable to attachment or sale in execution, viz., "lands—and save as hereinafter mentioned, all other saleable property belonging to the judgment-debtor, or over which, or the profits of which he has a disposing power which he may exercise for his own benefit,—Provided that the following particulars shall not be liable to such attachment or sale. namely,—(*n*) a right to future maintenance"

In *Diwali* v. *Apaji Genesh*, (1) which was also the case of a Hindu widow, it was held in effect that the restriction on alienation contained in the document of compromise then under consideration prevented her having a disposing power, and that consequently her interest could not be attached. It was, therefore, unnecessary to consider whether her interest under that document amounted to a "right to future maintenance" within the meaning of sub-section (*n*)

In the present document of compromise, Exhibit 28, the restriction on alienation is equally if not more emphatic than in *Diwali* v. *Apaji Genesh*. (1) It runs:

"I have taken for myself the property for the period of my life-time. I alone shall pay Judi and I shall go on making *vahivat*. I shall not sell or mortgage or give it on self-reducing mortgage or give it as present or in any manner give it into the possession of others. If I do so, it will not be valid. After my death, the said minor alone is owner of the said property."

In my judgment, this restriction on alienation prevents the judgment-debtor from having a "disposing power" within the meaning of S. 60 and consequently if that restriction is valid, the property cannot be attached.

Stopping there, therefore, I am of opinion that the learned Judge was right in following *Diwali* v. *Apaji Ganesh*. I may add that this decision was followed in *Munisami Naidu* v. *Ammani Ammal* (2) where by a slip the word "not" has been omitted from the head-note.

Turning next to the Transfer of Property Act, the appellant contends that under S. 10 in Chapter 11 the above restriction on alienation is invalid. The respondent relies on S. 6 (d) which enacts that "an interest in property restricted in its enjoyment to the owner personally cannot be transferred by him." He also relies on S. 2 (*d*) which provides that "nothing in the second chapter shall be deemed to affect any rule of Hindu-law."

It is stated in Shepherd and Brown's Commentary (7th Edn.) on the Transfer of Property Act at page 42:

"It may in some instances be difficult to mark the distinctions between holdings to which this paragraph [section 6 (d)] may apply and cases falling under sect. 10, in which it is attempted to fetter the transferee's power of alienation. A right to future maintenance cannot be attached in execution of a decree. And it seems clear that such a right enjoyed by a Hindu widow cannot be made the subject of a sale or other transfer by her, since the right exists for her personal benefit only. It may be doubted even whether she can effectually transfer her interest in property allotted to her for maintenance."

In my opinion it is clear that S. 6 (d) recognises that an interest in property may be validly created which is restricted in its enjoyment to the owner personally. The Act says the owner cannot transfer such an in-

(1) (1886) 10 Bom, 342.

(2) (1904) 15 M. L. J. 7.

terest; but if the restriction was invalid, it would follow that he would be able to do so. Accordingly in considering S. 10, one has to see that it clearly applies to any particular document. Have we then in the present case any property "transferred subject to a condition or limitation absolutely restraining the transferee from disposing of her interest"? Sect. 5 defines "transfer of property" as meaning "an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself and one or more other living persons; and 'to transfer property' is to perform such act."

Now in the present case one must bear in mind the circumstances under which Exhibit 28 came into operation. The widow was claiming a Hindu widow's estate in all the lands on the allegation of a separation of interest. The minor on the other hand claimed that she was only entitled to maintenance because the lands had remained joint. The compromise arrived at was that the widow was to have a restricted life-interest in certain lands, and the minor was to take the rest of the lands and the reversion in the former lands. *Prima facie* therefore, it would seem quite natural to restrict the widow's power of alienation and so prevent the possession or management passing out of the family.

But where do we find in this document a transfer from A to B? What the widow says is that she has taken for hereself the suit property for the period of her life-time; and the subsequent covenants by her make it clear that all she is intended to have is an interest in the property restricted in its enjoyment to her-self personally. But that is the very type of interest referred to in S. 6 (*d*) The deed does not expressly purport to transfer or convey anything. Nor does it decide the original point in dispute. She is to have the lands for a certain limited interest. This interest is less than that of a Hindu widow's estate, which she claimed, but it is more than the bare right to maintenance which was all the minor was prepared to allow her. In my opinion, therefore, there was no such "transfer" here as is mentioned in S. 10

Nor is this any fanciful distinction. In English law, for instance, there is a clear distinction drawn between an absolute gift followed by an attempted restriction on alienation, and a gift to a man of an interest determinable on alienation. The distinctions between these two classes of cases are set out in Wace on Bankruptcy, pp. 182 and 183, the latter class of interest being a valid one. The learned author proceeds at p. 183:

"But a proviso for cesser on bankruptcy or alienation, without an express gift over, may be part of the original gift; and there are numerous decisions, chiefly on wills, that a gift of real or personal estate to A for life, with remainder over and a proviso that if A should attempt to assign, etc. his life interest should cease, is read as a limitation to A. during his life, or until he should attempt to assign, and upon that event over, and is valid accordingly."

Similarly in *In re Detmold*; *Detmold* v. *Detmold* (3) Mr. Justice North at p. 588 said:—

"It is said that a gift over of a man's own property in the event of his bankruptcy is void, and no doubt that is so. But it has been held that a gift over in the event of a voluntary assignment by him is valid. This was established by *Brooke* v. *Pearson* (4) and *Knight* v. *Browne* (5), and I think the principle of those decisions applies to an involuntary alienation by operation of law in favour of a particular creditor"

Or again in the Transfer of Property Act itself we find in Ss. 12 and 31 instances of invalid and valid limitations on a transfer of a particular interest. I only quote these instances to show that s. 10 cannot be taken merely by itself, but must be construed strictly, and that it must not be used to defeat well-recognized provisions. In the present case I am

(3) [1889] 40 Ch. D. 585.
(4) [1859] 27 Beav. 181. R. 38.
(5) [1861] 9 W. R. 515.

dealing with a Hindu widow, and it seems to me that the restrictions placed upon her powers in the present case were very natural ones.

In *Kuldip Singh* v *Khetrani Koer* (6) there was a compromise of a dispute between a Hindu widow and other members of the joint family. Under the compromise she was given possession for her life on account of maintenance of her husband's share in the property, and then followed a clause which I construe as a restriction on alienation. It provided that if the widow took or executed any sort of a document, it would be null and void. It further provided that both parties might execute a document but any document not consented to by both parties should be null and void. Subsequently the lady alone executed a lease for eleven years, and it was claimed that the execution of that lease was a breach of the covenant. The Court of first instance held that the covenant was invalid, but on appeal this decision was set aside, and the judgment of the High Court proceeded (p. 871):

"We are unable to follow the reasoning upon which he (the Judge) comes to that conclusion. Admittedly there is nothing in any statute law which renders such a provision inoperative. Sections 10 and 15 of the Transfer of Property Act have no application here; and we are unable to see any principle underlying those sections which can be applied to the present case, or that there was any sort of absence of equity in an arrangement of this kind. This was a settlement of a dispute, and effect must be given, as far as possible, to every portion of it. It is not at all an unreasonable provision that reversioners giving up their claim and allowing a Hindu widow to remain in possession of their property should wish to retain supervision over it and to prevent any acts on her part which might cause injury to their reversionary rights. A provision of this kind is not only not contrary to law, but is one which might reasonably be made in common prudence by reversioners. There being admittedly nothing in law to show that this covenant is illegal, effect, must be given to it."

It was contended before us that the covenant in that case did not amount to a restriction on alienation, but in my opinion that argument is erroneous.

The distinction between a compromise and an alienation or transfer is further exemplified by Lord Moulton in *Musammat Hiran Bibi* v. *Musammat Sohan Bibi* (7) to which my learned brother has drawn my attention

In the result, therefore, I am of opinion that Exhibit 28 was a compromise under which the widow was to remain in the personal enjoyment of certain lands for the term of her life, and that it did not amount to a "transfer of property" within the meaning of S. 10 of the Transfer of Property Act.

It that view of the case, it is unnecessary for me to consider whether the compromise is not also protected by s. 2 (d) of the Transfer of Property Act, which provides that nothing in the second chapter of the Act is to be deemed to affect any rule of Hindu law. Nor need I consider whether the document is merely a right to future maintenance within the meaning of s. 60 (n) of the Civil Procedure Code, or whether as indicated in *Govinda Pillai* v. *Meenatchi Achi* (8) what the widow acquired was a right not to maintenance but to certain property or rather the usufruct of that property. In this latter case the property attached consisted of standing crops only and not of an interest in future as well as present income as in the present case. So, too, *Sundar Bibi* v. *Rajinder Narain Singh* (9) depends on the effect of s. 60 (n).

Another authority cited to us is

(6) [1898] 25 Cal. 869–2 C. W. N. 463.

(7) [1914] 18 C. W. N. 925–27 M. L. J. 149–1 L. W. 648–24 I. C 309 (P. C.)

(8) [1911] 22 M. L. J. 204–10 M. L. T. 493–(1911) 2 M. W. N. 563 –13 I. C. 152.

(9) [1921] 43 All. 617–19 A. L. J 648–63 I. C. 181.

Gulab Kuar v. *Bansidhar* (10) where Mr. Justice Knox held that the interest of a widow in certain lands assigned to her in lieu of her maintenance allowance could not be attached. But on appeal in *Bansidhar* v. *Gulab Kuar* (11) the point was left open (see p. 449), as it was held that no appeal lay.

In my judgment, therefore, on the true construction of the particular document we have to deal with, viz., Exhibit 28, there is nothing in the Transfer of Property Act or otherwise which invalidates the restriction on alienation. Consequently, in my opinion, decision of the learned Judge was right and this appeal ought to be dismissed with costs.

FAWCETT J.—In this appeal two points have been urged:—

(1) that defendant No. 2 had a power of disposal over the usufructuary interest of the lands, within the meaning of S 60, Civil Procedure Code, and that *Diwali v. Apaji Ganesh* (1) does not apply or in any case was wrongly decided;

(2) that the case does not fall under clause (*n*) of S. 60, viz. a right to future maintenance.

As to (1) it is urged that the restrictions against alienation in Exhibit 28 are void under S. 10 of the Transfer of Property Act, and that this section applies (notwithstanding the last para of S. 2 of the Act) because there is no rule of Hindu law against a widow alienating her life-interest, as is indeed recognised by Sargent C. J. in *Diwali v. Apaji Ganesh* (1) where he says a Hindu widow's estate has long been held to be transferable.

In my opinion, the answer to this is that Exhibit 28 is not a 'transfer' of property as defined in S. 5 of the Act, so as to fall under S. 10, but is a compromise or family arrangement to which the Courts should give effect, notwithstanding that a party may thereunder receive a less interest than he or she would ordinarily have under Hindu law.

The basis of defendant No. 2's title under Exhibit 28 is not a conveyance by a person having an admittedly good title to convey, but a compromise of conflicting claims. The distinction is pointed out by Lord Moulton in *Musammat Hira Bibi v. Musammat Sohan Bibi* (7) where the compromise was held not to be an *alienation* but a family settlement, in which each party took a share of the family property by virtue of independent title which was to that extent and by way of compromise admitted by the other parties.

As instances, where the Privy Council have recognised the validity of such compromises in spite of their deviating from the strict rights of the parties, I may refer to *Khunni Lal v. Gobind Krishna Narain* (12), where the High Court wrongly held there was an *alienation*; *Lekhraj Kunwar v. Harpal Singh* (13), where there was a change of the impartible character of the estate; *Brijraj Singh v. Sheodan Singh* (14), where the compromise was upheld though there was an unequal partition among three sons; and *Kanhai Lal* v. *Brij Lal* (15), where the compromise was upheld, though the last male owner deprived himself of his right to claim as a reversioner against a Hindu widow.

(10) [1893] 5 All. 371-(1893) A. W. N. 149.

(11) (1894) 16 All. 443-(1894) A. W. N. 146.

(12) (1911) 33 All. 356 (365,367)-38 I. A. 37-15 C. W. N 545-8 A. L, J, 552-13 C. L J. 575-13 Bom. L. R. 427-10 M. L. T 25-(1911) 1 M. W. N. 432-21 M. L. T. 645-10 I. C. 477 (P. C.)

(13) (1911) 34 All. 65 (70,71)-11 M. L. T. 1-(1912) M. W. N. 16-9 A. L. J. 40-16 C. W. N. 217-15 C. L. J. 72-14 Bom. L. R. 33-23 M. L. J. 1-39 I. A. 10-13 I. C. 269 (P. C.)

(14) (1913) 35 All. 337 (347, 348)-40 I. A. 161-11 A. L. J. 698-17 C. W. N. 949-18 C. L. J. 57-14 M. L. T. 11-25 M: L. J. 188-(1913) M. W. N. 515-15 Bom. L. R. 652-19 I. C. 826 (P, C.)

(15) (1918) 40 All. 487 (496)-45 I. A. 118-22 C. W. N. 914-8 L. W. 212-24 M. L. T. 23-35 M. L. J. 459-16 A. L. J. 825-(1918) M. W. N. 709-28 C. L. J. 394-5 Pat. L. W. 294-20 Bom. L. R. 1048-47 I. C. 207 (P. C.)

The Courts lean in favour of such family arrangements (Halsbury's Laws of England, Vol XIV, Article 1230, p. 546 ; *Chabildas v. Ramdas* (16) and *Ramdas v. Chabildas* (17). As long ago as 1869, this Court acted on the same principle : see *Abubekar Hagada Hajisaba v. Maibibi and Sidi Saheb.* (18).

Therefore I agree with my learned brother that S. 10 of the Transfer of Property Act does not apply to the case ; cf. *Kuldip Singh v. Kheirani Koer.* (6).

The settlement was a reasonable one The minor had reversionary right under Exhibit 28, and it was proper to restrict the widow from alienating or parting with possession, which might entail litigation after her death. Nor has the widow herself objected to this restriction. On the contrary she relies on it in her opposition to the Darkhast.

I think, therefore, the lower Court rightly held that defendant No. 2 had no power of disposal over the usufructuary interest of the lands. At most all that she can dispose of is actual usufruct in hand (e. g., standing crop), and she has no power to dispose of future usufruct, which would, in effect, be a disposal of the *corpus* of the property. Consequently she has no disposing power over the lands sought to be attached, or the future profits thereof which it is impliedly sought to attach by the attachment of the lands.

I think also that the reasoning in the penultimate para of the judgment in *Diwali* v. *Apaji Ganesh* (1) applies exactly to this case, and should be followed. That case was also one of a compromise.

It is unnecessary to go into the question whether the interest sought to be attached is a right to future maintenance, within the meaning of S. 60 (*n*).

I concur, therefore, that the appeal should be dismissed with costs.

Appeal dismissed.

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(16) (1909) 11 Bom. L. R. 606 (631)—3 I. C. 257.

(17) (1910) 12 Bom. L. R. 621 (624) 7 I. C. 134.

(18) (1869) 6 B. H. C. A. C. J. 777.

1923 BOMBAY 281.

MARTEN AND FAWCETT, J.J.

Sha Bulakhidas Jamandas—Defendant-Appellant.

v

Shah Ganpatram Dalsukhram—Plaintiff-Respondent.

S. A. No 643 of 1921 dated 14th Nov-1922 against the decision of the Assistant Judge of Ahmedabad in Appeal No. 8 of 1919.

(a) Deed-Construction.

A deed recited that there was originally one house and it then proceeded that three houses were afterwards built anew and "are hereby sold to you with the right of ingress and egress through the main door and given over to your possession" Then followed the particulars of boundaries. Then comes a clause about the Chowk. It ran "there is an open Chowk belonging to those three houses and in front of the door of my other house. All may use the said Chowk according to the limits of their respective houses and inmates of all the four houses have the right of egress and ingress throgh the main Khadki door". *Held* that the words Open Chowk belonging to these three houses do not mean, having regard to the context, that the Chowk was to be in the exclusive ownership and possession of the three houses. The words all may use the said chowk meant all four houses and there they have the same meaning as the inmates of all the four houses referred to in the next sentence. The word according to the limits of their respective houses meant that all might use the Chowk and this means the whole Chowk. [*p. 282 c. 1, 2.*]

(b) Procedure—Injunction on the ground of nuisance.

The Court ought not to grant an injunction on the ground of nuisance, unless the nuisance which is a question of fact is proved. [*p.283 c.1.*]

R. J. Thakor—for the Appellant.

H. V. Divatia—for the Respondent.

Marten J.—This is an unfortunate suit between neighbours, and it concerns mainly the rights of the parties to the chowk coloured pink on the plan Exhibit 17, and the rights in respect of the water tap Exhibit G shown on the same plan. It appears that formerly, that is to say prior to 1911, the whole of the property shown on this plan belonged to the defendant or his predecessors-in-title. The property consists of 4 houses, and as the result of a sale deed of the 19th of March 1911, Exhibit 16, these houses were conveyed to the plaintiff's predecessors-in-title, and the remaining house was retained by the present defendant. The plan I have referred to has the parties just the other way round, but

Gulab Kuar v. *Bansidhar* (10) where Mr. Justice Knox held that the interest of a widow in certain lands assigned to her in lieu of her maintenance allowance could not be attached. But on appeal in *Bansidhar* v. *Gulab Kuar* (11) the point was left open (see p. 449), as it was held that no appeal lay.

In my judgment, therefore, on the true construction of the particular document we have to deal with, viz., Exhibit 28, there is nothing in the Transfer of Property Act or otherwise which invalidates the restriction on alienation. Consequently, in my opinion, decision of the learned Judge was right and this appeal ought to be dismissed with costs.

FAWCETT J.—In this appeal two points have been urged:—

(1) that defendant No. 2 had a power of disposal over the usufructuary interest of the lands, within the meaning of S 60, Civil Procedure Code, and that *Diwali v. Apaji Ganesh* (1) does not apply or in any case was wrongly decided;

(2) that the case does not fall under clause (*n*) of S. 60, viz. a right to future maintenance.

As to (1) it is urged that the restrictions against alienation in Exhibit 28 are void under S. 10 of the Transfer of Property Act, and that this section applies (notwithstanding the last para of S. 2 of the Act) because there is no rule of Hindu law against a widow alienating her life-interest, as is indeed recognised by Sargent C. J. in *Diwali v. Apaji Ganesh* (1) where he says a Hindu widow's estate has long been held to be transferable.

In my opinion, the answer to this is that Exhibit 28 is not a 'transfer' of property as defined in S. 5 of the Act, so as to fall under S. 10, but is a compromise or family arrangement to which the Courts should give effect, notwithstanding that a party may thereunder receive a less interest than he or she would ordinarily have under Hindu law.

The basis of defendant No. 2's title under Exhibit 28 is not a conveyance by a person having an admittedly good title to convey, but a compromise of conflicting claims. The distinction is pointed out by Lord Moulton in *Musammat Hira Bibi v. Musammat Sohan Bibi* (7) where the compromise was held not to be an *alienation* but a family settlement, in which each party took a share of the family property by virtue of independent title which was to that extent and by way of compromise admitted by the other parties.

As instances, where the Privy Council have recognised the validity of such compromises in spite of their deviating from the strict rights of the parties, I may refer to *Khunni Lal v. Gobind Krishna Narain* (12), where the High Court wrongly held there was an *alienation*; *Lekhraj Kunwar v. Harpal Singh* (1.), where there was a change of the impartible character of the estate; *Brijraj Singh v. Sheodan Singh* (14), where the compromise was upheld though there was an unequal partition among three sons; and *Kanhai Lal* v. *Brij Lal* (15), where the compromise was upheld, though the last male owner deprived himself of his right to claim as a reversioner against a Hindu widow.

(10) [1893] 5 All. 371-(1893) A. W. N. 149.

(11) (1894) 16 All. 443-(1894) A. W. N. 146.

(12) (1911) 33 All. 356 (365,367)-38 I. A. 37-15 C. W. N 545-8 A. L, J, 552-13 C. L J. 575-13 Bom. L. R. 427-10 M. L. T 25-(1911) 1 M. W. N. 432-21 M. L. T. 645-10 I. C. 477 (P. C.)

(13) (1911) 34 All. 65 (70,71)-11 M. L. T. 1-(1912) M. W. N. 16-9 A. L. J. 40-16 C. W. N. 217-15 C. L. J. 72-14 Bom. L. R. 33-23 M. L. J. 1-39 I. A. 10-13 I. C. 269 (P. C.)

(14) (1913) 35 All. 337 (347, 348)-40 I. A. 161-11 A. L. J. 698-17 C. W. N. 949-18 C. L. J. 57-14 M. L. T. 11-25 M: L. J. 188-(1913) M. W. N. 515-15 Bom. L. R. 652-19 I. C. 826 (P, C.)

(15) (1918) 40 All. 487 (496)-45 I. A. 118-22 C. W. N. 914-8 L. W. 212-24 M. L. T. 23-35 M. L. J. 459-16 A. L. J. 825-(1918) M. W. N. 709-28 C. L. J. 394-5 Pat. L. W. 294-20 Bom. L. R. 1048-47 I. C. 207 (P. C.)

The Courts lean in favour of such family arrangements (Halsbury's Laws of England, Vol XIV, Article 1230, p. 546 ; *Chabildas v. Ramdas* (16) and *Ramdas v. Chabildas* (17). As long ago as 1869, this Court acted on the same principle : see *Abubekar Hagada Hajisaba v. Maibibi and Sidi Saheb.* (18).

Therefore I agree with my learned brother that S. 10 of the Transfer of Property Act does not apply to the case ; cf. *Kuldip Singh v. Kheirani Koer.* (6).

The settlement was a reasonable one The minor had reversionary right under Exhibit 28, and it was proper to restrict the widow from alienating or parting with possession, which might entail litigation after her death. Nor has the widow herself objected to this restriction. On the contrary she relies on it in her opposition to the Darkhast.

I think, therefore, the lower Court rightly held that defendant No. 2 had no power of disposal over the usufructuary interest of the lands. At most all that she can dispose of is actual usufruct in hand (e. g., standing crop), and she has no power to dispose of future usufruct, which would, in effect, be a disposal of the *corpus* of the property. Consequently she has no disposing power over the lands sought to be attached, or the future profits thereof which it is impliedly sought to attach by the attachment of the lands.

I think also that the reasoning in the penultimate para of the judgment in *Diwali* v. *Apaji Ganesh* (1) applies exactly to this case, and should be followed. That case was also one of a compromise.

It is unnecessary to go into the question whether the interest sought to be attached is a right to future maintenance, within the meaning of S. 60 (*n*).

I concur, therefore, that the appeal should be dismissed with costs.

Appeal dismissed.

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1923 BOMBAY 281.

MARTEN AND FAWCETT, JJ.

Sha Bulakhidas Jamandas—Defendant-Appellant.

v

Shah Ganpatram Dalsukhram—Plaintiff-Respondent.

S. A. No 643 of 1921 dated 14th Nov-1922 against the decision of the Assistant Judge of Ahmedabad in Appeal No. 8 of 1919.

(*a*) *Deed-Construction.*

A deed recited that there was originally one house and it then proceeded that three houses were afterwards built anew and "are hereby sold to you with the right of ingress and egress through the main door and given over to your possession" Then followed the particulars of boundaries. Then comes a clause about the Chowk. It ran "there is an open Chowk belonging to those three houses and in front of the door of my other house. All may use the said Chowk according to the limits of their respective houses and inmates of all the four houses have the right of egress and ingress throgh the main Khadki door". *Held* that the words Open Chowk belonging to these three houses do not mean, having regard to the context, that the Chowk was to be in the exclusive ownership and possession of the three houses. The words all may use the said chowk meant all four houses and there they have the same meaning as the inmates of all the four houses referred to in the next sentence. The word according to the limits of their respective houses meant that all might use the Chowk and this means the whole Chowk. [*p. 282 c. 1, 2.*]

(*b*) *Procedure—Injunction on the ground of nuisance.*

The Court ought not to grant an injunction on the ground of nuisance, unless the nuisance which is a question of fact is proved. [*p.283 c.1.*]

R. J. Thakor—for the Appellant.

H. V. Divatia—for the Respondent.

Marten J.—This is an unfortunate suit between neighbours, and it concerns mainly the rights of the parties to the chowk coloured pink on the plan Exhibit 17, and the rights in respect of the water tap Exhibit G shown on the same plan. It appears that formerly, that is to say prior to 1911, the whole of the property shown on this plan belonged to the defendant or his predecessors-in-title. The property consists of 4 houses, and as the result of a sale deed of the 19th of March 1911, Exhibit 16, these houses were conveyed to the plaintiff's predecessors-in-title, and the remaining house was retained by the present defendant. The plan I have referred to has the parties just the other way round, but

that is because it was made for the purpose of another suit where the parties were reversed.

The plaintiff's claim as regards the chowk is founded on the allegation that he is the owner of the chowk. This allegation has been decided against him in both the lower Courts, but the lower appellate Court has in effect granted an injunction restricting the defendant to the use of ¼th of the chowk, and also against his using that ¼th in such way as to cause a nuisance and annoyance to the owners of the other three quarters. It is this injunction of the lower appellate Court that the present appellant the defendant objects to. The cross-objections raised by the plaintiff contend *inter alia* that he is the owner of the chowk.

It is all important, therefore, to consider what is the true construction of the sale deed Exhibit 16. This deed recites that there was originally one house, and it then proceeds that three houses were afterwards built anew and "are hereby sold to you with the right of ingress and egress through the main door and given over to your possession. Then followed particulars of the boundaries. Then comes a clause about the chowk which has given rise to much controversy in the present case. It runs. "There is an open chowk belonging to these three houses and in front of the door of my other house. All may use the said chowk according to the limits of their respective houses, and the inmates of all the four houses have the right of egress and ingress through the main Khadki door."

In my judgment, if it had been intended to include the chowk in this sale deed, it would have been included as part of the three houses which are expressly sold to the defendant with the express boundaries which are there described. But if, on the other hand as, I think, is the true view, it was intended to keep this chowk as an open space for the benefit of all the four houses, then one can understand that only three houses would be expressly conveyed, and that there would be a separate provision as to the rights of the parties in connection with the chowk. In my opinion the words "open chowk belonging to these three houses do not mean, having regard to the context that this chowk was to be in the exclusive ownership and possession of the three houses. I construe the words "all may use the said chowk" as meaing all 4 houses, and that they have the same meaning as "the inmates of all the 4 houses" referred to in the next sentence,

The words "according to the limits of their respective houses" no doubt create some difficulty. But in my opinion the dominating motive of the parties was that all might use the chowk, and this means the whole chowk. Accordingly the limitation put in that deed was intended to prevent any one particular owner using the chowk more than would be reasonable aocording to the proportion of the whole property which he actually occupied. For instance, one party could not tether his horses, or put up linen or pots and pans over the whole of the chowk. It is difficult in these cases where some open space is intended to be used in common by all parties proportionately to their respective holdings, to frame any rules which unreasonable or cantankerous men won't find an opportunity of creating quibbles about and possibly bringing about litigation. Obviously a small space like this used in common may lead to squabbles and quarrels, if the parties who have the right of user cannot be reasonable enough to respect their neighbour's rights as well as their own. However that may be, on the true construction of this deed, I am of opinion that the plaintiff is entirely wrong in contending that it conveyed the chowk to him and that he is the sole owner of the chowk.

I am further of opinion that the learned appellate Judge was wrong in granting an injunction restraining the defendant from using any more than ¼th of this chowk. That injunction in effect amounts to a partition of the chowk because if you restrain a man from using any more than ¼th of land, for all practical purposes you have given him that quarter and prevented him from exercising any rights whatever over the remaining ¾th. Further in the present case the unfairness of such an injunction is that it

only operates against the defendant and that there is no corresponding injunction against the plaintiff debarring him from exercising rights over the ¼th allotted to the defendant. On the contrary the learned Judge gives the plaintiff a right of passage over this quarter which is nowhere found expressly in the deed under construction. In a formal partition, each party would have been allotted a particular portion, and could not have afterwards used the portion of the other party, apart from any rights of way or other easements granted on partition.

Then as regards the injunction which the learned Judge has granted restraining the defendant from so using his quarter as to create a nuisance to the plaintiff, the issue on that question of fact in the trial Court was issue 2, viz, whether the defendant and his tenants obstruct the plaintiff and his tenants from passing through and using open chowk. The answer to that issue was No. When we come to the appellate Court, there is no issue whatever raised as to whether there was any such nuisance as is the subject of this injunction. Nor do I find that the learned appellate Judge has even found as a fact that there was such a nuisance and annoyance The trial Court held on p. 14 line 55 that in almost all important particulars the plaintiff was guilty of exaggerations and falsehoods. Then with reference to the plaintiff's witness he refers to Exhibit 57 as being a friend of Plaintiff's who speaks of defendant's children being made to answer the calls of nature in the chowk, and alleged nuisance which even plaintiff has not the hardihood to mention.

In my judgment, the Court ought not to grant an injunction on the ground of nuisance, unless the nuisance which is a question of fact is proved. Here there is no issue raised on the point in lower appellate Court. There is no finding of fact, and on the contrary I find the facts found quite clearly the other way in the trial Court. In my opinion the learned appellate Judge erred in granting this injunction; and I cannot for one moment accept the contention of the respondent's pleader that all that the learned Judge was really doing was to endeavour to carry out the rights of the parties under Exhibit 16. As I have said he had no right to grant an injunction for nuisance unless the nuisance was proved.

Now I come to the question of the tap. There was an express issue on this in the Court of first instance, viz, whether the defendant's water tap near the Khadki door is a nuisance to the plaintiff. The answer to that finding was No. In the lower appellate Court there is no issue raised about this tap Exhibit G at all, except issue 2, viz, as to whether the lower Court erred in holding that the tap Exhibit G and Chokdi F are not new but they looked old. The answer to that issue was No. There is no finding here whatever, as far as I can see, that the defendant has committed a nuisance in respect of his user of this tap G. There, again, if I may say so with all respect, the learned Judge seems to have granted an injunction merely by way of emphasizing his views as to how this particular tap should be used. He says in paragraph 20 " He (the plaintiff) can only have an injunction restraining the user of the pipe for any other purposes such as, washing and bathing than that of taking water from it ", and paragraph 23 is the formal order to that effect.

Now I can quite understand that if on the facts here it could be proved that the defendant's household at all hours of the day were either washing their dirty clothes or washing their persons and slopping dirty water over the entrance to the chowk and keeping the main Khadki door open for that purpose and really causing a nuisance to their neighbours and particularly if this injuriously affected the common user of the chowk, then I can understand that the Court would force the defendant by injunction or otherwise to preserve a more neighbourly and gentlemanly attitude. But here, again, these matters of nuisance are questions of fact, and no such evidence is brought before our notice.

Accordingly it seems to me that on

the facts at present before us, the learned Judge erred in granting an injunction in these terms. It follows therefore that in my opinion the decision which the learned trial Judge arrived at was the correct one, and that this appeal must be allowed and the judgment of the learned trial Judge must be restored. Then as regards costs, I would also restore the learned trial Judge's order as to costs, viz, that each party pay the costs mentioned in his judgment. As regards the costs of the lower appellate Court and of this appeal they must be borne by the respondent to this Appeal 643 of 1921. Similarly the cross-objections in which he has urged *inter alia* his absolute ownership of the chowk will be dismissed with costs.

I wish to add, speaking for myself, one word of advice if I may be allowed to do so to the parties. I regret to see neighbours fighting and squabbling and spending their money over litigation in this way for years and years. They have adjoining properties where if they choose to behave in this ungentlemanly way, they can no doubt find opportunities for further quarrels. Up to now it may be said that the honours of the fight have rested fairly easy between them. Now that this Court has explained what their legal rights are, I trust that there will be no more conduct on either the one side or the other such as we have seen in the past, as to lead to further litigation. I trust in particular that nobody will think that as a result of this judgment he is entitled to make an unreasonable use of either the chowk or the water tap in such a way as to cause annoyance and nuisance to his neighbours. If he does, he will probably find that the result of such future litigation will be extremely unpleasant. But I sincerely hope that the parties will have the good sense to regard this present litigation as their last venture in the law Courts.

FAWCETT, J :—In regard to the plaintiff's claim to ownership of the whole chowk, I think that the construction put upon the sale-deed Exhibit 16 by the Subordinate Judge is a more reasonable one than that adopted by the Assistant Judge in appeal. On this point I fully concur in the remarks and conclusion of my learned Brother. I would only add that, on the facts of this case, it seems to me analogous to one falling under section 22 of the Easements Act, which in effect lays down that the dominant owner is to exercise his right in a reasonable manner, with due regard to the interests of the other person concerned.

As regards the injunction which has been granted by the lower appellate Court, I concur fully with the views of my learned Brother. I think that the learned Judge had no jurisdiction to grant those injunctins, because the proper foundation for such an injunction is not forthcoming. There is no proof that there has been an actual invasion, or threat of invasion, of the plaintiff's right as to entitle him to an injunction under section 54 of the Specific Relief Act, cf. section 35 of the Easements Act.

Accordingly I concur that the trial Court's order should be restored and that costs should be borne as proposed in my learned Brother's judgment

Appeal allowed.

1923 BOMBAY 284

MARTEN. J.

Mrs Rose Hill—Appellant.

v.

Mr. Luke C. Hill—Respondent.

O. C. J. Suit No. 1765 of 1922 D. 16th Jan. 1923.

(a) Divorce Act S. 15—No relief to guilty person—Counter petition.

Speaking generally, a guilty party cannot obtain relief by way of judicial separation any more than he or she can obtain relief by way of a divorce. 13 P. D. 141 Foll. In a suit by wife it is competent to the husband to bring the cross-petition, not by a separate petition on a separate document, but by a further statement added to the original defence to the wife's petition. [P. 285 C. 1]

(b) Divorce Act-Jurisdiction-Foreigner as co-respondent.

There is jurisdiction in the Court to add a foreigner as co-respondent. P. 286 C. 2.

Davar—for the Appellant.

Campbell—for the Respondent.

Marten J. This suit consists of a

petition for divorce by the wife against her husband on the ground of his alleged adultery, cruelty and desertion, and a cross-petition brought by the husband against the wife and a co-respondent named Nicola Kandelaft asking for a divorce on the ground of the wife's adultery.

On the wife's petition being called on and after I had read the two petitions, I asked counsel for the wife whether he was in a position to put his client into the box to deny the accusations against her which had been made in the husband's petition. They included in particular an allegation that the wife had travelled with the co-respondent in the same cabin from Bombay to Marseilles by the steamer *Loyalty* in December 1919 and that the only other occupant of that cabin was a small boy aged eight or thereabouts. Mr. Davar admitted that his client had travelled on that steamer and, after consulting his client, he told the Court that he was not in a position to call his client to contest the husband's allegation against her in that respect.

Then there remained the allegations which she made against the husband on the ground of his desertion and cruelty. As regards the question of desertion, counsel for the husband took the point that the desertion required to be proved under the Act was desertion within the meaning of S. 3, sub-S. 9, viz, an abandonment against the wish of the person charging it. He pointed out that here the wife left the petitioner of her own wish and not of her husband's wish. Moreover it was clear from certain correspondence which took place almost immediately, between her pleader and her husband and from a letter written by the husband to the wife that it was in no way his wish that she should leave the house in this way. I should explain that the marriage took place on June 2 and that the wife left her husband on June 27. On putting this to Counsel for the wife and asking him whether he wished for leave to amend, counsel after consulting his client said that the real reason for leaving him was something different from what was stated in the pleadings, and that he had no objection to his client's petition being dismissed.

However, as the lady had charged cruelty I also considered whether there was any ground open to her there. This raised another point on the authorities, viz., that, speaking generally, a guilty party cannot obtain relief by way of judicial separation any more than she can obtain relief by way of a divorce. The leading case on that point is *Otway* v. *Otway* (1). Similarly as regards the point I have mentioned about the desertion, viz., that it must be a wilful abstention by the husband against the wish of the wife, I may refer, so far as our own Courts are concerned, to *Bai Kanku* v. *Shiva Toya* (2).

However, at this stage of the argument counsel for the wife intimated that he was not in a position to controvert the propositions which had been advanced by counsel for the respondent and accordingly the petition could be dismissed. I accordingly directed the wife's petition to be dismissed and made no order as to costs, the husband not asking me to make any order for costs, nor the wife's counsel either.

That left me with the husband's petition for divorce. On that, counsel appears for the wife but does not defend the suit. I may, however, say at once that I am satisfied there is no collusion or anything of that sort on the evidence before me. There is one technical point, and that is that the cross-petition has been brought not by a separate petition on a separate document, but by a further statement added to the original defence to the wife's petition. However, S. 15 of the Indian Divorce Act assists the husband in this respect. There is also a decision of Sir Samuel Evans in *N.* v. *N.* (3) in which the point raised was whether a husband who had objected successfully to his wife obtaining a divorce on the ground of want of jurisdiction having regard to the domicile of the parties, could after-

(1) [1888] 13 P. D. 141.
(2) [1892] 17 Bom. 624.
(3) [1913] P. 75.

wards in answering his wife's amended petition for a judicial separation put in an answer claiming damages. The English Registrar considered that a separate document was necessary, but the learned President ruled otherwise, and further held that there was a sufficient service of the cross-petition on the wife by the fact that the husband had given a copy of his answer to the wife s solicitors. As far as the question of service is concerned, as we have counsel appearing for the wife, there is no difficulty on that point as regards her. And there is an affidavit proving service by registered post on the co-respondent in accordance with the practice of this Court.

I should mention one word as regards the co-respondent. What his precise nationality or domicile is seems to be open to some doubt. He can hardly be a British subject, and at the date of this petition he was apparently living in Paris. A point has been raised as to whether there is jurisdiction in the Court to add a foreigner as co-respondent That matter was considered by Sir Samuel Evans in *Rayment v. Rayment* (4) and he came to the conclusion that the Court had that jurisdiction. As a matter of common sense that decision must be right. It would seem absurd to hold that a wife can commit adultery with impunity, provided she is only careful enough to select a foreigner to consort with When one remembers that as far as the English Courts are concerned, Scothmen and Irishmen are considered foreigners, such absurdity becomes all the more apparent.

I, therefore, consider that there is ample jurisdiction in this Court to add a foreigner as co-respondent Of course that point is entirely different from the question whether our High Court has jurisdiction to grant a divorce where the parties are domiciled in England or elsewhere abroad. But the facts here are perfectly clear that the petitioner was and is domiciled in India ; he was born in India ; he has lived all his life in India ; and the marriage was celebrated in Bombay. The wife moreover is still living in Bombay according to her own petition. Therefore the matrimonial domicile was and is clearly Indian, and so this Court is in no way affected by the recent decision in England on the jurisdiction of the Indian Courts.

I think I have now disposed of the several technical points that were raised on this petition, and it remains to consider whether the charge against the wife, has been proved. Counsel for the wife admitted yesterday that she was on this boat with the co-respondent, and that they occupied the same cabin. But quite apart from admissions of counsel, an official in the steamship company, who owned this particular steamer, has been called He produced the original passenger tickets issued to the co-respondent and the respondent. He also produced a passenger register showing the passengers, who eventually travelled by this boat. Having regard to the peculiar name of the co-respondent and the name of the wife and the fact that her son by her former marriage is named Jules, I think the identity of the persons named in these records is clearly established as being that of the wife and the co-respondent,

In my opinion, therefore the charge of adultery against the wife is clearly proved. I think it unnecessary for counsel to go into the other charges which are contained in para 18 of the petition, and in respect of which there was a particular order dispensing with the co-respondent. Nor is there any point of delay, because the husband swears that it was not till after his wife had brought this petition that he knew that she had gone with the co respondent on this particular voyage to Marseilles.

On the cross-petition of the husband, there will accordingly be decree *nisi* for the dissolution of the marriage. There will be an order for costs against the co-respondent as asked in prayer (*b*). The usual minimum period of six months will be fixed in the decree *nisi*.

Cross-petition allowed.

(4) [1910] P. 271.

✱ 1923 BOMBAY 287 (1)

SHAH. J

Tirthdas Ghanshamdas Bajaj—Defendant-Appellant.

v.

Sadhusingh Udhasingh — Plaintiff—Respondent.

O. C. J. Suit No. 4810 of 1921. D-13th November 1922.

Registration Act S. 17 (2) V -Unregistered agreement to effect mortgage admissible if it does not create charge.

As an agreement to effect a mortgage an unregistered deed would be admissible in evidence; but if it is relied upon as justifying a declaration as to charge then it ceases to be a document merely creating a right to obtain another document, but becomes in effect a document operating to create a charge and is inadmissible. 10 Cal. 315 Foll. [P. 284 C. 1.]

Setalvad —for the Plaintiff.

SHAH J.—This suit has been heard *ex parte* as a short cause.

As I felt some difficulty in granting reliefs (*b*) and (*c*) claimed in the plaint, I heard further arguments both on the question of jurisdiction and as to the effect of the agreement of December 10, 1918 to execute a mortgage.

As regards the question of jurisdiction I do not feel any difficulty now. I have dealt with this question in the judgment delivered in *Jasraj v. Akubai* (1).

As regards the agreement, I am satisfied that it cannot be used for the purpose of holding that there is a charge on the property mentioned therein. As an agreement to effect a mortgage it would be admissible in evidence: but if it is relied upon as justifying a declaration as to charge as distinguished from a mortgage, it seems to me that it ceases to be a document *merely* creating a right to obtain another document, but becomes in effect a document operating to create a charge in future 'when the declaration sought is made.'

I have considered the argument urged by Mr. Setalvad that the document does not operate to create a charge; but that the charge is the result of such an agreement by operation of law. I am unable to accept the contention. If that is the effect of the document it operates to create such an interest, and would require to be registered. I need not deal with this question at any length. The *ratio decidendi* in *Bengal Banking Corporation* v. *Mackertich* (2) appears to me to afford a complete answer to the plaintiffs' contention on this point.

I am, therefore, unable to allow any relief to the plaintiffs except the personal relief claimed in prayer (*a*): interest on judgment at six per cent. per annum.

There will be a decree in the plaintiffs' favour in terms of prayer (*a*) in the plaint: the plaintiffs will not get the costs of the further hearing on November 9.

Suit decreed.

(1) (1922) O. C. J. No. 2839 of 1922.

(2) (1884) 10 Cal. 315.

✱ 1923 BOMBAY 287 (2)

MACLEOD C. J. AND CRUMP, J.

Ramchandra Laxman — Plaintiff-Appellant

v.

Balbhim Babaji and others— Defendants-Respondents.

S. A. No, 31 of 1921 dated 7th Nov. 1922 against the decision of the Assistant Judge with A. P. at Sholapur in Appeal No 133 of 1921.

Civil P. C. S. 11—Deccan Ag. Rel. Act-Mortgage suits.

If a mortgagor brings a redemption suit and obtains a decree *nisi*, which entitles him on payment of a certain sum by a certain time to get back the property and nothing further is done, and no attempt is made to get back the possession and no order is made barring the mortgagor to redeem, then a second suit can be brought for redemption and the same would not be barred either by section 11, or section 47 of the Civil Procedure Code, even though the suit is under Deccan Agr. Rel. Act. Whether a decree made under the Deccan Agr. Act, in a mortgage suit is a decree nisi or a decree which puts an end to the mortgage will always be a question for decision in each case when it comes before the Court. 43 B, 334 F. B. and 43 P. 477 Foll. *p. 283 c. 1, 2.*

J. R. Gharpure—for the Appellants.

P. V. Kane—for the Respondents.

Macleod C. J.—The plaintiff sued to recover possession of the suit property as the mortgagor. The original mortgage was passed by his father to his uncle Dada acting Benami

for the plaintiff's father. Dada mortgaged the plaint land with possession to one Bala in 1884. Dada brought a suit for redemption in 1892 under the Deccan Act, and on taking account, it was found that nothing was due under the mortgage, and therefore, a decree was passed directing that he should get possession. In appeal this decree was set aside. It was found that Rs. 310-9-0 were due to the mortgagee. and unless the sum was paid the possession was to be given back to the mortgagee. The amount was not paid and an order was made restoring the land to the possession of the mortgagee. It may be noticed that but for the erroneous order of the trial Court the land would never have got into the possession of the mortgagor. We may take it, therefore, that on the final order of the Appellate Court the same effect resulted as if there had been originally a decree *nisi* in favour of the mortgagor, directing that if he paid Rs. 310-9-0 within the time fixed he should get possession of the property. He did not pay, and as far as one can see there is no order of the Court which could be considered to operate as a decree for foreclosure so as to put an end to the mortgage. Dada's heir Pandharinath gave up all his rights over the plaint property in favour of the plaintiff by a deed of release in 1920. The plaintiff has brought this suit for redemption. The defendants contended that the equity of redemption had been extinguished by the proceedings in the previous suit, and this contention has found favour with both the lower Courts.

We think that the learned Judges have not sufficiently recognized the effect of the Full Bench decision in *Ramji* v. *Pandharinath* (1). The simple decision there was that if a mortgagor brings a redemption suit and obtains a decree *nisi*, which entitles him on payment of a certain sum by a certain time to get back the property, and nothing further is done, and no attempt is made to get back possession, and no order is made barring the mortgagor's right to redeem, then a second suit can be brought for redemption and the same would not be barred either by section 11 or section 47 of the Civil Procedure Code, and if the facts in the present case could be brought within that Full Bench ruling, then the mortgagor in spite of the previous suit is entitled to redeem.

It has been suggested that if the suit is brought under the provisions of the Deccan Act, some inherent element in a decree passed thereunder prevents the Full Bench ruling being made applicable. The Chief Justice said. "A suit for redemption under the Deccan Act is substantially a suit to have an account taken in accordance with the provisions of section 13, and a decree for foreclosure is never passed in the first instance or until the mortgagor has had ample opportunity of paying the sum found to be due. But in such cases section 47 of the Civil Procedure Code might affect the plaintiff's right of suit as Chapter 34 of that Code would not be applicable." These remarks were commented on by Mr. Justice Heaton in the same case when it returned to the Court after the decision of the Full Bench. The learned Judge was evidently referring to the last paragraph of the Chief Justice's judgment when he said that there was a disturbing element in the judgment, which was the possibility of there being under the Deccan Act a decree in a redemption suit which was not a decree *nisi*. Then he came to the conclusion that the decree, although it was made in a suit filed under the Deccan Act, was a decree of the ordinary kind. Here it may be said also that the decree is made under the Deccan Act, but it is a decree of the ordinary kind, and not one of the variant decrees which can be passed under section 15B of the Act. Whether a decree made under the Deccan Act in a mortgage suit is a decree nisi or a decree which puts an end to the mortgage will always be a question for decision in each case when it comes before the Court. We think, that in this case there was a decree nisi, and it comes within the Full Bench ruling. The appeal must be allowed and the

(1) [1919] 43 Bom. 334-21 Bom. L. R. 56-49 I. C. 894 (F. B.).

case sent back to the trial Court for the hearing on the merits. The appellant to get his cost here and in the Court below. Costs of the trial Court to be costs in the cause.

CRUMP, J.—I agree. This decree on the face of it is within the Full Bench ruling in *Ramji* v. *Panaharinath* (1), and unless it can be shewn that there is something in the special provisions of the Deccan Act to prevent the operation of that ruling, we are bound by it. I can find nothing in the special provisions of the Deccan Act, and indeed the respondent's pleader has not specifically referred to any section, which could have the effect of altering the nature of this decree in such a way as to prevent the operation of the law as laid down in the Full Bench case. It is on the face of it a decree which does not put an end to the relations of mortgagor and mortgagee, and therefore, the present suit for redemption cannot be held to be barred.

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*1923 BOMBAY 289

MACLEOD C. J. AND CRUMP, J.

The Broach City Municipality—Applicant.

v.

Gulam Rasul Haji Bhanubhai—Opponent.

Civil Extraordinary Application No. 198 of 1922, D. 23rd Jan. 1923 from an order passed by Dt. J. of Broach in Darkast No. 3 of 1921.

Bombay District Municipality Act (1901) S. 160 (3)—Order can be executed as decree.

An order made or a decision given by the District Court under S. 160 (3) of the Bombay District Municipal Act (Bom. Act III of 1901) can be executed and it is not necessary to make any application to the Court to pass a decree in accordance with the order on decision before execution can be taken.

R. J. Takor—for the Applicant.

H. V. Divatia—for the Opponent.

Macleod C. J.—The only question in this application made on behalf of the Broach City Municipality is whether an order made or a decision given by the District Court under S. 160 (3) of the Bombay Municipal Act (Bom. Act III of 1901) can be executed or whether it is necessary to make an application to the Court to pass a decree in accordance with the order or decision. It would certainly be very remarkable, when a summary method has been provided for by the Legislature for determining disputes arising for money compensation or damages which are directed to be paid by the Act that it should be necessary in order for the successful party to obtain relief to file a suit when the District Court has come to a definite conclusion on the merits. The District Court in cases in which the compensation is claimed in respect of land should follow, as far as may be, the procedure provided by the Land Acquisition Act, 1894, for proceedings in matters referred for the determination of the Court. Under the Land Acquisition Act, in the case of a reference, the Court proceeds to hear the parties, and to determine the value of the land, and to make an award. Clearly that award could be executed as a decree. It follows that where the District Court makes an order under S. 160 (3), it must be treated for the purpose of execution in the same way as an award made in a reference under S 18 of the Land Acquisition Act of 1894.

We have been referred to the decision in *Chunilal Vichand* v. *Ahmedabad Municipality* (1) but that, if anything, is against the present applicant's contention. It was decided there that no appeal lies from the decision of a District Court under S. 160 (3) of the Bombay District Municipal Act 1901. Once we find that the decision of the Court under that section is considered as an order, though it may not be a decree, it must follow that there is some way for the parties entitled to the benefit of the order to get satisfaction without having to file another suit.

Again it is clear from S. 160, proviso (*b*), that the Court has full power to give and apportion the costs of all proceedings in any manner it thinks fit. According to the applicant's contention, although the Court had ful

(1) [1911] 36 Bom. 47-13 Bom. L. R. 958-12 I. C. 540.

full power to apportion costs, it had no power to issue execution in order that a successful party might get his costs given to him already by the Court.

In my opinion, therefore, there can be no doubt that the decision of the lower Court was right and that the rule should be discharged with costs.

Rule discharged.

1923 BOMBAY 290

MACLEOD, C. J, AND CRUMP. J.

Balkrishna Daji Gupte—Petitioner.

v.

The Collector "Bombay Suburban"—Opponent.

Civil Rev. No. 285 of 1922 dated 26th Jan. 1923, praying for the revision of the order passed by the Collector Bombay Suburban District in L. A. Q. 123 of 1922.

*Land Acquisition Act S. 18,-Refusal to make a reference-Revision-*C. P. C. *S* 115.

High Court has not been given power to interfere with the proceedings of the Collector so that if he refuses to do what seems incumbent upon him under the provision of section 18 of the Land Acquisition Act High Court cannot direct him to make a reference and the proper remedy is either for the Legislature to give the High Court powers of superintendence over the Collector's proceeding under the Land Acquisition Act, or for the Government to draw the attention of their officers to the provisions of the Act and lay down rules for their guidance, if they have not already done so. No doubt as the expression "Person interested" in section 3 [b] of the Land Acquisition Act includes "All the persons claiming an interestin the compensation to be made on account of the acquisition of the land under this Act", and under S. 18, clause 1, "any person interested who has not accepted the award may by written application to the Collector, require that the matter be referred by the Collector for the determination of the Court, whether his objection be to measurement of the land, the amount of the compensation, the person to whom it is payable, or the apportionment of compensation among the person interested", the Collector is bound to make a reference. But if he fails in the duty imposed upon him by that section the High Court has no power to direct him to perform it. [P. 292 C, 1,2]

W. B. Pradhan—for the petitioner.

The Government Pleader — for the Opponent.

Macleod C. J.—Certain lands situated in the District of Thana were notified for acquisition under the Land Acquisition Act. Notice was served by the Collector on Mr. P. N. Gupte, in whose name the lands stood in the Government records.

On the 5th of May 1920 Mr. P. N. Gupte put in a claim for compensation under Section 9 of the Land Acquisition Act. Mr. B. D. Gupte, his uncle who was present, stated that he and Mr. P. N. Gupte, his nephew. were interested in the same land.

After the award was made Mr. B. D. Gupte wrote on the 8th July 1922 to the Salsette Development officer stating that he was the owner of one half of the land, and had appeared before the Collector to make a demand for compensation. He complained that without any further intimation to him a cheque for the full value of the land had been ordered to issue to his nephew Mr. P, N. Gupte; and in spite of his protest made when he appeared again on the 30th June, the cheque was handed over to Mr. P. N. Gupte. He, therefore, made an application under Section 18 that the matter might be referred to the District Judge of Thana for settling the apportionment of payment. On that letter a note was made that nothing could be done by the Collector as Mr. P. N. Gupte only had been recognised as the claimant.

On the 14th July Mr. B. D Gupte wrote that he might be furnished with a true copy of the award made in respect of the land, and he was informed that the land which he said stood in the name of his late father Daji Govind Gupte, never so stood in his name. He was also informed that no land acquired for the protection of Vehar Lake stood in the name of Daji Govind. If he referred to the land in which he claimed half a share, he knew already that the land stood in the name of Mr. P. N. Gupte.

An appeal was made to the Commissioner. In August 1922 the Commissioner for the Bombay Suburban Division replied that he was unable to ask the Collector to make a reference to the District Court as desired by him The applicant was referred to the Civil Court.

We are now requested by the Petitioner to interfere under the powers given us by Section 115 of the Civil Procedure Code. The first question that arises is whether the Collector acting under the powers given him by the Land Acquisition Act is a "Court" and then if he is a 'Court' whether it is Subordinate to the High Court. What constitutes a 'Court' does not appear to have been defined by any Act of Legislature but it may be presumed that an officer to be a 'Court' must be competent to make a judicial decision. But even if the Collector is a 'Court' when an application is made to him to make a reference under Section 18 of the Land Acquisition Act can he be said to be Subordinate to the High Court. Under Section 107 of the Government of India Act each of the High Courts has superintendence over all Courts for the time being subject to its appellate jurisdiction, and may do the various things mentioned in the Section. So it may be presumed, in the absence of any statutory direction to the contrary, that unless the High Court has appellate jurisdiction over a Court, that Court will not be subordinate to the High Court

In Civil Extraordinary Application No. 165 of 1918, decided on the 29th July 1919, this Court was asked to interfere in revision with an order passed by the City Survey Officer of Broach who had been directed to acquire certain land for the Broach Municipality. The Petitioner after an award had been made by the City Survey Officer made an application that the case should be referred to the Court, and the City Survey Officer passed an order that the application was time-barred. The Judgment of the High Court said "The first question is whether we can interfere with the decision of the City Survey Officer under section 115 of the Civil Procedure Code, and we are clearly of opinion that the City Survey Officer was not 'a Court' within the meaning of that Section".

Again in Civil Extraordinary Application No. 282 of 1921, decided on the 10th April 1922, the Petitioner prayed that the order passed by the Land Acquisition Officer on the application for making a reference to the District Court of Ahmedabad under Section 18 of the Land Acquisition Act should be set aside. Following the decision in the previous case it was held that the Land Acquisition Officer was not "a Court" within the meaning of Section 115 of the Code, although it was said that if there had been any merits in the case the Court would have expressed an opinion that the Petitioner's request should be treated with some consideration at the hands of Government.

We have been referred to the decision in *P. K. Parameswara Aiyar* v. *Land Acquisition Collector* (1), In that case an application had been made to the Collector to refer the matter of compensation to the Court. An order was made on the application that the applicants did not appear to be the accredited representatives of the devaswom. The petition was therefore rejected. It was held that the act of the Collector in the refusing to make a reference under Section 19 was a judicial act. It could not be denied that the proceedings under Part III of the Land Acquisition Act which resulted in an award of the Court were judicial proceedings and by virtue of section 54 the Court was subordinate to the High Court. Sections 18 and 19 provided for the procedure to be adopted to initiate those proceedings. Ordinarily a proceeding was commenced in a Court of law by the presentation of a plaint or a petition to it; but the Land Acquisition Act had adopted a somewhat different method, viz., the presentation of the application to the Collector. If the requirements of Section 18 were complied with, the Collector had no option but to make the reference, and in doing so, in addition to statement to be sent by him under Section 19, clause (1), he has to attach a schedule of the particulars of the notices served and of the statements made by the parties. It seemed clear, therefore, that the proceedings which culminated in the Court's award commenced with the filing of the application under Section 18. As

(1) [1919] 421 Mad. 23-36 M. L. J 95—49 I. C. 659.

soon as it was filed the matter of the amount of proper compensation assumed a litigious form and became a contentious proceeding between the owner and the Collector. It followed, therefore, that if the Collector decided to reject it or passed any orders regarding it, he did so judicially and not administratively for a judicial proceeding once commenced could not be affected by administrative action. The view that the Collector was a "Court" seems to have been adopted as stated by Mr. Justice Krishnan at p. 235 because it was consistent with the language and scheme of the Act, and because if the High Court did not do so, there would be no proper and adequate remedy to prevent a misuse of power by the Land Acquisition Collector who, by adopting the simple expedient of refusing to refer, might prevent an enquiry by the Court into the correctness of his own award, at any rate in all cases arising outside the Presidency towns. The remedy by 'mandamus' under Section 45 of the Specific Relief Act was available only within the ordinary original civil jurisdiction of the High Courts and not outside it.

With all due respect I cannot agree with this reasoning. I can quite understand that if the Collector refuses to do an act which is incumbent upon him under the provisions of the Land Acquisition Act, Part III, there should be some remedy available to the party aggrieved. But it does not follow that the refusal of the Collector to do his duty is a judicial act, or that even if it is a judicial act, it is a judicial act of a Court subordinate to the High Court. In this case I admit there seems to have been no reasonable grounds for the refusal of the Collector or the Commissioner to refer to the Court the question of the apportionment of the compensation awarded, though at the same time there is nothing to prevent the present Petitioner from filing a suit against his nephew for the division of the compensation money. As far as I can see High Court has not been given the power to interfere with the proceedings of the Collector so that if he refuses to do what seems incumbent upon him under the provisions of section 18 of the Land Acquisition Act, we cannot direct him to make a reference, and the proper remedy is either for the Legislature to give us powers of superintendence over the Collector's proceedings under the Land Acquisition Act, or for the Government to draw the attention of their officers to the provisions of the Act, and lay down rules for their guidance, if they have not already done so.

No doubt as the expression "person interested" in section 3 (d) of the Land Acquisition Act includes "all persons claiming an interest in compensation to be made on account of the acquisition of land under this Act", and under section 18, clause (1), "any person interested who has not accepted the award may by written application to the Collector, require that the matter be referred by the Collector for the determination of the Court whether his objection be to the measurement of the land, the amount of the compensation, the persons to whom it is payable, or the apportionment of the compensation, among the persons interested", the Collector, provided he does not consider the application as time-barred, is bound to make a reference. But if he fails in the duty imposed upon him by that section, in my opinion, this Court has no power to direct him to perform it. I think, therefore, that the rule must be discharged with oosts.

CRUMP. J.—The question for our decision in this case is whether we have power to interfere with an order of the Collector refusing to refer to the Court the question of apportionment of compensation. That the Petitioner here was a person interested cannot be denied, for he was a person claiming an interest in compensation made on account of the acquisition of land under the Act, and he therefore, fell within the definition of section 3 (b).

The real question is whether the Collector refusing to make a reference under section 18 is a "Court," and as such subject to our powers of revision or superintendence. Now it is clear from the decision in *Ezra* v. *Secretary*

of State (2) that the functions of the Collector in making an award are administrative and not judicial. In that case their Lordships of the Privy Council say "The objection is based and depends upon the theory that the enquiry by the Collector was a judicial proceeding, and that the rules of judicial proceedings apply. The argument of the appellant starts from the word "award" (which is used to describe the conclusion of the Collector), and has nothing else to support it. When the sections relating to this matter are read together, it will be found that the proceedings resulting in this "award" are administrative and not judicial; that the "award" in which the enquiry results is merely a decision (binding only on the Collector) as to what sum shall be tendered to the owner of lands; and that, if a judicial ascertainment of value is desired by the owner, he can obtain it by requiring the matter to be referred by the Collector to the Court. Sections directly relevant (besides the 9th already set out) are the 11th, 12th, 13th, 14th, 15th, and 18th".

It is clear, therefore, that up to the time when the Petitioner made his written application to the Collector requiring the matter to be referred for the determination of the Court, the Collector was acting adminstratively only, and speaking for myself, I can find noting in sections 18 and 19 to lead me to hold that the Collector at that stage of the proceedings became "a Court." In the absence of any definition of "Court", the question would be whether the Collector was clothed with any judicial functions, that is to say, had he power to hear and determine any question between conflicting parties?

Now apart from the power to decide the question of limitation, which is dealt with by the Proviso to Section 18, a matter with which we are not concerned in the present case, all that the Collector had to do was on receipt of the application to take the steps set out in section 19. I cannot say that he had power to determine anything. He was bound to proceed, and as his refusal to proceed was contrary to the plain duty imposed upon him by the Statute, it seems to me a contradiction in terms to say that in refusing to do that which he was bound to do he was acting judicially.

Those shortly are the reasons for which I hold that the Collector acting under section 18 of the Act cannot be held to be "a Court", and if that is so, it necessarily follows that we have no power to interfere with his order in this case. That there is a hardship is plain. But that is not, in my opinion, a reason for placing upon the words of the Statute an interpretation which they do not reasonably bear. That is a matter for the consideration of the Executive Government or for the Legislature, and one with which we have no concern. I agree, therefore, that this Rule should be discharged with costs.

(2) (1905) 32 Cal. 605-2 A. L. J. 771-9 C. W. N. 454-1 C. L. J. 227-7 Bom. L. R. 422 (P. C.)

1923 BOMBAY 293

MACLEOD C. J. AND CRUMP. J.

Mahadeo Ramchandra Patkar and another—Appellant.

v.

Raghoji Jijyaji Raje Shirke and others—Respondents.

S. A. No 824 of 1917, D. 8th November 1922, against the decision of Asst. J. of Ratnagiri, in Appeal No. 114 of 1912.

Evidence Act S. 90—Old document-Conduct of parties.

Assuming that a document which is produced apparently from proper custody, was executed, still if, there are circumstances which show that it was not acted upon as one would have expected a document of that nature to be acted upon the, presumption as to the title created by such document falls down. [P 264 C 1]

K. N. Koyaji—for the Appellants.

P. B. Shingne—for the Respondents

Judgment:—The question in this appeal is whether the lower Court was wrong in holding that the permanent lease granted to defendant 38 had not been proved by evidence. Both Courts have come to the conclusion that the lease has not been proved. Some of the grounds on which that conclusion was arrived at may not be altogether justified, but we are asked in Second appeal to reserve the decision of two Courts with regard to an alleged fact which undoubtedly is surrounded with doubt and suspicion. Assuming that this document which is produced apparently from proper custody, was executed, still there are circumstances which show that it was not acted upon as one would have expected a document of that nature to be acted upon The property is included in a mortgage of 1868 from which one might conclude that this particular Thikan was in the possession of the mortgagors instead of being in possession of defendant 38, who alleges that he was a permanent lessee. Then the Judge says that that Exhibit only shows possession of defendant 38 as mortgagee. Various documents appeared to the Courts below to be entirely opposed to defendant 38's contention. Nothing that has been urged before us on second appeal would be sufficient to upset the conclusion of the Courts below on a question which is mostly a question of fact, and only very incidentally a question of law. If as a matter of fact the 38th defendant has been a permanent lessee, he would, in the ordinary course, have been in management, cultivating the Suit land, and it would have been an easy matter for him to prove possession as tenant. That possession as tenant is the very thing which he failed to prove in the lower Courts. This appeal must be dismissed with costs.

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1923 BOMBAY 294

MACLEOD C. J. AND CRUMP. J.

Babusing Narayanji Raje Shirke—Appellant.

v.

Sambhaji Shiwaji Raje Shirke—Respondent.

S. A. No. 836 of 1917 D. 8th November 1922, against the decision of Asst. J. of Ratnagiri, in A. No. 114 of 1912.

Partition, Suit for—Questions to be considered.

Considering that partition suits are always extremely complicated, it is certainly advisible that any question regarding disputes with regard to particulars, such as between a mortgagor and mortgagee should, be kept out of the main partition suit or if they are taken up in the course of the trial, very great care should be taken to keep such question separate as for as possible. [P 295 C 1]

K. N. Koyaji—for the Appellant.

P. B. Shingne—for the Respondent.

Judgment:—The is a very complicated suit for partition of a Khoti village. We are only concerned in this appeal with the heir of the original defendant 22 on the one hand and defendant 24 on the other. Yeshwant, the father of the original defendants 21, 22 and 23, mortgaged his share in the khotki including Khasgi Thikans to defendant 24. Yeshwant died before suit, and his heirs were defendants Nos. 21, 22 and 23. The present appellant is the heir of the original defendant 22. It appears that in 1880 a creditor of Yeshwant issued an attachment against his interest in the property mortgaged to defendant 24, which would be the equity of redemption, and it was put up for sale in execution of the decree and was purchased benami for Yeshwant by defendant 24. Yeshwant would then be recognized still as the owner of the equity of redemption, though the property would be charged with the additional payment which the mortgagee made for his purchase at the Court sale. Thereafter by Exhibit 522, Exhibit 24 gave notice to Yeshwant to pay off the mortgage debt. Nothing was said in the notice as to what should be done if the mortgage debt was not paid The result was that the *status quo* continued, the mortgagee being in possession

of certain of the mortgaged property, the remainder being in possession of the mortgagor. That was a state of affairs when the suit was filed. It appears that in the trial Court an attempt was made to decide matters which might be in dispute between the mortgagor and mortgagee with regard to his particular share in the khotki. Considering that partition suits of this nature are always extremely complicated, it is certainly advisable that any question regarding dispute with regard to particulars, such as this between a mortgagor and mortgagee should be kept out of the partition suit, or if they are taken up in the course of the trial, very great care should be taken to keep such question separate as far as possible. Such issues ought to be raised as in a suit between the mortgagor and mortgagee. Here there is only the general issue "What are the final shares, rights and Thikans to which parties are at present entitled?" Apparently it was under that issue that the trial Judge endeavoured to deal with this particular share in the khotki which was mortgaged to defendant 24. By some process of reasoning, which we cannot follow, he came to the conclusion that the mortgagors had lost all interest in the share mortgaged to defendant 24, although they might have some claim to retain possession of what they had been in possession of as owners by adverse possession, while the mortgagee might claim to have acquired equity of redemption by adverse possession, because his notice was not replied to.

Now we are not disposed to agree in any way with the reasoning of the trial Court as it appears to us that there is no evidence from which it could be held either that the mortgagee was holding adversely against the mortgagor or that the mortgagor was holding adversely against the mortgagee. Certainly nothing could result from non-compliance with the notice, Exhibit 522. Mr. Kotwal does not appear to have accepted the reasoning of the lower Court, and at the end of his judgment he says "I hold the Court-sale binding, but the actual possessions as they continue need not be disturbed as equity between the parties can be satisfied by helping neither party to disturb the sale as it existed at the date of the suit." We understand what he must have meant by those words was that the possession of each party should remain as it existed at the date of the suit, and any questions between the mortgagor and mortgagee would have to be decided thereafter. We certainly find nothing in the judgment which could lead us to infer that the learned Judge decided that either the mortgagor or the mortgagee had become owner of any part of the mortgaged property or any interest in the mortgaged property by adverse possession. Certainly that was an important question which ought to have been dealt with in the appeal judgment. All that was decided was that the purchase of the equity of redemption at the Court-sale by the mortgagee was benami for the mortgagor. We think, therefore, that the mistake which Mr. Kotwal made was in not altering the decree in accordance with his judgment so as to reserve the rights of the mortgagor and mortgagee, leaving them to take such further action as they might be advised.

It is necessary, therefore, to amend the shares of the Thikans in accordance with the rights of the parties which appear at p. 61 and the following pages of the print. With regard to defendants 21, 22 and 23 the direction that the share of these defendants had been lost should be deleted, and it need only be mentioned that these defendants should remain in possession of the Thikans in their possession at the date of the suit. As regards defendant 24 it will be stated that the remaining portion of the 1/6th share mortgaged to him by the father of defendants 21 to 23 will remain in his possession, leaving all questions between him and the heirs of the mortgagor to be decided in any suit which the parties may be advised to file hereafter. No order as to costs. No order as to costs of the cross-objections which are not pressed and are dismissed.

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1923 BOMBAY 296 (1)

MACLEOD C. J., AND CRUMP, J

Dulanbi Kom Dastaqirsahab Ganachari and others — (Original Plaintiffs) Apapellants.

v.

Muhammad Hanif Valad Kahse Isai and others—(Original Defendants) Respondents.

S. A. No. 539 of 1920 D. 26th Jan. 1923, against the decision of Asst. J., of Belgaum in A. No. 19 of 1919.

Deed--Construction -Endorsements.

An endorsement appended to the Register of Sunads will not be a sufficient proof that the Vatan property became ordinary property' 25 B 47 O Foll. F A 170 of 1922 Ref.

A. G. Desai—for the Appellants.

S G. Desai—for the Respondent No. 6.

Judgment.—The only question which arises for the determination in the present appeal is whether the property which formed the subject matter of the suit is vatan property. Unfortunately the materials for determining that question are not quite as intelligible as could have been desired and the only point upon which stress has been laid by the appellant's pleader is the endorsement appended to the Register of stnads which is set out in the judgments of the Courts below. Now the effects of these, with reference to this very sanad, and this same Vatan, has already been considered by this Court in *Amirbi Kom Jamalkhan* v. *Lalbi Kom Sangajba* (1), decided on the 13th April 1922, and in that case it was held that these words did not suffice, to change the land from Vatan property to ordinary property. That decision was based upon the decision in *Bao Jadw* v *Narai Lal* (2) and after hearing the arguments that have been advanced before us in reference to the present case, we find no reason to take a different view. It follows therefore, that the decisions of the lower appellate Court must be confirmed and the appeal dismissed with costs.

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(1) F. A. No. 177 of 1920.
(2) (1901) 25 Bom. 470-3 Bom. L. R. 249.

1923 BOMBAY. 296 (2)

MACLEOD C. J, AND CRUMP, J.

Ramachandra Mahadeo Nayagaokar—(Original Plaintiff) Appellant. v.

Narayanrao Bhagwantrao Gosavi — (Original Defendant) Respondent.

S. A. No. 781 of 1921, D. 1st Feb. 1923, against the decision of Dt. J., of Nasik in A. No. 125 of 1921.

Hindu Law---Religious endowment---Alienation by managers.

A gift by owner who is also the manager of a Temple property in the form of a Sanad purporting to make a certain allowance yearly from generation to generation out of the Sansthan funds, cannot be given effect to as against the Temple estate, beyond the life time of the grantor.

D. C. Virkar and S. S. Patkar—for the Appellant.

G. S Rao—for the Respondent.

Judgment.—The plaintiff sued for Rs. 235 payable out of the estate of the late Damodar Timaya in the defendant's hands, or out of the Sansthan of Shri Vyankatesh Balaji at Nasik. On the 20th January 1850, Damodar who was then the owner and manager of the Sansthan gave to Sitaram, the plaintiff's grandfather, a sanad purporting to make an allowance of Rs 235 yearly from generation to generation out of the Sansthan funds. It is difficult to see on what possible ground the plaintiff could support his suit. The Sanad in effect is a gift in perpetuity by a manager of the temple out of the temple funds. In the first place, gift in perpetuity would be bad. In the second place, the manager could not make such an alienation out of the temple property. In any event an alienation made by him could not extend beyond his life-time. Both the lower Courts have dismissed the plaintiff's claim and we think very rightly.

There was an alternative claim that an annuity should be paid out of the estate of Damodar, the original grantor. But he was careful enough to charge that portion of the revenue of the Inam property which was to provide maintenance for the Gosavi family managing the temple, and that portion of the income could not be rendered in any event liable to plaintiff's claim. Therefore the appeal must be dismissed with costs.

✱ 1923 BOMBAY 297

MACLEOD C. J., AND CRUMP, J.

Mahableshwar Narayan Bhat Devte—Defendant,—Appellant.

v.

Subramanya Shivram Joshi and others—Plaintiff—Respondent.

S. A. No. 22 of 1922 dated 21 Nov. 1922 against the decision of the Dt. Judge of Kanara in Appeal No. 36 of 1920.

Hindu Law—Adoption—Rights of the adopted son—Share in partition.

The adopted person is not divested of any property which is absolutely vested in him before adoption. If a son is given in adoption after partition between father and sons the property already vasted in the adoptee will not devolve on his natural father. [P. 298 C. 2, P. 299 C. 1]

Nilkant Atmaram—for the Appellant.

G. P. Murdeshwar—for the Respondent No. 1.

Judgment:—A joint Hindu family consisted of one Shivram Joshi, his 3 sons Mahableshwar, Ganpati and Venkatraman by his first wife, and one son Subramanya by his second wife. In 1904 there was separation of the family and partition of the family property, the father and his 4 sons each taking one-fifth of the family property. Mahableshwar the present 1st defendant after partition was in 1907, given in adoption by his father to one Narayan Bhatta Devte. He thereby became a member of his new family. Shivram Joshi died leaving a will dated 28th September 1907 wherein he stated that he was not quite confident as to whether he could own the entire property which had been acquired by partition by the 1st defendant or only one-fourth share. If he owned the whole he left it in equal shares to Subramanya and Ganpati. If he only had a share he left it all to Subramanya. Subramanya then brought this suit seeking to recover from the 1st defendant the share which was given him by his father's will in the property originally acquired by the 1st defendant on partition. The suit has been decreed in both Courts on the ground that the decision in *Dattatraya Sakharam* v. *Govind Sambhaji* (1) was conclusive on the point.

In order to see whether the decision in that case applies, it is necessary to ascertain the facts. One Mahadev and his brother Sambhaji.. were divided in interest. Mahadev died more than 20 years before the suit leaving a widow Parvatibai, a son Ramchandra, and daughters. After Mahadev's death Ramchandra was given in adoption to a different family at Gwalior, and the properties in suit, which were originally assigned to the share of Mahadev, and which were vested in Ramchandra alone after Mahadev's death, were mortgaged by Parvatibai in 1909 to one Dattatraya, long after Ramchandra's adoption. The mortgagee filed a suit to enforce the mortgage. The opponents were the sons of the divided brother of Mahadev and the heirs of Parvatibai. The plaintiff's claim was contested on the ground that the property being vested in Ramchandra at the time of his adoption remained vested in him even after he was given in adoption, and that Parvatibai had no right to mortgage the property, as Ramchandra was alive. Mr. Justice Shah in giving judgment at p. 432 said:—"The text of Manu (Adhyaya IX, verse 142) bearing on this point is clear. It is translated in Vol XXV of the 'Sacred Books of the East' at page 355 as follows: 'An adopted son shall never take the family (name) and the estate of his natural father, the funeral cake follows the family (name) and the estate, the funeral offerings of him who gives (his son in adoption) cease (as far as that son is concerned)." It was urged there by Mr. Shingne that there was no provision in the text for the divesting of an estate once vested in a person, and that the person leaving the family of his birth could not be divested of property exclusively vested in him before adoption. But the learned Judge thought that that argument ignored the essential idea of an adoption. He said "There is a change in the position of the boy, and this divesting of the estate of the natural father is

(1) (1916) 40 Bom. 429–18 Bom L. R. 258–34 I. C. 423.

an incident, and, in my opinion, a necessary incident, of that change. The boy given in adoption gives up the rights, which may be vested in him by birth, to the property of his natural father, if the adoption takes place in his father's lifetime. To that extent the rights vested in him are divested after adoption. If the divesting of a vested interest so far is to be allowed, I do not see any difficulty in holding that even if the estate of the natural father be wholly vested in the boy before adoption, he is divested of it when he is given in adoption."

That is the *ratio decidendi* in that case. If the father and son are joint, and the son is given in adoption, then any vested interest which the son had in the joint family property is divested by virtue of the adoption. If the father dies and the whole estate becomes vested in the son, then on the son being adopted, the learned Judge thought, the same result would follow.

There was a fu ther argument that if the adopted boy could take his self-acquired property with him and was under no obligation to leave it in the family of his birth, there was no reason why he should not take with him the property, which had vested in him exclusively on the death of his father before the adoption. The learned Judge thought that that argument ignored the difference between the self-acquired property and the estate which had become vested in him exclusively on his father's death. In one case the property was his own, and in the other it was the estate of his natural father.

The same question came before a Bench of the Madras High Court in *Venkata Narasinha* v *Rangayya Appa Row* (2). One Venkatamayya had become entitled after partition with his brother to what was called the Madur Estate. Venkatamayya had a son Narayya who on his birth became a cosharer with his father in that estate. Then Venkata died and his son became the last surviving member of the family and was solely entitled to the estate subject to the right to maintenance of his mother. Narayya was adopted by the widow of another Narayya belonging to an elder branch of the same family, and the question was whether he was divested of the Madur estate by reason of his adoption. The learned Judges after citing the texts bearing on the question including the text of Manu Adhyaya IX verse 142 came to the conclusion that there was nothing in those texts which necessarily carried with it the idea that the adopted son was divested of property which was his own absolutely at the time of adoption. In their opinion the correct view seemed to be that by the adoption the filial relationship, as the author of the Chandrika said, was extinguished in one family, and that thereafter the person adopted could not claim or take any property in his natural family by virtue of the extinguished filial relationship therein.

With the very greatest respect it seems to me that there was a good foundation for the conclusion arrived at by their Lordships.

In the present case the 1st defendant had an absolute right to the share in the family property which had come to him on partition. He could have disposed of it so long as his right of disposition was not fettered by a son being born to him. It might be said that the rights of disposition possessed by the sole surviving member of the joint family would be the same until a son was born to him, but the origin of his title to the property would be of a different character, since nothing would have been done to put an end to the existence of the joint family. In my opinion it cannot be said that in the case of a partition in a Hindu joint family consisting of a father and his sons, the sons take their shares as the estate of their natural father and therefore the decision in *Dattatraya Sakharam* v. *Govind Sambhaji* (1) cannot be taken as governing this case. Otherwise the heir of the defendant at the time of his adoption, would have had to be ascertained as if he was dead and if there were no heirs then such property would have escheated to the crown. As their Lordships said in *Venkata* v. *Rangaya* (2) there is a

(2) (1904) 29 Mad. 437-16 M. L. J. 178

great danger in speaking of adoption as civil death and a re-birth, and in attempting to enforce the consequences that might be supposed to logically flow from those conceptions. It could only be on the assumption that the 1st defendant was civilly dead that his father as his heir would be considered as entitled to deal either *inter vivos* or by will with the property in the 1st defendant's possession. There are certain circumstances which by operation of law may bring obout the devolution of an interest in property from the holder to another person, but I do not think that the texts which have been relied upon in this case show that under Hindu Law the interest of the 1st defendant in the suit property devolved upon his father on his adoption. I think the appeal must be allowed and the suit dismissed with costs throughout.

Crump J.,--I agree.

✱ 1923 BOMBAY. 299 (1)

MACLEOD C. J., AND CRUMP. J.

Husenuddin Nurddin—Plaintiff.

v.

Dulakshidas Kshavlal—Defendant.

Civil Ref. No. 22 of 1922, D-30th Jan. 1923, made by Sub. J., of Broach on the point arising out of suit No. 131 of 1921.

Limitation Act 1908 Art 177-Amending Act XXVI of 1920--Limitation under.

The period of limitation under Art 177 is now 90 days and does not continue to be six months. (P. 299 C. 2.)

M. B. Dane—for the Plaintiff.

R. J. Thakore—for the Defendant.

Judgment.—In Act IX of 1908, the period of limitation against Art 175 was six months. Against Articles 176 178 and 179 in the column of "period of limitation" was the word "Ditto" which meant the period of limitation was the same as the last period of limitation mentioned above in the same column. By Act XXVI of 1920 in Art 176 the period of limitation was reduced to 90 days. No amendment of Art 177 was made and the words "Ditto" then meant that the period of limitation was the same as that appearing next above it in the column provided for the period of limitation namely 90 days. In Art. 178 the word "Ditto" became changed to "six months" because if the word "Ditto" had remained the period of limitation would necessrily be altered to 90 days. If it was intended that no alteration should take effect in the period of limitation for Art. 177 then that Art would have been amended in the same way as Art 178.

The question proposed is whether the period of limitation under Art 177 is now 90 days or still continues to be six months and the answer to that is that the period of limitation is now 90 days.

✱ 1923 BOMBAY. 299 (2)

MACLEOD C. J., AND CRUMP J.

Totaram Chunilalshet (Original Judgment-Debtor)—Appellant.

v.

Chhotu Motiramshet and another (Original Purchasers)—Respondents.

F. A. F. O. No. 48 of 1922, D-15th Feb. 1923, against the order passed by First Class Sub. J., of Jalgaon in Mis. Application No. 28 of 1922.

Civil P Code O 21 R 89-Money received by the decree holder-Meaning.

As long as the Legislature had decided that only money received by the decree-holder can be taken into account, the Court cannot say that money paid into Court, and not put into the pocket of the decree-holder, is money received by him 23 B 723 Foll. (P. 300 C. 1)

D C. Virkar—for the Appellant.

K. H. Kelkar—for the Respondent No. 1.

Judgment:—The question in this appeal is clearly covered by the decision in *Trimbak Narayan* v. *Ramchandra Narsingrao* (1) where it was held that payment of sale proceeds into Court is not sufficient to constitute them money received by the decree-holder. That decision was under Section 310 A of the Code of Civil Procedure of 1882. The same words are used in Order 21 Rule

(1) (m. L R. 215.

of the present Code. As long as the Legislature has decided that only money received by the decree-holder can be taken into account, then it is not for the Court to say that money paid into Court, and not put into the pocket of the decree-holder, is money received by him. The appeal, therefore must be dismissed with costs.

Appeal dismissed.

1923 BOMBAY 300

MACLEOD C. J., AND CRUMP. J.

Hanmant-(Original Plaintiff)-Appellant.

v.

Shidu Sambhu Gatada and others-(Original Defendants) Respondents.

S. A. No. 101 of 1922. D. 23rd Jan. 1923. against the decision of the Dt. J., of Satara in A. No. 212 of 1920.

Decree-Construction-Mortgage decree—Limitation Act Art. 181.

A decree was passed in August 1886 in a suit between the parties in which a consent decree was taken in the following words 'The plaintiff do pay to the defendants Rs. 55 in respect of the debt on mortgage in Chaitra of any year and the plaintiff do obtain possession of the lands in suit considering the same to have been redeemed. The plaintiff is not entitled to take possession of the lands in dispute in any other month except Chaitra.' The plaintiff was now seeking to execute the decree and was met by the contention that execution was barred. *Held* that the relationship of mortgagor and mortgagee still continued to exist between the parties. It was really a preliminary decree. 43 Bom. 334, 477, Cons 23 B. 592. Dissent. Under S. 181 until he paid the money he was not entitled to possession and until possession was asked for and refused he had no right to apply to the Court. (P 300 c 2 p 301 c 1).

A. G. Desai-for the Appellant.

H. G. Kulkarni-for the Respondents.

Judgment:—A decree was passed in August 1886 in a suit between the respective predecessors of the parties in which a consent decree was taken in the following words. "The plaintiff do pay to the defendants Nos. 2 & 3 Rs. 55 (in words fiftyfive rupees) in respect of the debt on mortgage in the month of Chaitra of any year and the plaintiff do obtain possession of the lands in suit considering the same to have been redeemed from the mortgagee. It should be understood that the plaintiff is not entitled to take possession of the lands in dispute in any other month except the month of Chaitra".

The plaintiff is now seeking to execute the decree and was met by the contention that execution was barred by limitation. The trial Court relying upon the decision in *Maruti* v. *Krishna* (1) held that the application was time barred. and disallowed the plaintiff's application to treat Durkhast as a suit under section 47, Civil Procedure Code, as the relationship of the mortgagor and mortgagee no longer existed.

This decision was confirmed in appeal by the District Judge. It seems that the decision of the Full Bench in *Kamji* v. *Pandharinath* (2) was not considered. I do not think that there the effect of the decree of 1886 was to put an end to the mortgage and that is the real test. The relationship of mortgagor and mortgagee still continued to exist between the parties, only the mortgage amount which had previously been in dispute was settled and it was directed that if the plaintiff paid that amount in Chaitra of any following year, the defendant should give backpossession. If the plaintiff did not choose to pay the mortgage amount then he had no right to apply for possession. It was really a preliminary decree. It is quite true that in *Maruti* v. *Krishna* (1) the Court considered that "when the words of the decree were vague and indefinite and were to be considered as really mentioning no time for payment the decree should be taken as operating from its date, and to be enforceable only within 3 years from that time unless kept alive by application for execution made according to law within the prescribed period".

With all respect I cannot agree with that decision. Under article 181, 3 years are prescribed as the period of limitation for applications for which no period of limitation is provided elsewhere in the schedule or by section 48 of the Code of Civil

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(1) (1899) 23 Bom. 592—1 Bom. L. R. 31.

(2) (1919) 43 Bom. 334; 477—21 Bom. L. R. 56-49 I. C. 894 (F.B.)

Procedure of 1908, and time begins to run from the time when the right to apply accrued. The plaintiff could apply for the assistance of the Court after he had offered to pay Rs. 55 and the defendants refused to give him possession of the land. Until he paid the money he was not entitled to possession and until possession was asked for and refused he had no right to apply to the Court. If he had not tendered the money, he could make no application to the Court, for assistance, and it is difficult to see what sort of application the plaintiff could have made to the Court from time to time. If as a matter of fact he was not prepared to pay the amount mentioned in the decree, he could only say to the Court 'I am not ready to pay the amount. I want time extended.' The Court would reply 'there is no time mentioned for the payment of the amount, therefore, there is no necessity for you to make an application to extend time which has not expired.' But in any event as the relationship of mortgagor and mortgagee continued after the decree of 1886 was passed, it cannot be said there was anything in that decree which could be considered as barring the plaintiffs right to redeem. He would then come under article 148 which prescribes 60 years as the period of limitation for redemption of a mortgage, and if his right of redemption is not barred then under the decision in *Hamji* v. *Pandharinath* (3) he can bring another suit for redemption. Therefore, even supposing we are prepared to hold that the Darkhast is barred under S. 48 of the Civil Procedure Code, then it is still open to the Court under section 47 Civil Procedure Code, to treat the Darkhast application as a suit for redemption. That seems to us a perfectly right course to take. On that ground we think the appeal must be allowed, and the plaintiff appellant must be allowed to redeem the mortgaged property. The plaintiff to pay the costs in the trial Court. He will get his costs in this Court and in the lower appellate Court. *Appeal allowed.*

(3) (1919) 21 Bom. L. R. (56).

✱ 1923 BOMBAY 301

MACLEOD C. J., AND CRUMP J.

Bhau Abaji Deshpande—(Plaintiff)—Appellant.

v.

Hari Ramchandra Patki and another—(Defendants)—Respondents.

S. A. No. 121 of 1922, D 30th Jan. 1923, against the decision of Asst. J., of Belgaum in A. No. 36 of 1920.

Hindu Law—Adoption—Eligibility—Prior adoption invalid.

The defendant claimed to be the adopted son of Krishnaji, his claim was disputed on the ground that he had been previously adopted by one Ramachandra. The factum of that adoption was proved. It was also proved, however, that the first defendant was the sister's son of Ramachandra. *Held* The parties being Deshastha Brahmins, *primâ facie* the adoption of a sister's son would be invalid. No attempt was made to show that in the community to which the parties belonged a custom has been established to permit the adoption of the sister's son therefore the fact that the defendant had gone through the ceremoney of adoption purporting to result in his passing into the family of Ramachandra, must be considered as a nullity and would not operate as a defect against his being validly adopted by Radhabai into the family of Krishnaji. An adoption must either be effectual for all purposes, or a nullity. P 302 C 1

H. C. Coyajee with P. B. Shingne—for the Appellant.

Bhandarker with A. G. Desai—for the Respondents.

Judgment.—The plaintiff sued for possession of certain property on the basis of a sale deed from the daughter of one Krishnaji dated 14th March 1919. There was an agreement that Rs. 2000 should be paid after the vendee had recovered possession and that fact alone leads one to think that the parties to the sale deed were aware that there was some defect in the title. Krishnaji was the last male-holder of the property. He died leaving a widow Radhabai, who adopted the 1st Defendant on the 20th May 1913. The 2nd defendant was a vendee from the 1st defendant. Obviously, if the adoption was good, the plaintiff would have no rights against the 1st defendant. But the plaintiff contended that the 1st defendant had no title as the adopted son of Krishnaji because he had been previously adopted by one Ramchandra Waman Patki. The factum of

that adoption was proved. It was also proved, however, that the 1st defendant was the sister's son of Ramchandra. The parties being Deshastha Brahmins, *prima facie* the adoption of a sester's son would be invalid. No attempt was made to show that in the community to which the parties belonged, a custom has been established to permit the adoption of the sister's son. That being the case the fact that the 1st defendant had gone through the ceremony of adoption, purporting to result in his passing into the family of Ramchandra, must be considered as a nullity, and would not operate as a defect aginst his being validly adopted by Radhabai, into the family of Krishnaji.

The question whether, an invalid adoption confers any rights in the adoptive family is considered by Mr. Mayne in his 9th Edition of Hindu Law; paragraph 176, and the following paragraphs and after discussing the cases, the conclusions, arrived at in paragraph 179 that the view taken by the Madras High Court that an adoption must either be effectual for all purposes, or a nullity, has the merit of being practical and intelligible while doing substantial justice to all parties. We think, therefore, that there was no obstacle in the way of the 1st defendant being adopted by Radhabai, and it follows that Krishnaji's daughter then had no title to sell the property to the Plaintiff. The appeal fails and must be dismissed with Costs.

Appeal dismissed.

1923 BOMBAY 302

MACLEOD C. J. AND CRUMP, J.

Shidappa — (Defendant)—Appellant

v.

Santawa Kom Bhojappa and another—(Plaintiffs)—Respondents.

S. A. No. 173 of 1922, D. 12th Jan. 1923, against the decision of the Asst J., of Belgaun in A. No. 222 of 1920.

[a] *Deed—Construction—Consequences.*

A document purporting to be an adoption deed contained the following words "you [the adopted son] alone are the full owner of my moveable and immoveable property." *Held*: that it cannot be contended for a moment that the executant in executing the deed which was to evidence the previous adoption intended to transfer thereby all his immoveable and moveable properties unless he used in the document words of conveyance or transfer P 302 C 1.

[b] *Hindu Law—Adoption—Widow.*

If it is established that events had occurred which could constitute an adoption, apart from any question of the competency of the person alleged to be adopted the widow can not dispute such an adoption made by her husband. 24 B. L. R. 469 Foll. P 303 C 1.

(c) *Hindu Law-Adoption-Evidence.*

Mere execution of a deed does not effect an adoption, and it has yet to be found in a Court of law that in a community where an orphan adoption is recognised as valid such an adoption could be made up by a deed alone. P 302 C 1

A. G. Desai—for the Appellant.

G. N. Thakore with H. B. Gumaste—for the Respondent No. 1.

Judgment:—Plaintiff No. 1 is the widow and plaintiff No. 2 is the daughter of one Bhojappa who died in 1918. They sued to recover possession of the suit property on the death of Bhojappa, their claim being resisted by the 7th defendant who set up an adoption alleged to have taken place at the instance of Bhojappa in 1898. Both the lower Courts have found that the adoption alleged by the 1st defendant did not as a matter of fact take place. But a document was executed by Bhojappa in 1912 which purports to be an adoption-deed, and refers to the adoption of the 1st defendant when he was a minor in 1898. The defendant 1 has an alternative claim for a decree under the deed, relying upon the following words "you alone are the full owner of my moveable and immoveable property." I think if the 1st defendant wishes to rely upon the deed of 1912 as evidence of the transfer to him of all property of Bhojappa, then he must confine himself to the strict construction of the deed. It cannot be contended for a moment that Bhojappa in executing the deed, which was to evidence the adoption of 1898, intended to transfer thereby all his immoveable and moveable properties

unless he used in the document words of conveyance or transfer. These words which are relied upon by the 1st defendant merely express the result which followed on the adoption according to Bhojappa's idea, namely that on his recognition of the 1st defendant as an adopted son, he would become under Hindu Law equally entitled to Bhojappa's property as Bhojappa himself was. I do not think, therefore that there is anything in the point on which I admitted the appeal. When the appeal came up for admission, the 1st defendant suggested that, as a matter of fact the adoption had taken place in 1912 by virtue of the execution of the adoption deed by Bhojappa because the 1st defendant was an orphan at that time. So there could be no giving or taking and therefore on the execution of the deed he obtained the status of the adopted son. No doubt if the 1st defendant could establish that events had occurred which could constitute an adoption, apart from any question of the competency of the person alleged to be adopted then under the decision in *Chimabai v. Malgonda Patil* v. *Mallappa Pavanappa* (1) the widow could not dispute such an adoption made by her husband Bhojappa. But the 1st defendant has failed to prove that anything has occurred which could be considered in Hindu Law as an adoption. Mere execution of a deed does not effect an adoption, and it has yet to be found in a Court of law that in communities where an orphan adoption is recognised as valid, such an adoption could be made up by a deed alone. But it has not been even proved in this case that in the community to which the parties belong, orphan adoption is recognised. Therefore, the whole of the 1st defendant's case on this ground falls to pieces. The appeal, therefore, must be dismissed with costs.

Appeal dismissed.

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(1) (1922) Bom. 397-46 Bom. 946 -24 Bom. L. R. 489-67 I. C. 654.

1923 BOMBAY 302

MACLEOD C. J., AND CRUMP J

Bhogilal Kupushanker (Original Plaintiff) — Applicant.

v.

Darasha Kooverjee Contractor and another - (Original Defendants) - Opponents.

C. E. A. No.212 of 1922 D. 23-1-1923, order Dt. J., of Surat in Mis, A. No. 26 of 1920.

Jurisdiction—Trial Court and Appellate Court C. P. C. O. 22 R. 2.

Even if in case of interlocutory appeals High Court sends for the record for the purpose of dealing with that particular matter, for all other purposes the suit is pending in the trial Court. Therefore the trial Court has jurisdiction during the pendency of such appeal to entertain the application of the representative of the deceased party, to be joined in the suit. P. 303 C. 1

H. V. Divekar—for the Applicant.

M. B. Dave — for the Opponent

Judgment:—We think the initial error was made by the trial Court when the present applicant applied to be put in the record in the place of Sorabji, who was dead. At that time there was an appeal against an interlocutory order pending in the High Court. The learned trial Judge thought that on account of that appeal its functions were entirely suspended. Even if in case of interlocutory appeals, the High Court sends for the record for the purpose of dealing with that particular matter, for all other applications the suit is pending in the trial Court. Therefore the trial Court had jurisdiction to entertain the application since on the death of a party it is necessary to place his representatives on the record. It seems to me, therefore, that once we find that the trial Court failed to exercise its jurisdiction and that error is at the root of all later proceedings it is really not necessary to consider why the applicant has been still unsuccessful in getting his name on the record in the place of the deceased Sorabji. There has been a failure to exercise proper jurisdiction. On these grounds, we think the rule must be made absolute, with costs in this Court and in the appellate Court. Other costs will be costs in the cause.

Application granted.

✱ 1923 BOMBAY 304

MACLEOD C. J., AND CRUMP, J.

Parbhubhai Morar—'Original Plaintiff)–Appellant.

v.

Bai Lalita and others — (Original Defendants)—Opponents.

Civil Extra. Application No. 257 of 1922, D. 19th Jan 1923, praying for the reversal decree of passed by First Class Sub. J., at Surat in Small Cause Suit No. 374 of 1922.

Guardian and Ward — Promissory note by guardian — Necessary purpose — Minors not bound.

The promissory note sued upon contained the words. "I (the Sister) had taken these rupees because I conduct a suit in the Court as the guardian of minors named Thakordas and Shankerlal (brothers) and I shall pay you the rupees of the promissory note with interest at one per cent per mensem whenever you will demand the same. *Held* that assuming that she the executant (sister of minors) was a *de facto* guardian she does not purport in the document to bind the minors. They cannot therefore be personally responsible on the note, nor could the sister, as the next friend or as sister of the minors, make a contract with the plaintiff which would bind the estate of the minors. The plaintiff may proceed against the minors to recover moneys which they might be liable to pay as a debt incurred by their father or by their mother or sister for necessary purposes, in another suit properly framed. *P.304C.2*

G. S. Rao—for the Applicant.

K. V. Divatia—for the Opponent No. 1.

M. B. Dave—for the Opponent No. 2 and 3.

Judgment.—The plaintiff brought this suit against three defendants to recover Rs. 950 being the amount of principal due on a promissory note dated the 30th November 1921 Admittedly defendants 2 and 3 are minors and did not, and could not, make themselves liable on the promissory note, although defendant 2 signed for his sister. The promissory note recites that the minor s father Keshvram Parbhuram had taken Rs. 200 and their mother had taken Rs. 300 to institute a suit in a Court, At the date of the note Rs. 627½ were due on these loans. On the day of the note, Bai Lalita had taken Rs. 300 to engage another pleader. The promissory note was signed for the total Rs. 927½. Then follow the words. "I had taken these rupees because I conduct a suit in the Court as the guardian of minors named Thakordas and Shankerlal and I shall pay you the rupees of this promissory note with interest at one per cent per mensem whenever you will demand the same.

The suit was decreed against the 1st defendant but dismissed against defendants 2 and 3. A very large number of cases were cited, and we have been referred to various decisions here, but the first point to note is that Lalita was not the natural guardian of the minors. She was only the next friend to conduct the suit on behalf of the minors, and even assuming that she was a *de facto* guardian, she does not purport in the document to bind the minors They cannot therefore be personally responsible on the note nor could Lalita as the next friend or as sister of the minors make a contract with the plaintiff which would find the estate of the minors.

In *Maharana Shri Ramnal Singii* v. *Vidilal Vakatchand* (1), it was held that a minor could not be bound personally by contracts entered into by a guardian which did not purport to charge his estate. The Court was there referring to a legal guardian. At p. 70 is the following passage " holding, however, that a minor cannot he bound personally by oontracts entered into by a guardian which do not charge his estate we do not think it follows that he is necessarily exempt from liability. If the debts were incurred for necessaries, he would, we believe, be bound to pay them on the general principles embodied in Section 68 of the Contract Act, as his liability would not probably be affected by the fact that the loans were advanced at the instance of the guardian. Her contract on his behalf might be ineffectual like one entered into by himself, but the liability to discharge debts incurred for necessaries would remain. The necessity for them would determine whether or not he was bound to repay them, and not, we think the reasonable belief of the lender that they were for necessary purposes."

(1) (1894) 20 Bom. 61.

The questions therefore, which would arise between the Plaintiff and the minors in a suit for money advanced for necessary purposes would be entirely different to those that, would arise in a suit on a promissory note. In a recent case of *Vithalrao Sheshgirirao Moktesar* v. *Vithalrao Sondekar* (2) which was a suit against the members of a joint family on a promissory note signed by one of them, we said. " The real point is whether a suit which is primarily a suit on a promissory note and therefore a suit to which particular rules of procedure apply, could also be treated as a suit for the debt for which the promissory note was passed. If that were permissible, difficulties would arise, because the issues in a suit on a promissory note would be entirely different from the issues which would be raised in a suit against the whole family to recover a debt. I think an application should have been made in the first instance for amendment of the pleadings when the point was taken that only the party signing the note could be liable in a suit based on the note itself."

We think therefore, that questions which would ordinarily arise in a suit against the minors to recover moneys which they might be liable to pay as a debt incurred by their father or by their mother or sister for necessary purposes cannot be decided in this suit, although it will be open to the plaintiff to proceed against the minors in a suit properly framed. Nothing has been decided in the present suit with regard to their liability to satisfy such a demand.

The Rule will be discharged with costs. The 1st defendant appeared but there was no necessity for her to appear as there was no doubt about her liability. One set of costs.

Rule discharged.

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(2) (1923) Bom. 244-25 Bom. L. R 151.

1923 BOMBAY 305

MULLA. J.

Nariman—Plaintiff.

vs.

The Municipal Corporation of the City of Bombay—Defendants,

O. O. C. J., Suit No 753 of 1923, D. 19th March 1923.

(a) *City of Bombay Municipal Act S. 16(j)—Employee in a newspaper.*

The clause does not mean that no councillor who happens to be an employee in the office of a newspaper in which advertisements relating to the affairs of the Corporation are inserted can vote at a meeting of the Corporation held to consider the question whether the fares charged by the Bombay Electric Company should or should not be increased. [P. 309 C 1]

(b) *City of Bombay Municipality Act S. 36 (p)—Construction—Matter before the meeting.*

In construing Sec. 36 Cl. (p), regard must be had to the "matter" before the meeting. A Councillor having an interest in a lease of land within the meaning of Cl. (g) cannot be held by reason of his having that interest only to be disqualified from voting on a question relating to a loan to the Corporation contemplated by Cl. (h) [P. 309 C. 1.]

(c) *City of Bombay Municipal Act S. 36 (p) and S. 16 (1) (f)—Interest,— Meaning—Share-holders — Trustee of a share holder—* Medallion - holders — *Editor with Complimentary pass.*

The interest comtemplated by Sec. 36, Cl. (p) and by S.16 Sub.sec. (1) Cl.(f) of the Bombay Act, must not be too speculative and remote. It must not be a mere sentimental interest such as that which a father may have in the prosperity of his son. Where there is a pecuniary advantage, or a reasonable expectation of a pecuniary advantage, it must be regarded as an " interest " within the meaning of the section. The interest in a contract is pecuniary, it is immaterial that the amount involved is trifling. Even if the interest is not pecuniary, it must at least be a material interest. It is clear on the language of Sec. 36. (p.) that a councillor, whose name stands as a share-holder on the register of the said company, and who has a beneficial interest in the shares, is disqualified from voting or taking part in the discussion of any matter pertaining to the said company. It is also clear that if the shares stand, not in his name, but in the name of a nominee of his, the beneficial interest being in him, he is similarly disqualified. The shares again may stand in the name of a councillor who holds them not in his own right but as a trustee for another. Where the shares stand in the name of a person who has no beneficial interest, he cannot, it seems, vote at meetings of that company in a manner inconsistent with the interests of the beneficiaries. The reason is that he derives the position which he holds as a member of the company from the legal ownership of the shares. But if such person

is also a member of the Corporation, he is entitled to vote and take part in the discussion of any matter relating to the company in which his name stands as a share-holder. He is under no obligation to vote in a manner beneficial to the interests of the *cestui que* trust, for he does not owe the membership of the Corporation having regard to the fact that he is a share-holder of that company. He commits no breach of contract if he votes in contravention of the interest of his beneficiary. It is no part of his duty as a trustee to vote at meetings of the Corporation in matters affecting the company as the beneficiary would have him to do. If no such duty is imposed upon him by law it cannot be a case of conflict between two duties. Nor can it be a case of conflict between interest and duty. In a suit to decide the validity or otherwise of the votes of A and B at a meeting of the Bombay Corporation held to decide the question of increase in the tramway fares, it was contended that their votes were invalid as they were the holders of a medallion from the said company. The medallion on one side bears the words "Member of Tramways Committee of the Bombay Municipality", and on the other, the words "Allowed to stand on back platform of cars when there is no room inside—Bombay Electric Supply and Tramways Co. Ltd". It was admitted that the holder of a medallion even though he had to stand when there was no room inside had to pay the usual fare like any other passenger. *Held* that it is impossible to conceive what share or interest a holder of a medallion could have in the said company. It cannot also be said on principle, that a Councillor, who happens also to be the editor of a newspaper and to whom as editor a complimentary pass is issued by the Tramway Company for correspondence purposes, has an interest in the company within the meaning of sec. 36 cl. p. [P. 310, C, 1 P. 311 C. 1]

(d) Evidence Act S. 114 (h)—No advesre presumption where question irrelevant.

When the question in issue was whether transfer by one M was nominal, he was asked what his income was and how much income-tax he paid. M. refused to answer. *Held* that the Court need not disbelieve his evidence merely because of those answers: Nor need it presume from his refusal to answer the question as to his income, that the answer if given would have been unfavourable to him; it was too much to ask a witness what his income was in a case of this kind. [P. 312 C. 2]

(e) Civil P. C. S. 9—Civil nature—Question as to validity of votes at a meeting—Internal management.

The question of the validity of a vote is a question of law, and a Court of Law has jurisdiction to entertain it. It is an elementary principle of the law relating to joint stock companies that the Court will not interfere with the internal management of companies acting within their powers, and in fact has no jurisdiction to do so. But surely questions relating to the validity of votes are not questions relating to the internal management of a Corporation. They are questions that can be disposed of only by a Court of Law. [P. 316 C 2]

(f) Civil P. C. O. 8 R. 1—Permission after filing of suit—Necessity of such permission if persons interested have notice of the suit,

Permission under this rule may be given even after filing the plaint. (21 Bom. 784 Ref.) but no such permission is necessary and the suit may be continued in the name of one person, if the persons interested have otherwise notice of the institution of the suit.

(g) Civil P, C. O. 6 R. 17—Suit under O. 1 R. 8.

If a suit, to which O. 1 R. 8 applies, is brought in the name of one person alone as plaintiff and it is otherwise good, the Court will allow, if necessary, the suit to be amended so as to make the necessary additions with respectto parties under O. 6 R. 17 as under O. 1 R. 10. [P. 319 C 2]

Jinnah, Desai and Taraporewala — for the Appellant.

Strangman—for the Respondents.

Judgment:—The defendant is the Municipal Corporation of the City of Bombay. The plaintiff is a member of Corporation. The present suit is brought by the plaintiff against the defendant for certain declarations and for an injunction.

By a Deed of Concession dated August 7, 1905, and made between the Municipal Corporation for the City of Bombay, The Brush Electric Engineering Company, Limited and the Bombay Electric Supply & Tramways Coy. Ltd. (hereinafter termed the said company), the said Company was granted certain rights and concessions for carrying on business in tramway, to convert them into a tramway to be worked by electric power and to construct new tramways in Bombay to be worked by such power subject to the provisions of clause 15 of the said Deed. By that clause it was provided that the said Company should not charge more than an uniform fare of 1 anna from any one point to any other point within the distance comprised in the lines existing at the time of the concession.

On May 20, 1922, the Managing Engineer of the said Company addressed a letter to the Muncipal Corporation and applied for a revision of the present scale of fares charged by the said company. A copy of the said letter was forwarded by the Commis-

sioner to the Corporation with a covering letter dated May 31, 1922. In that letter (Ex. I) the Commissioner stated that under the Deed of Concession the said company was bound to maintain an uniform fare of 1 anna on the lines taken over by it from the old company, and he recommended that the area covered by the existing lines and the extensions that were then under contemplation should be divided into half a dozen zones, and that the fare of 1 anna should be restricted only to a certain number of zones, and that an increase should be allowed in the fare for longer distances.

At a meeting of the Corporation held on August 3, 1922, the matter mentioned in the said letter was brought up for consideration. Mr. Mirza Mahomed Alli Khan who presided at the said meeting declared that no share-holder of the said company could take part in the debate or vote on the question before it. At the said meeting a resolution was passed being Resolution No. 3929 whereby the matter was referred for consideration to the Tramways Company constituted by Corporation Resolution No. 2437 of June 22, 1922 (see Ex. J). The said committee made its report substantially approving of the recommendations made by the Commissioner.

The said report was placed before a meeting of the Corporation held on February 15, 1923. Dr. D, B. Master presided at the meeting. At that meeting Mr. P. J. Marzban proposed that the said report be approved and adopted. After some discussion the meeting was adjourned to February 19, 1923.

At the adjourned meeting held on February 19, 1923, Mr. Golabchand Dewchand moved that the consideration of the said report be postponed till April 1. 1923, when the new Corporation would be formed. Dr. D. B. Master who presided at the meeting declared that the amendment was carried by a majority. A poll was then demanded by Mr. P. J. Marzban, Dr. Cursetji and two others. The result of the poll was that 17 including the Chairman had voted against the amendment and 17 for the amendment. Dr. Master who had as chairman an additional or casting vote exercised such vote against the amendment and he declared that the amendment was lost (see Ex. K).

The plaintiff says that 6 out of the 17 councillors that voted against the amendment were disqualified from voting having regard to Sec. 36, cl. (p) of the City of Bombay Municipal Act, and he asked for a declaration that the declaration by the chairman that the amendment was lost was invalid and that the amendment was duly carried, and for an injunction restraining the Corporation from acting upon the said declaration of the chairman.

The defendants have filed their written statement in which they deny that any of the said 6 councillors was disqualified from voting. They also contend that 2 of the councillors who voted for the amendment were disqualified from voting, and they submit that the plaintiff is not entitled to any of the reliefs claimed by him.

The 6 Councillors who voted against the amendment are:—

(1) Mr. Meyer Nissim;
(2) Dr. Master;
(3) Dr. Cursetji;
(4) Sir. Temulji Nariman;
(5) Mr. P. J. Marzban and.
(6) Mr. Mahomedbhai Karimbhai Ebrahim.

The 2 councillors who voted for the amendment are:—

(1) Mr. Hansraj Pragji, and.
(2) Mr. Miya Mahomed Chhotani.

At the trial of the suit the following issues were raised, viz.,

The grounds of disqualification alleged against the said 8 councillors are as follows:—

(1) that 3 of them, namely, Mr. Hansraj Pragji, Mr. Miya Mahomed Chhotani and Mr. Meyer Nissim were on February 19, 1923, the holders of several shares of the said company;
(2) that 4 of them, namely; Dr Cursetji, Sir Temulji Nariman and Mr. Mahomedbhai Karimbhai Ebrahim held shares in the said company but that they transferred the same to their nominees for the purpose solely of enabling them to vote at the said meeting;

(3) that Mr. Marzban was at the date of the said meeting the editor and proprietor of the Jame Jamshed, being a newspaper in which advertisements relating to the affairs of the said company were inserted and that he held a free pass from the said company which entitled him to travel on the lines of the company without payment of any fare; and.

(4) that Dr. Master and Dr. Cursetji were also the holders of medallions which entitled them to stand at the back of the cars if no sitting room was available though on payment of the usual fare.

The decision of the several questions raised by the 3rd issue depends on the construction of Sec. 36, cl. (p) of the Municipal Act.

That clause runs as follows:—

"A councillor shall not vote or take part in the discussion of any matter before a meeting in which he has, directly or indirectly, by himself or by his partner, any share or interest such as is described in clauses (g) to (l) both inclusive of section 16, or in which he is professionally interested on. behalf of a client principal or other partner".

There is no allegation in the present case that any one of the said councillors had an interest "by his partner". Nor is it alleged that any one of them was professionally interested as stated in the section. Eliminating these portions the portion of Sec. 36, cl. (p), material to the decision of this case would be as follows:—

"A councillor shall not vote or take part in the discussion of any matter before a meeting in which he has directly or indirectly, any share or interest in—

(j) any newspaper in which any advertisement relating to the affairs of the Corporation is inserted ; or

(k) any Joint Stock Company which shall contract with or be employed by the commissioner on behalf of the Corporation.

The only councillor to whom cl. (J) of sec. 16 can possibly apply is Mr Murzban, as to whom it is alleged by the plaintiff that he was on the material date the proprietor of the Jame-Jamshed and that advertisements relating to the affairs of the said Company were inserted in that newspaper. This allegation appears in para 7 of the plaintiff's affidavit dated February 22, 1922. It does not appear anywhere in the plaint. Mr. Murzban stated in his evidence that he is not now nor was he on the material date the proprietor of the newspaper, and that his father was the sole proprietor, and that he was the editor of the newspaper on a salary of Rs. 600 per month. He further stated that he had nothing to do with the advertisement department of that paper. I accept his evidence. But even if he was the proprietor of the paper, the fact that advertisements relating to the affairs of the said Company are inserted in the paper could not bring the case within cl. (J). That clause refers to advertisements relating to the affairs of the Corporation and not any other body. Mr. Jinnah who appeared for the plaintiff noticed this while dealing in his opening address with Mr. Murzban's case and he applied for an amendment I asked him how the omission came to be made. He said that the plaint was drafted by another counsel, and that those who drafted the instructions for drawing the plaint thought that cls. (G) to (L) did not apply to the present case. It is, indeed, sruprising how that could be so, for if these clauses do not apply, the plaintiff has no ground to stand on. I was not satisfied with the explanation, and I refused the application. Moreover, when the Rule for injunction was brought before me for argument, Mr. Desai who then appeared for the plaintiff said, the plaintiff intended to rely at the hearing on additional facts not stated in the plaint, to which Sir Thomas Strangman objected. I then told Mr. Desai that I would not allow either party to rely on new grounds of objection on which Mr. Desai applied for an amendment of the plaint which I allowed. The plaint was then amended, and though the new para 6 B of the plaint sets forth the additional

grounds of objection as regards Mr. Murzban, he does not say that advertisements relating to the affairs of the Corporation appeared in the Jame-Jamshed.

The application for amendment made by Mr. Jinnah having been refused no further question arises on cl. (J) but even if the amendment were allowed, there is no substance in it, for I held on the evidence of Mr Murzban that he was not on the material date proprietor of the Jame-Jamshed, but was only an editor on a salary of Rs. 600 per month. As such, I think, he had no interest, either direct or indirect, in the Jame-Jamshed which disqualified him from voting at the meeting of February 19, 1923. To hold otherwise would be to say that no councillor who happens to be an employee in the Office of a newspaper in which advertisements relating to the affairs of the Corporation are inserted can vote at a meeting of the Corporation held to consider the question whether the fares charged by the Bombay Electric Company should or should not be increased. There was no question at the said meeting about any tender by the Jame-Jamshed for advertisements. In construing sec. 36 cl. (p), regard must be had to the "matter" before the meeting. A councillor having an interest in a lease of land within the meaning of cl. (g) cannot be held by reason of his having that interest only to be disqualified from voting on a question relating to a loan to the Corporation contemplated by cl. (h)

The next question to consider is whether any of the said eight councillors was disqualified from voting on the ground that he had, on February 19, 1923, directly or indirectly, any share or interest in the said Company. The principal argument on both sides centered round the word "interest." On behalf of the defendants it was contended that the interest must be a pecuniary interest, and this argument was sought to be supported by a reference to the expressions "partner" and "professionally interested" in S. 36 cl. (P), and to cls. (G) to (L), all of which it was said pointed to pecuniary interest. Reliance was also placed on the decision in *Todd* v. *Robinson* (1) where it was held on the construction of the word "interested in a bargain or contract" in sec. 193 of the Public Health Act 1875 (38, 39 Vict. C. 55) that they were co-extensive and identical with the words participates in profits" occurring in schedule II, r 64, of the Act, and consequently that a share holder in a Gas Company which had entered into a contract to supply gas to a Local Board was a person interested in the Company within the meaning of Sec. 193.

On the other hand it was contended for the plaintiff that the interest need not be pecuniary, and that any interest, however small, which created a conflict between interest and duty, was sufficient to disqualify a councillor.

Sec. 16 of the Bombay Municipal Act is almost in the same terms as sec. 12 of the Municipal Corporations Act, 1882, (45 & 46 Vict. c. 50). Both these sections deal with disqualifications for being a councillor. One of the disqualifications laid down in both the sections is where a councillor "has directly or indirectly by himself or his partner, any share of interest in any contract or employment with, by, or on behalf of the council." Sec. 41 of the English Act provides a penalty if any person acts in a corporate office without being qualified. As regards disqualifications for voting, the language of the two Acts is dissimilar; for while S. 22, sub-sec. (3), of the English Act prohibits a councillor from voting in any matter in which he has, directly or indirectly, by himself or by his partner, "any pecuniary interest", sec. 36, cl. (p) of the Bombay Act applies the prohibition to "such interest as is described in cls. (g) to (L) of sec. 16."

I do not propose to define the term "interest" which occurs in sec. 36, cl (p), of the Bombay Act and in sec. 16, sub-sec. 1, cl. (f), of the same Act which corresponds with sec. 12, sub-sec 1, cl. (c) of the English Act. There have been within recent years cases before the House of Lords in which

(1) (1885) 14 Q. B. D. 739.

the question arose as to what constituted "interest" within the meaning of Acts in "*pari materia*" with the Bombay Act, but the House refrained from defining the expression. I do not propose to rush in where the House of Lords would not tread. But I will note the description of that term as given in English cases as well as the test laid down in some of them. To begin with, it seems to me, that the interest contemplated by sec. 36, cl. (p) and by sec, 16, sub-sec. 1, cl, (f) of the Bombay Act, must not be too speculative and remote as was the case in two cases before the House of Lords, namely, "*Norton* v. *Taylor*" (2) and "*Laughton* v. *Port Erin Commissioners.*" (3) Again it must not be a mere sentimental interest such as that which a father may have in the prosperity of his son, as was said in "*England* v. *Inglis* (4). Such an interest, I think, would be an interest too remote. "England's" case is, so far as I know, the first case in which we find a definition or rather a description of the term "interest" as used in sec. 12 sub sec. 1, cl. (c) of the English Act of 1882. In that case Salter J., said: "An interest" within the meaning of the section must, I agree, be something more than a sentimental interest, such as arises from the natural love and affection of a man for his son; it must be a pecuniary, or, at least, a material interest; but I do not see on what principle it must necessarily be a pecuniary advantage, because, if a public man is likely to suffer loss by his interest in any particular contract, his judgment is as likely to be deflected as when he is obtaining a pecuniary advantage from it." It follows from this that where there is a pecuniary advantage or a reasonable expectation of a pecuniary advantage, it must be regarded as an "interest" within the meaning of that section. If the interest in a contract is pecuniary, it is immaterial that the amount involved is trifling: *Nell* v. *Longbottom*" (5) a case under sec. 22 sub-sec. (3), of the English Act of 1882: *Rex* v. *Rowlands* (6) a case under sec. 46 of the Local Government Act, 1894. If the interest is not pecuniary, it must at least be a 'material' interest.

I will now turn to the test so much emphasized at the bar, namely, the test of conflict between interest and duty. That test was laid down for the first time in explicit terms by Lindley L. J., in *Nutton* v. *Wilson* (7). The question in that case was whether where a member of a local board does part of the work which a contractor has entered into a contract with the board to do on their premises, he is within the meaning of the Public Health Act, 1875 (38 and 39 Vict. c. 55) "in any manner concerned in the contract." It was held that he is. In the course of his judgment Lindley L. J., said: "The expression in any manner concerned" is a somewhat lax one. Cases may be put in which a person might perhaps he said in one sense to be concerned in a contract entered into by the board, and yet it might be tolerably obvious that he was not 'concerned in the contract' in the sense in which the Act uses the words. To interpret words of this kind, which have no very definite meaning, and, which perhaps were purposely employed for that very reason, we must look to the object to be attained. The object obviously was to prevent the conflict between interest and duty that might otherwise inevitably arise. This test was approved of by the Court of Appeal in "England v. Inglis", a case under Sec. 12 of the English Act of 1882, and it was applied and acted upon by Astbury J., in *Holden* v. *Southwark Corporation* (8) a case under Sect. 46 of the Local Government Act, 1894 (56 & 57 Vict. c. 73.)

In most of the cases referred to above the question before the Court was whether a councillor had an interest in contracts with the local board. The question in the present case is whether any of the said 8 councillors had a share or interest in the said company on February 19, 1923. The

(2) (1906) A. C. 378.
(3) (1910) A. C. 565.
(4) (1920) 2 K. B. 636 at pp. 639, 641.
(5) (1894) 1 Q. B. 767.
(6) (1906) 2 K. B. 292.
(7) [1889] 22 Q. B. D. 744, 748.
(8) [1921] 1 Ch. 550, 555; 557.

principle laid down in this case affords, I think, a fairly good guide to the determination of the several points raised in this suit. I proceed to deal with those points.

It is clear on the language of Sec. 36, Cl. (p), that a councillor, whose name stands as a share holder on the register of the said company, and who has a beneficial interest in the shares, is disqualified from voting or taking part in the discussion of any matter pertaining to the said company. It is also clear that if the shares stand, not in his name, but in the name of a nominee of his, the beneficial interest being in him, he is similarly disqualified. The shares again may stand in the name of a councillor who holds them not in his own right but as a trustee for another. Where the shares stand in the name of a person who has no beneficial interest in them but is a mere trustee, he cannot, it seems, vote at meetings of the company in a manner inconsistent with the interests of the beneficiaries. The reason is that he derives the position which he holds as a member of the company from the legal ownership of the shares. But if such person is also a member of the Corporation, he is, I think, entitled to vote and take part in the discussion of any matter relating to the company in which his name stands as a share holder. He is under no obligation to vote in a manner beneficial to the interests of the *cestui que* trust, for he does not owe the membership of the Corporation having regard to the fact that he is a share holder of that company. He commits no breach of contract if he votes in contravention of the interests of his beneficiary. It is no part of his duty as a trustee to vote at meetings of the Corporation in matters affecting the company as the beneficiary would have him to do. If no such duty is imposed upon him by law it cannot be a case of conflict between two duties. Nor can it be a case of conflict between interest, and duty, the interest which he has in the beneficiary being no higher than what a father has in the prosperity of his son as observed in "*England* v. *English*" (4).

There is no difficulty as regards Mr. Meyer Nissim and Mr. Mahomedbhai Karimbhai Ibrahim owing to admissions most fairly and frankly made by Sir Thomas Strangman on behalf of the Corporation. Mr. Meyer Nissim is the mortgagor of certain shares of the said company. The shares stand in the name of his wife. It was admitted that the shares stood in his wife's name as his nominee, and that he had a beneficial interest in the equity of redemption which disqualified him from voting at the meeting held on February 19, 1923. As to Mr. Mahomedbhai Karimbhai, it was thought at an earlier stage of the proceedings that he had no interest at all in the shares which stand on the register of the company in the name of his brother Sir Fazalbhai Karimbhai. But inquiries made at a later stage revealed the fact that the said shares belonged not to Sir Fazalbhai but to Karimbhai & Co. Ltd. The last named company is a private company, and Mr. Mahomedbhai being one of the share holders of that company had an interest in those shares and as such he was disqualified from voting at the said meeting. I accept without any hesitation Mr. Mahomedbhai's statement that he believed that he had no interest in the said shares when he first went into the witness box.

Mr. Miya Mahomed Chhotani was one of the two whose vote was challenged by the defendants. It was at first considerably doubtful whether he had in fact sold the shares which now stand in his name. But several entries from his books as well as the broker's books were produced at a later stage of the proceedings which showed, coupled with the evidence of his son and constituted attorney Mr. Usman that Mr. Chhotani had in fact sold the shares in February, 20, 1.23, and that he had no interest in them on the material date, and this was frankly conceded by Sir Thomas Strangman. It may here be stated that Mr. Chhotani could not attend the Court owing to his illness

Another councillor whose vote was challenged by the defendants was Mr. Hansraj Pragji. In his examination-in-chief he stated that on November 11, 1922, he made a gift to his wife of

several shares of diverse joint stock companies. Among them there were 45 preference and 30 ordinary shares of the said company.

The shares of three of the other companies were transferred to the name of his wife on the very day he executed the instrument of transfer in her favour. But the shares in the said company still stand in Mr. Hansraj Pragji's name. Mr. Hansraj Pragji refused to give any information as regards the alleged gift of the said shares to his wife. He said that it was a matter of secrecy and he refused to show his books of account except to the Court. I refused to look into the books unless he was prepared to show the books at least to counsel on both sides, but he point blank refused to do so. Such being the case I hold that the alleged gift is not proved and that the shares belonged to him on February 19, 1923, and that he was disqualified from voting at the said meeting.

Dr. Master was one of the councillors who presided and voted at the meeting of February 19, 1923. He voted as councillor and he also gave his casting vote as chairman. Dr. Master has been a councillor for the last 25 years. He and his wife held 18 preference shares and 5 ordinary shares of the said company. They were purchased by him with his own money. On December 20, 1922, he and his wife executed instruments of transfer (Exhs. Nos. 14 and 15) of those shares to his wife and daughter. The transfers were by way of gift. The object of the transfer, as Dr. Master said was to enable him to vote and take part in the discussion of matters appertaining to the said company. He said that he had no longer any interest in those shares and that they were the absolute property of his wife and daughter. He was asked in cross-examination whether he had ever made a gift of shares to his wife and daughter before this. His answer was that he had. That was about a year ago, the gift being of 10 share of the said company. The gift, he said, was effected by a purchase of 10 shares with his money in the name of his wife and daughter.

He refused, however, to disclose his income and the income-tax paid by him. The plaintiff impeaches the "bona fides" of the transaction and contends that the transfer was nominal. I do not think this contention should prevail. Dr. Master gave his evidence in quite a straight forward manner, and I have no reason to disbelieve his evidence. While under cross-examination he was considerably excited. It seemed he thought that no person had a right to impeach nor even to test his veracity, and in his excitement he gave some stupid answers. But this does not detract from the truth of his evidence. I am not prepared to disbelieve his evidence merely because of those answers. Nor am I prepared to presume from his refusal to answer the question as to his income that the answer if given would have been unfavourable to him. I think it was too much to ask a witness what his income was in a case of this kind. I accept Dr. Master's evidence without hesitation and I hold he parted with all his interest in the shares to his wife and daughter on December 20, 1922, and that he was not disqualified from voting at the meeting of February 19, 1923.

The next objection is to the vote of Dr. Cursetji. Dr. Cursetji has been a councillor for the last 22 years. He owned 5 ordinary shares of the said company. They stood in the joint names of himself and his wife Pirojbai. He says that in December 1922 he wanted to dispose of those shares to enable him to vote and take part in the discussion of matters relating to the said company. On december 23, 1922, he signed the instrument of transfer Exh. No. 17, took his wife's signature on it both as transferor and transferee and gave instructions to his son Jamshed, who is an LL. B. of the Bombay University, to sign it as a witness and to take the signature of his eldest son Dr. Khurshed as transferor. With these instructions he left his house. It appears from the evidence of Mr. Jamshed that he misunderstood his father's instructions and instead of signing the transfer as a witness and getting the signature of his brother Dr. Khurshed as transferee,

he signed it not only as a witness but as a transferee. The share certificates along with transfer were then sent to the said company, and the shares were transferred on the register of the company to the names of Mr. Jamshed and Pirojbai. It appears from the evidenee of Dr. Cursetji and Dr. Khurshed that Dr. Cursetji had in September 1922 borrowed Rs. 400 from Dr. Khurshed. In the middle of January 1923 he borrowed a further sum of Rs. 150 from him, and it was then arranged that Dr. Khurshed should keep the 5 shares in discharge of the two loans. In the beginning of March 1923 as a result of inquiries consequent on the present suit the mistake aforesaid was discovered and steps were taken to rectify the mistake and substitute Dr. Khurshed's name in place of Jamshed.

Dr. Cursetji has sworn that he ceased to have all interest in the shares from December 23, 1922. It is contended for the plaintiff that the transfer was nominal and that Dr. Cursetji was on the material date the beneficial owner of the shares. I am not prepared to accede to this contention. I am inclined to believe the evidence of Dr. Cursetji, Dr. Khurshed and Jamshed. They all seemed to me to be truthful witnesses. Dr. Cursetji showed no desire to suppress anything from the Court. He produced his Pass Book and allowed the other side free inspection thereof. He frankly admitted that when he signed the transfer on December 23, 1922, he did not intend to part with the beneficial interest in the shares. The first time he parted with it was in January 1923 when the second loan was made. He said that he wanted the first loan to advance Rs. 400 to a female servant in his employ and the second loan for household purposes. Counsel for the plaintiff argued that the whole story was got up from the beginning to the end to justify the vote which Dr. Curseti had given, and denounced it as a perjury. He contended that the story was too complicated and too incoherent to believe. The obvions answer to this is that if perjury was meant, Dr. Cursetji could have told a very simple and plausible story, namely, that he had transferred the shares for consideration to his son Jamshed, in whose name the shares stood on February 19, 1923. An advance to an old trusted servant is not unusual: nor are temporary loans by a Parsi son to his father unknown. I, therefore, hold that Dr. Cursetji ceased to have any beneficial interest in the shares from about the middle of January 1923 and that he was not disqualified from voting on February 19, 1923.

As to Dr. Master and Dr. Cursetji it was also contended that their votes were invalid as they were the holders of a medallion from the said company. The medallion speaks for itself. On one side it bears the words "Member of Tramways Committee of the Bombay Municipality :" and, on the other, the words "Allowed to stand on back platform of cars when there is no room inside —— Bombay Electric Supply and Tramways Co. Ltd." It was amitted that the holder of a medallion even though he had to stand when there was no room inside had to pay the usual fare like any other passenger. Such being the case it is impossible to conceive what share or interest a holder of a medallion could have in the said company. I, therefore, hold that neither Dr. Master nor Dr. Cursetji was disqualified from voting by reason of the fact that they held the medallion from the said company

Another councillor whose vote is objected to by the plaintiff is Sir Temulji Nariman. He has been a member of the Corporation for the last 15 years. He and two others are executors and trustees of the Will (Ex No. 12) of one H. M. Sethna who died in October 1918. The will has been proved and the estate has been administered, but the trusts created by the testator for the benefit of his wife and his children still continue. The testator held 13 old preference shares of the said Company which were converted after his death into 39. On January. 26, 1923, Sir Temulji executed an instrument of transfer

(Ex No. 13) whereby the said 39 shares which stood in the names of all the three trustees were transferred into the names of the other two. Sir Temulji said that he did so for the purpose of enabling him to vote and take part in the discussion of matters pertaining to the said company. It is contended for the plaintiff that Sir Temulji being a trustee of the said shares, he had an interest in the said company, and that he was, therefore, disqualified from voting. The broad ground in which the argument is based is that a trustee is under a legal obligation to his *cestui que* trust to vote as he desires. I will assume for the purposes of this case that all the 39 shares stood in the name of Sir Temulji as sole trustee on February 19, 1923, but even so I fail to see how it is obligatory on Sir Temulji to vote at meetings of the Corporation according to the directions of the beneficiaries. I have already set forth above the principles by which such a case as that of Sir Temulji should be decided. At meetings of the said company he would, no doubt be bound to vote as the beneficiaries desire, but not at meetings of the Corporation. Sir Temulji was not disqualified from voting at the meeting of February 1923.

It was next objected on the part of the plaintiff that Mr. P. Marzban was disqualified from voting as he held a complimentary pass (Ex. A 8) from the said Company. Mr. Marzban has been the editor of the Jame-Jamshed for several years past. The pass entitles the holder to travel on the lines of the said company free of charge. It is not transferable. It appears to have been first issued to editors of Indian newspapers in July 1910. The purpose for which it was issued is stated in a letter dated July 21, 1910, from the said company to the editors of 6 newspapers including the Jame-Jamshed (Ex No. 10). The said letter runs as follows:—

"As the editor of the above large and influential paper, you frequently receive letters from the public regarding the Tramway service in this City and in order to enable you to see for yourself whether the subject-matter of these letters is such as to give your readers a fair and truthful account of the position I send herewith a complimentary Tramway pass which I should be much obliged if you would kindly make use of."

The pass was renewed in the January of every year, the last renewal having been in January 1923. As in previous years, so in this year, it was made out at first in the name of the Editor, but Mr. Marzban sent it back to Mr. Mahaluxmiwalla who is the Secretary of the said company with a request to issue one in the name of the representative of the Jame-Jamshed, and it was done accordingly. The reason why he did so was that about 4 or 5 months ago a councillor raised the point whether he was entitled to speak on matters relating to the said company as he held the pass. Mr. Marzban said that he got it changed to put an end to the criticisms. He used the pass every day up to the end of 1922. In January 1923 he gave it for use to one of the reporters of the paper Mr. Pavri Mr. Marzban said that he had not used it even once this year, though as a representative of the paper he could use it if he liked. His father Mr. Jehangir stated in his evidence that he did not know anything about the pass, and that his son as chief of the editorial staff managed all about the pass. On these facts the question arises whether Mr. Marzban can be said to have an interest in the Bombay Electric & Tramway Co, within the meaning of Sec. 36, cl. (p). It seems to be one of the plaintiff's grievances that Mr. Marzban got the pass renewed in the name of the representative of the Jame-Jamshed to enable him to vote at meetings of the Corporation involving discussion of matters pertaining to the said company. But why should he not? Mr. Marzban makes no secret of it. I will, however, approach the consideration of this question on the footing that the pass was renewed in the name of the

editor. The pass did not at any time bear Mr. Marzban's name or the name of any other person as editor. It was issued to the editor of the Jame-Jamshed as it was to editors of the other newspapers. Mr. Marzban is the editor of the Jame-Jamshed today; he may sever his connection with the paper tomorrow. It is not suggested that the executive of the Tramway Company ascertains the names of the editors before the pass is renewed, or that it issues the pass to only those editors who happen to be councillors. Mr. Marzban was elected a councillor about 4 years ago. The pass has been issued to the editor of the Jame-Jamshed for the last 12 years. It cannot therefore be said, on principle, that a councillor who happens also to be the editor of a newspaper and to whom as editor a complimentary pass is issued by the Tramway Company for the purposes mentioned in the company's letter of July 21, 1910, has an interest in the company within the meaning of Sec. 36, Cl. (p)- Nor do the cases cited at the bar warrant any such conclusion. Applying the definition of "interest" as laid down by Salter J., it is impossible to say of such a councillor that he has a "pecuniary" interest or even "material" interest in the company. He might perhaps be inclined to do a good turn to the company by voting for an increase of fares, but that does not constitute an interest in the company. The pass, if he uses it, would save him the fare, but that either is not an interest in the company. A councillor who holds no shares in the Tramway Company but whose wife or son does, may be interested in voting for the Company, but that does not constitute an interest in the company. For the same reasons Mr. Marzban's case cannot be brought within the principle of of conflict between interest and duty enunciated by Lindley L. J. The interest must be one within the meaning of Sec. 36, Cl. (p), and not any interest that might influence the judgment of a councilior in voting for the company. For these reasons I hold that Mr. Marzban was not disqualified from voting at the meeting of February 19, 1923.

The result is that if the councillors whom I have held to be disqualified had not voted at the said meeting, there would have been 16 votes for the amendment, and 15 against it. The chairman therefore was not entitled to give his casting vote, and he was wrong in declaring that the amendment was lost.

The 2nd issue is whether the declaration of the chairman at the meeting of February 19, 1923, as to the result of the poll was conclusive or whether it can be opened. There is no doubt that the declaration is not conclusive, having regard to the provisions of Sec. 36, cls. (r) and (s). It will be necessary to refer to the provisions at some length later on.

I now turn to the first issue, namely whether the suit as framed is maintainable. The defendant's contention on this issue is that the suit ought to have been instituted in the name of the Corporation, and reference was made to the provisions of Sec. 517 which contemplate a suit by the Corporation. This issue which was kept in the background at the earlier stage of the proceedings was brought to the forefront after it became clear that the defendant must lose on the merits of the case.

Before proceeding to examine the legal arguments on issue No. 1, it is necessary to ascertain what precisely was the proposition before the meeting held on February 19, 1923,—whether it was a proposition merely for the adjournment of the meeting within the meaning of rule 40 or an amendment involving the disposal of a "question" within the meaning of rule 46. These rules form part of the rules framed under section 36 of the Bombay Municipal Act. Rules 14, 38, 39, 40 and 41 relate to adjournments of meetings; rules 34 to 37 to amendments, and rules 42 to 45 to voting. It is clear from these rules that a proposition for adjournment need not be seconded (rule 38); an amendment, however, must be seconded, or it falls through (rule 34). A proposition for an adjournment, if lost, may again

be moved at the same meeting (rule 40), but an amendment, if lost, cannot be moved at the same meeting. It can be moved, even if can be moved at all, after the lapse of three months from the date of its disposal as provided by section 46, provided the original proposition has not been disposed of before them. The original proposition in the present case was as follows :—

"That the fifth report, dated the 4th December, 1922, of the Tramways Committee.....regarding the revision of the present scale of Tramway fares be approved and adopted."

To that the following amendment was moved by Mr. Gulabchand Dewchand, being the amendment that has led to the present suit :—

"That further consideration of the fifth report, dated the 4th December, 1922, of the Tramways Committee .....regarding the revision of the present scale of Tramway fares, be postponed to the April meeting of the Corporation."

The amendment was seconded as required by rule 34. The significance of the April meeting lies in the fact that the life of the present Corporation ends on March 31, 1923. It seems that the plaintiff and his party were apprehensive that the original proposition, if brought before the present Corporation, would be passed by a majority and they were anxious that it should be disposed of by the Corporation as reconstituted in April next. The question involved in the amendment was whether the report of the Tramways Committee recommending an increase in Tramway fares should be disposed of by the Corporation as now constituted in April, 1923, and this was the question disposed of at the meeting of February 19, 1923. I do not think this was a mere matter of adjournment within the meaning of rule 40. It was a disposal of a "question" comtemplated by rule 46 which could not be brought up again before the Corporation until after the expiration of three months.

I now turn to rule 44 which is a reproduction of section 36, cl. (r). That rule provides that a declaration by the Chairman that a proposition has been carried shall unless a poll be demanded at the time of such declaration, be conclusive evidence of the fact. In the present case a poll was demanded, and the Chairman declared the result of the poll. This declaration, the section says, is not conclusive. If it is not conclusive it may be re-opened. But by whom ? Surely by a Court and a Court of Law alone. That is the tribunal to decide questions as to the validity of votes. Neither the Corporation nor the Chairman has any power to do so. The question of the validity of a vote is a question of law, and a Court of Law has jurisdiction to entertain it. One of the points raised on behalf of the defendants was that the Court has no power to interfere with the internal management of a Corporation, and reliance was placed on the observations of Lord Davey in *Burland* v. *Earle* (9). On page 93 the noble and learned Lord says. "It is an elementary principle of the law relating to joint stock companies that the Court will not interfere with the internal management of companies acting within their powers, and in fact has no jurisdiction to do so." But surely questions as to the validity of votes are not questions relating to the internal management of a Corporation. They are questions that can be disposed of only by a Court of law.

It was further contended for the defendants that the Court should not grant any relief to the plaintiff, for the relief, if granted, would be rendered nugatory by the President of the Corporation convening another meeting. It was also contended that the suit, if it could be sustained at all, could only be sustained by the Corporation. This argument is based on the decisions in *Foss* v. *Har-*

(9) [1902] A. C. 83.

bottle (10) *Mosley* v. *Alston* (11) and *Macdougall* v. *Gardiner* (12). But all these were cases of internal management. In *Foss* v. *Harbottle* (10), two members of a company took legal proceedings against the directors and others to compel them to make good losses sustained by the company by reason of the conduct of the directors, and the Court held that as the acts were capable of confirmation by the majority of the members the Court would not interfere; that is to say, it was left to the majority to complain or to condone as they might think best. In that case Sir James Wigram, V. C. said: "Whilst the Court may be declaring the acts complained of to be void as the suit of the present plaintiffs, who in fact may be the only proprietors who disapprove of them, the governing body of proprietors may defeat the decree by lawfully resolving upon the confirmation of the very acts which are the subject of the suit." It is difficult to see how this can be done in the present case. In *Mosley* v. *Alston* (11) the complaint was that four out of twelve directors were not entitled to act as directors and that they might be restrained from acting as such. The bill in that case was brought by two share-holders of a company. In that case Lord Cottenham said: "That, if it be an injury at all, it is an injury not to the plaintiffs personally, but to Corporation of which they are members—a usurpation of the office of directors, and therefore, an invasion of the rights of the Corporation." Such being the case, it was held that the company was the proper party to sue. I do not think that the fact that councillors disqualified from voting vote at a meeting of the Corporation is an injury to the Corporation. At least it was viewed in that light in two Chancery cases to which I shall presently refer. In *Macdougall* v. *Gardiner* (12) also the question was one of internal management. The bill was brought by a single share-holder complaining of several acts. "The whole question", said James, L. J., "comes back to a question of internal management; that is to say, whether the meeting ought not to be held in a particular way, or whether the directors ought or ought not to have sanctioned certain proceedings which they are about to sanction, whether one director ought or ought not to be removed, and whether another director ought or ought not to have been appointed. If there is some one managing the affairs of the company who ought not to manage them, and if they are being managed in a way in which they ought not to be managed, the company are the proper persons to complain of that. . . But then the plaintiff says, "Give us leave to amend." It is rather late to ask for leave to amend when the amendments might have been obtained from the Master of the Rolls before any costs had been incurred. But the question is, is there anything substantial in this case on which we should give leave to amend on the part of the company? I can see nothing. I do not think we ought to give leave to amend for the purpose merely of getting a declaration as to what the proper mode of dealing with the adjournment was, because that would be simply to give a declaration without any relief. . . I am not aware that there could be any practical result following upon a declaration obtained by the company as to the particular mode in which the meeting ought to have been adjourned."

I do not think that the present case is at all analogous to any of the three cases cited above. It would, I think, be monstrous to say, if councillors disqualified from voting at the meeting of the Corporation vote at the meeting and by so voting form a majority, that the minority has no remedy in a Court of Law. Suppose that the amendment was properly lost, and the Corporation had proceeded to consider the original proposition and the proposition was carried by the casting vote of the chairman; suppose, further, that the councillors who were disqualified from voting at the meeting recorded their votes, and a suit was brought for a declaration that the chairman's declaration was invalid and for an

(10) [1843) Hare. 461, 494.
(11) [1847] 1. Ph. 790, 798.
(12) [1875] 1 Ch. D. 13, 21-25.

injunction restraining the Corporation from acting upon the resolution. Could such a suit lie? According to the defendants' contention, the Court should not entertain such a suit, for the relief, if granted, could be rendered nugatory by convening another meeting at which the proposition might be carried by a validly constituted majority. Suppose that a requisition is made to call another meeting on the ground that some of the votes were invalid. Could another such meeting be called on that ground? Who is to decide whether the votes were valid or not? Certainly not the President, not the Corporation. It is difficult to see how another meeting could be called unless a suit is brought in the first instance for a declaration that the chairman's declaration was invalid, as certain votes were invalid, and the Court declares that the chairman's declaration was invalid. There is therefore, no substance in the contention that if the declaration asked for in this suit is granted, it will be of no effect. I think the minority would also be entitled to an injunction restraining councillors who are unqualified for voting from voting or taking part in the discussion of any matter pertaining to the said company at subsequent meetings held for that purpose so long as the disqualification continued. I do not think that the present suit should have been brought in the name of the Corporation.

It was urged for the defendants that there are only two cases in which an action may be brought by two or more members of the Coporation on bahalf of themselves and others being the two mentioned in the judgment of Lord Davey in *Burland* v. *Earle*. The passage relied upon is as follows:—

"Again, it is clear law that in order to redress a wrong done to the company or to recover moneys or damages alleged to be due to the company the action should *prima facie* be brought by the company itself. Thus cardinal principles are laid down in the well-known case of *Foss* v. *Harbottle* (10) and *Mozley* v. *Alston* (11) and in numerous later cases which it is unnecessary to cite. But an exception is made to the second rule where the persons against whom relief is sought themselves hold and control the majority of the shares in the company and will not permit an action to be brought in the name of the company. In that case the Court allowed the shareholders complaining to bring an action in their own names. This, however, is mere matter of procedure in order to give a remedy for a wrong which would otherwise escape redress and it is obvious that in such an action the plaintiffs cannot have a larger right to relief than a company itself would have, if it were the plaintiff and would complain of acts which are valid if done with the approval of the majority of the share-holders or are capable of being confirmed by the majority. The cases in which the minority can maintain such an action are therefore confined to those in which the acts complained of are of fraudulent character or beyond the power of the company".

It is clear that the above remarks are made with exclusive reference to joint stock companies, being companies formed for the purpose of making gain. The Municipal Corporation of Bombay is not a corporation for making any gain. There is no question here of redressing a wrong done to the Corporation or to recover moneys or damages alleged to be due to the Corporation. Nor is there any question of any shares controlled by a majority or of the ratification of any resolution. The question is whether the minority of the Corporation are to sit and look on while councillors disqualified from voting at a meeting vote at the meeting so as to make up a majority. Is the Court to say to the minority in such a case "we shall not interfere, for our interference may result in nothing."

I think that to deny jurisdicition in such a case or to refuse relief in such a case would be equivalent to saying that there shall be no justice at all administered Nor is authority wanting for the proposition that when the question is one of the validity of votes an action could be brought by the

share-holders complaining in their own names. In *Young* v. *South African and Australian Exploration Development Syndicate* (13) (1896) 2 Ch. 268, action was brought by two share-holders against the company and 3 directors for an injunction to restrain the defendants from holding a meeting convened to confirm a resolution passed at a previous meeting of the company, or in the alternaive, for an injunction to restrain them from acting on the said resoluion. The plaintiff contended that the resolution had been passed irregularly on the grounds *inter alia* that it was not passed by a three-fourths majority of the share holders as required by Sec. 51 of the Companies Act, 1862. Kekewich J, held that one of the nine who voted for the resolution was not entitled to vote with the result that the majority was reduced to eight and as eight did not constitute the necessary three-fourths majority he held that the special resolution was not properly passed. In the course of his judgment the learned Judge said:—

"Renshaw has said it is a useless proceeding to go through all this again because there is no doubt what the majority will do. However, that may be, that is the right of a minority; and experience tells us that sometimes when the minority insist on their rights they ultimately prevail. There, must, therefore, be an injunction to restrain the defendants from acting on the resolution."

This decision was disapproved on another ground in later cases with which we are not now concerned. In *Arnott* v. *United African Lands Ltd.* (14) (1901) 1 Ch 518 a suit was brought by two of the share-holders on behalf of themselves and all the other share-holders against the company and their directors to restrain them from acting upon some resolutions which purported to have been passed as special resolutions at a general meeting of the company. The resolutions were for the voluntary winding up of the company. By the writ in the action the plaintiffs claimed a declaration that the resolutions were not in fact passed at the meeting, but that a resolution for the adjournment of the meeting was in fact carried and injunction to restrain the defendants from in any way acting upon the resolutions as if passed. It was held by the Court of Appeal that no poll having been demanded the declaration of the chairman that the resolutions had been duly carried was conclusive. In this case it was not even suggested that the action should have been brought in the name of the company. Nor is there any reference to it in the judgments.

I think that if the present suit had been brought by two or more of the councillors on behalf of themselves and others, no objection could be taken to the frame of the suit. But the suit is by the plaintiff in his own name and the question is whether the suit must fail for that reason alone. I think it does not, because the defect can be cured by amendment. O. 6 r. 17, of the Code of Civil Procedure gives a wide power to the Court to allow a party to amend his pleading. Mr. Jinnah applied for an amendment of the plaint so as to bring it within O. I. r. 8. O. 1. r. 8. provides that where there are numerous persons having the same interest in one suit, one or more of such persons may with the permission of the Court, sue on behalf of all persons so interested: but the Court shall in such case give notice of the institution of the suit to all such persons. It has been held by a Full Bench of the High Court of Bombay in *Fernandez* v. *Rodriques* (15) (1897) 21 Bom. 784 F. B. that the permission under this rule may be given after the filing of the plaint. In that case Farran, C. J., said: "The question raises no point of jurisdiction, and there is nothing which makes it essential that leave should be given before the filing of the suit. It is a point analogous to that of adding of parties. It is clear that where a suit is defective as to parties, the requisite parties can be added after the suit has been filled." Tyabji, J. expressed the same opinion. This Court therefore has ample powers to allow the amendment asked for, and I am prepared, if necessary to grant leave to amend by add

after the plaintiff's name and description the words "and all other members of the Municipal Corporation." I am also prepared to grant permission to the plaintiffs under O. 1. r. 8, to sue in that form, and I should have done so but for the fact that r. 8. is mandatory so far as notice to the other persons interested is concerned, and it will cause unncessary delay if the suit has to be adjourned for that purpose. Moreover, this point was not taken by the defendants at all either in their written statement or in the argument of counsel. The Municipal Corporation being a party to the suit, there can be no doubt that every councillor whether he has the same interest in the suit as the plaintiff or not, had notice of the institution of the suit. Having regard to these facts and to the frame of the suit in Young's case cited above, I do not consider it necessary to direct any amendment and I proceed to pass my orders in the suit.

First, there will be a declaration in terms of prayer (a) of the plaint. Next, there will be an injunction restraining the defendants from in any wise acting upon the declaration of the chairman at the meeting held on February 19, 1923. If those whom I have held to be unqualified for voting had not voted at the said meeting, the result would have been 16 for the amendment and 15 against it, and the chairman would have declared the amendment carried, and this would have been recorded in the minute book of the Corporation. The result of such a declaration would have been that the same question could not have been brought up before the Corporation prior to the April meeting of the Corporation having regard to rule 46. I therefore hold that the chairman ought to have declared that the amendment was carried. As this has not been done, this Court will declare that the amendment be taken as carried, and restraining the defendants from doing any act inconsistent with the amendment that is, from proceeding further with the consideration of the Tramways Committee's Report until April 1. 1923; see *Harben* v. *Phillips* (16)

The only question that remains to be disposed of is one of costs. It is alleged in para 6 of the plaint that the transfers by Dr. Master Dr. Cursetji and Sir Temulji Nariman were fraudulent and nominal, and that they were not entitled to take part in the discussion or vote at the meeting of February 19. It is, indeed painful to find that the plaintiff who is a member of the Corporation should have made reckless charges of fraud against his brother councillor's without having made adequate enquiries and without sufficient grounds and Mr. Jinnah said that all that was meant by "fraud" was that the transfers were ostensible, and not real. But you cannot varnish the word "fraud"; you cannot put a gloss on it, you cannot clothe it with a glittering surface, and persuade the Court to believe that 'fraud" did not mean 'fraud." It is to be regretted that the plaintiff should have stooped to make these charges. I cannot overlook these charges, for they affect the question of costs. The investigation of the cases of Dr. Master, Dr. Cursetji, Sir Temulji and Mr. Marzban occupied a fairly good part of the Court's time. My order as to costs will be that the defendants do pay three fourths of the plaintiff's costs.

Suit decreed.

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(16) (1883) 23 Ch. D. 14, at pp. 20 and 30.

1923 BOMBAY 321
FULL BENCH

MACLEOD C. J. MARTEN AND CRUMP, JJ.

Alfred Wilkinson—Petitioner.

v

Grace Emily Norah Wilkinson and another--Respondents

Civil Reference No. 19 of 1922 with F. A. No. 13 of 1922 dated the 4th April, 1923, made by the District Judge Poona under S. 17 of the Divorce Act in Suit No. 12 of 1921.

(a) *Ultra vires-Powers of Indian Legislature.*

The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can of course do nothing beyond the limits which circumscribe those powers. But when acting within those limits it is not in any sense an agent or delegate of the Imperial Parliament, but has and was intended to have plenary powers of legislation as large, and of the same nature as those of Parliament itself. The established Courts of Justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question; and the only way in which they can properly do so, is by looking to the terms of the instrument by which, affirmatively, the lagislative powers were created, and by which negatively, they are restricted. If what has been done is legislation within the scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited, it is not for any Court of Justice to enquire further, or to enlarge constructively those conditions and restrictions. The British Parliament intended to give the widest powers to the Indian Legislature, and that, though relying on the latter's good sense not to abuse those powers, it yet retained practical checks in case of necessity. [P. 325 C. 1]

(b) *Divorce-Jurisdiction.*

Macleod, C. J.—Jurisdiction in matrimonial causes was not based on a so-called-matrimonial domicile when the Indian Councils Act was passed in 1861. [P. 325 C. 1]

The Indian Divorce Act does not confer jurisdiction on the Courts to dissolve the marriages of non-domiciled parties. Relief not involving the status of the parties may be granted under the Act if the condition of residence is satisfied. Undoubtedly a country by its Municipal Law may lay down its own tests for creating jurisdiction within its own boundaries even in cases where the status of the parties is involved When the jurisdiction of the Court is exercised according to the rules of International Law, as in the case where the parties have their domicile within its form, its decree dissolving their marriage ought to be respected by the Tribunals of every civilized country. The Court in considering a petition for divorce will follow the principles of International Law, whatever doubts may have been felt on the question until the decision in *Le Mesurier* v. *Le Mesurier*. (1895 A. C. 517). As the legislature has not directly given to the Indian Courts the power to dissolve marriages between non-domiciled parties, the District Court has no power by implication even if the argument, that residence has been made the test of jurisdiction, was a soundone. [P. 325 C 2, P. 326 C 1, 2, P. 327 C 1,2]

Marten, J. — Jurisdiction over residence, with reference to judicial separations as opposed to decrees for dissolution of the marriage itself, is now well recognised by the English Courts as a principle of private International Law and a similar jurisdiction is exercised by the Bombay High Court or its predecessor the Supreme Court for 100 years. (History of the Court for divorce and matrimonial causes in England discussed.[P 334]

The Court has not any jurisdiction to dissolve the marriage by reason of the appearance of the parties without protest. The High Court has no jurisdiction to dissolve their marriage, not withstanding that it was solemnized in India and that adultery was committed in India. But on the other hand the court has jurisdiction to grant the husband a decree for judicial separation and to provide for the custody of the children. This is because the word 'reside' in S. 2 of the Divorce Act should be construed as such, and not as meaning 'domiciled', and because under S. 7 the principles of the English Courts should be applied which in such cases will grant judicial separations to non-domiciled parties. Having regard to S. 7 Indian Courts give or withhold relief on the principles of jurisdiction now finally established in the English Courts, and it is no objection to their so doing, that those principles as now enunciated are not the same as those enunciated in the English Court of appeal in *Niboyet* v. *Niboyet* (4 P. D. 1). The jurisdiction to dissolve a marriage as opposed to granting a judicial separation, did not exist until it was given by the Matrimonial Causes Act, 1857. [P. 358 C. 1]

Crump, J.---The jurisdiction, whatever it may be, is conferred by the act in express terms, and the provisions which confer that jurisdiction are not in any way subject to any rules or principles which may from time to time be laid down by English Courts. Those provisions, confer upon the Courts in India jurisdiction to give decrees for dissolution of marriage between British subjects domiciled in England who in other respects are within the conditions prescribed by the Act. [P. 354 C. 1]

(c) *Divorce—Adultery—Proof.*

Macleod, C. J.—The mere fact that two people of opposite sexes are together under the same roof is not sufficient. From the reports of Divorce cases, it has always been considered that there must be some evidence that they occupied the same room. [P. 329]

(d) *Practice-New plea—Non-objection cures defect.*

Marten, J.—Where the issue was wide and both parties led evidence on a point not covered by the pleadings, no party can object to

the evidence as being not covered by the pleadings.

(e) *Divorce Act—Validity of the Act.* [P. 347]

Marten, J.—The Indian Divorce Act, 1869 is, and always has been, within the legislative powers conferred upon the Indian legislature by the Indian Councils Act, 1861.

(f) *Jurisdiction—Objection.*

When the judge has no inherent jurisdiction over the subject matter of the suit, the parties cannot by their mutual cansent convert it into a proper judicial process. It is the settled practice of the Bombay High Court to entertain objections taken for the first time even in second appeal, and even in England the Court can raise the question of jurisdiction at any time in proceedings for divorce [P. 349 C. 2]

(g) *Practice—Precedents—English Law.*

Crump, J.—The opinions of jurists, however eminent, are entitled to Indian Courts' respectful consideration but the Courts are not bound by those opinions, and judgments of English Courts stand in the same category. [P. 350.]

(h) *Interpretation of Statutes-Plain meaning.*

Crump, J.—Courts are bound to construe a section of an Act according to the plain meaning of the language unless either in the section itself, or in any part of the Act anything is found to modify, qualify or alter the statutory language even if absurdity or anomaly be the result of such interpretation. The proper course in interpreting an Act intended to codify a particular branch of law is first to examine its language for its natural meaning uninfluenced by any considerations derived from the previous state of the law, and to start with enquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view. [P 351,]

(i) *Divorce Act, S. 7-'For the time being,' meaning of*

Crump, J. (contra Marten, J.)—There is the possibility of reading into S. 7 an intention on the part of Legislature to adopt whatever test the Court of Divorce in England might from time to time lay down upon the matter of divorce but that is a forced and unnatual construction. Also it would be necessary to omit the words "Subject to the provisions contained in this Act..."Indeed, had the Legislature intended any such result, it would have been easy to say in express terms that the provisions of the Act must be read as subject to the rules and principles applied from time to time by the Matrimonial Courts in England. They have chosen to say precisely the contrary. Any such construction would introduce an element of uncertainty where certainty is essential ... The doctrine of English Courts has varied from time to time upon this point. Since 1895 domicile alone is recognized as conferring jurisdiction. [P. 352 C. 1, 2]

S. 7 is a residuary section intended to provide for any matters which by inadvertance or otherwise are not expressly dealt with in the Act. It is not unusual in statutory drafting to insert provisions of this nature *ex majore cautela* more especially where an attempt is being made to codify in this country an unfamiliar branch of English Law. The expression 'rules and principles' points rather to the rules and principles on which the Court deals with these matrimonial causes in requiring a certain degree of evidence and other cognate matters. [P. 355 C. 1, 2]

Campbell with H. V. Divatia and S. E. Bamji—for the Petitioner.

D. B. Binning with D. C. Virkar—for Respondent No. 1.

M. M. Karbhari—for Respondent No. 2.

Macleod, C. J.—This is a reference under section 17 of the Indian Divorce Act IV of 1869 to the High Court of Bombay for the confirmation of a decree for dissolution of marriage in a suit filed in the Court of the District Judge of Poona by the petitioner Alfred Wilkinson against his wife Norah Wilkinson as the respondent and a Captain D' Arcy as co-respondent.

The petitioner alleged that he was married to the respondent on the 8th May 1914 at Poona. That he resided in Poona till 1917 and in Bombay until 1920 when he went to England with his wife and two children. That he returned on the 18th March 1921 and resided at Poona. From the 1st May he was employed in Bombay while his wife remained at Poona and they last resided together at Poona. In Poona the respondent became familiar with the co-respondent and on various occasions committed adultery with him. On the 27th August the respondent came to Bombay to the petitioner and on the 23rd left him to go away with the co-respondent who left her that night at the Apollo Hotel. On the 1st September the respondent wrote to him that she was going away altogether. The petition was filed on the 7th September. The respondent denied that she had committed adultery on various occasions at Poona. She alleged that on the 23rd May the petitioner turned her out of the house when the co-respondent gave her a helping hand and found a room for her at the Apollo Hotel where she stayed till her father arrived and took her back to Poona. The co-respondent

in his written statement adopted the same defence as the respondent. When the case came on for trial, the following issues were raised:—

(1) Whether plaintiff proves adultery between respondents 1 and 2

(2) If plaintiff proves adultery, has he condoned it by his subsequent conduct ?

Although no issues were raised with regard to the domicile of the petitioner or the jurisdiction of the Court to deal with the petition, it appears that the question of jurisdiction was argued on the basis that the parties were domiciled in England The learned Judge said " The jurisdiction depends on the Indian Divorce Act, 1869 and so long as that Act is in force, this Court cannot decline jurisdiction. Moreover the Courts in India are not subject to the Probate Division of the High Court of Justice in Fngland. As apparently divorces garanted in India between parties of non-Indian domiciles are not recognised in England now, the present position of the Law is anomalous but that is a matter for the Legislature and not for the Courts in India". In this Court the petitioner has put in an affidavit alleging that before the date of the institution of the petition he had given up his English domicile, but such a statement was too clearly prompted by the occasion, and for the purposes of this Reference we must take it that the petitioner was not domiciled in India.

By section 2 of the Act nothing herein after contained shall authorise any Court to grant any relief under the Act, except in cases where the petitioner professes the Christian religion and resides in India at the time of presenting the petition, or to make decree of dissolution of marriage except in the following cases;— (a), where the marriage shall have been solemnized in India, or (b) where the adultery, rape or unnatural crime complained of shall have been committed in India, or (c) where the husband has, since the solemnization of the marriage, exchanged his profession of Christianity for the profession of some other form of religion.

By section 7 subject to the provisions contained in the Act, the High Courts and District Courts shall, in all suits and proceedings thereunder. act and give relief on principles and rules which, in the opinions of the said Courts, are as nearly as may be conformable to the principles and rules on which the Court for Divorce and matrimonial causes in England for the time being acts and gives relief.

By section 10 any husband may present a petition for dissolution of his marriage on the point of his wife's adultery and any wife may petition for dissolution of her marriage on any of the grounds mentioned in the section.

Section 22 enables a husband or a wife to obtain a decree for judicial separation on any of the grounds therein mentioned.

It has been contended before us that the District Court of Poona had no jurisdiction to pass the decree under Reference for two reasons : (1) because the Indian Divorce Act, 1869 could not be deemed to warrant the making of laws by the Indian Government to interfere with the status of subjects of the Crown not domiciled in India, (2) because even if the Indian Councils did warrant the making of such laws, the Indian Divorce Act itself did not give such jurisdiction to the Indian Courts. It cannot be disputed that ever since Act IV of 1869 was passed, the Indian Courts have assumed to themselves jurisdiction to divorce non--domiciled parties. It has never been questioned that decrees of divorce in such cases were valid in India and it has been taken for granted that they were also valid in England. *Thornton* v. *Thornton* (1) *Warter* v. *Warter* (2) and *In re Norton Settlement* (3) [*Norton* v. *Norton*]. The decision of the President of the Probate Divorce and Admiralty Division in

(1) (1886) 11 P.D. 176—54 L.T. 774—55 L.J.P. 40—34 W. R 509

(2) 15 P.D. 152—63 L.T. 250—59 L.J.P. 87—54 J.P. 631.

(3) (1908) 1 Ch. 471-99 L. T. 257 -77 L.J.Ch. 312

Keyes v. *Keys* (4) has necessitated a reconsideration of the nature and extent of the powers of the Indian Courts under Act IV of 1869. In that case the petitioner Reginald Keyes had obtained a decree for the dissolution of his marriage from the Chief Court of the Punjab in 1918. Apprehending that the validity of that decree might not be recognised in England, he filed a petition for divorce in England. It was not defended, but considering the importance of the case, the Secretary of State obtained leave to intervene in consequence of which the King's Proctor also appeared. The Attorney-General said that the question was whether having regard to the clear words of section 7 of Act IV of 1869 the word 'resides' in section 2 was to be read as meaning merely resident or with the more pregnant meaning of domiciled. The jurisdiction of the English Court rests not on residence but on domicile. He referred to *Armytage* v. *Armytage* (5) in which Mr. Justice Gorell Barnes said "the jurisdiction to dissolve marriages was conferred on this Court by the Matrimonial Causes Act, and although that Act does not expressly make domicile a test of jurisdiction, that test is applied by the Court to the exercise of jurisdiction in cases of dissolution of marriage. It is derived from the principles of private international law an adherence to which is necessary, as Lord Penzance said in *Wilson* v. *Wilson* (6) in order to preclude the scandal which arises when a man and woman are held to be man and a wife in the country and strangers in another".

Sir Erle Richards for the Secretary of State pointed out that the doctrine that divorce jurisdiction must be based on domicile did not obtain in 1861 when the Indian Councils Act was passed. He relied on the user of the last 50 years and on the fact that the Indian Divorce Act was within the authority given by the Imperial Parliament and was binding everywhere within the British Empire.

The President in giving judgment said that the substantial question to be decided was whether the Governor-General of India in Council was authorised by the Indian Councils Act, 1861 to establish Courts having jurisdiction in India with power to decree the dissolution of the marriage of persons domiciled elsewhere, and whether the authority, if any, thereby given was so exercised in the enactment of the Indian Divorce Act, 1869. It was pointed out that so far from its having been recognised in 1861 that divorce jurisdiction need not be based on domicile, the law of nations with regard to the power of communities to deal with the status of marriage between strangers resident among them had long been declared by jurists to be that afterwards laid down in *Le Mesurier* v. *Le Mesurier* (7). In *Warrender* v. *Warrender* (8) Lord Brougham had said with the assent of Lord Lyndhurst that the parties to the marriage contract must be deemed to enter into it with reference to their domicile and laws and that jurisdiction must depend on domicile. These pronouncements seemed to be material in the inquiry whether upon the true construction of the Imperial Statute of 1861 power was thereby conferred upon the Governor-General of India in Council to legislate for British subjects merely resident in India so as to affect their status as to marriage in the country of their domicile. Accordingly the learned President decided that section 22 of the Indian Councils Act could not be deemed to warrant the making of laws by the Indian Government to interfere with the status of subjects of the Crown not domiciled in India. As between two possible constructions, that which was conformable to international law as declared in English Tribunals was to be preferred to that which would involve infringement of the rights of other communities.

With the very greatest respect it might be said that for the purpose of the decision in *Keyes* v. *Keyes* (4) it

(4) 1921 P. 204.
(5) [1898] P. 178-78 L. T. 689-14 T. L. R. 480-67 L. J. P. 90.
(6) L. R. 2 P. & D. 435.
(7) (1895) A. C. 517-64 L.J.P. C. 97-72 L.T 873-11 R. 527.
(8) [1835] 2 Clark & Finnelly 488.

was only necessary to discuss the question whether extra-territorial effect could be given to the decree of the Chief Court of the Punjab, but in the present case it must be taken as granted that if we confirm the decree of the District Judge, it will have no validity in England, so we have to decide whether we have jurisdiction to confirm a decree which will only be valid in India, and on that question the judgment in *Keyes* v. *Keyes* (4) has to be carefully considered. There are three courses open to us.

We may follow the decision in *Keyes* v. *Keyes* (4) that the Indian Legislature has no power to give the Courts jurisdiction to grant decrees for dissolution of marriage to non-domiciled parties ; or

we may hold that the Indian Legislature has the power and has not exercised it ; or

we may hold that the Indian Legislature has the power and has exercised it.

I am not prepared to differ from the decision in *Keyes* v. *Keyes*. (4) For the argument that jurisdiction in matrimonial causes was based on a so-called matrimonial domicile when the Indian Councils Act was passed in 1861 can hardly be said to be grounded on fact. *Niboyet* v. *Niboyet* (9) which forms its chief support was decided in 1878, and as was pointed out in *Le Mesurier* v. *Mesurier* (7) it could not be said that at any time the doctrine was completely established, so that we could safely say that the Indian Councils Act was passed on the understanding that it was a part of international law. I do not deny that there is considerable force in the argument that there is nothing in the Indian Councils Act itself to impel us to construe it in the restricted manner for which Mr. Binning has contended. In *Queen* vs. *Burah* (10) their Lordships said at p. 193. " The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can of course do nothing beyond the limits which circumscribe those powers. But when acting within those limits it is not in any sense an agent or delegate of the Imperial Parliament, but has and was intended to have plenary powers of legislation as large, and of the same nature as those of Parliament itself. The established Courts of Justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question ; and the only way in which they can properly do so, is by looking to the terms of that instrument by which, affirmatively, the legislative powers were created, and by which negatively, they are restricted. If what has been done is legislation within the scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited, it is not for any Court of Justice to inquire further, or to enlarge constructively those conditions and restrictions. It may be said, therefore, that unless we can read into the Indian Councils Act an express provision prohibiting the Indian Legislature from giving the Indian Courts of Justice powers to divorce non-domiciled parties, an Act of the Indian Legislature giving such powers would not be *ultra vires*.

Apart, however, from the undesirability of a conflict of Judicial opinion between the Indian and English Courts on the question of the construction of an Imperial Statute, the discussion may be said to be purely academical, if my view is correct that the Indian Divorce Act does not confer jurisdiction on the Courts to dissolve the marriages of non-domiciled parties, since the Legislature would not be likely in the future to suggest the amendment of the Act so as to enable the Courts to grant decrees for divorce which would only be valid in India.

The argument that the Legislature intentionally made residence the test of jurisdiction and not domicile must also include the proposition that the Legislature omitted or declined to recognize that in matrimonial cases which involved dealing with the status of the parties the Courts follow the principles of International Law

(9) 4 P.D. 1-39 L.T, 486-27 W.R. 203-48 L. J., P. 1.
(10) (1879) 4 Cal. 172-5 I. A. 178-3 C.L.R. 197-3 App. Ca 889 (P.C.)

unless they are expressly excluded by the Municipal Law. In *Banerjee* v. *Banerjee* (11) Jenkins J. said that residence and not domicile had been made the test of jurisdiction, but apart from the fact that in that case there was no question with regard to the domicile of the parties, I doubt very much whether the argument is sound that because the Court can only give relief to a petitioner who is resident in India the question of domicile may be disregarded altogether. Relief not involving the status of the parties may be granted under the Act if the condition of residence is satisfied, but that is in accordance with the principles and rules of the Ecclesiastical Courts which by section 22 of 20 and 21 Vic. Ch. 85 were to be acted upon by the Matrimonial Court in all suits and proceedings other than proceedings for the dissolution of marriage. The question whether the Court of Divorce in England had jurisdiction to entertain a suit for judicial separation where the husband was domiciled in Australia and the act of cruelty alleged was said to have been committed in Italy was very fully considered in *Armytage* v. *Armytage* (5). The petitioner maintained that the test of domicile was not applicable as in a suit for dissolution of marriage and that the Ecclesiastical Courts would have given her relief when she and her husband were both residing in England in the circumstances proved. The respondent contended that no relief would have been given because the parties were not domiciled in England and no act of cruelty had been proved within the jurisdiction. Gorell Barnes J. said in conclusion at page 197. 'It may I think be safely laid down that the Ecclesiastical Courts would formerly and the Courts will now, interfere to protect a wife against the cruelty of her husband, both being within the jurisdiction, when the necessities of the case require such intervention. The argument that the Indian Divorce Act has made residence and not domicile the test of jurisdiction may best be refuted by referring to the following passage in the judgment of the Privy Council in *Le Mesurier* v. *Le Mesurier* (7) when dealing with the decision in *Niboyat* v. *Niboyat* (9) "The main reason assigned for these decisions by the learned Judges of the majority was that, before the Act of 1857 became law, the petitioner would have been entitled to sue her husband in the Bishop's Court, although he was not domiciled in England and to ask either for restitution of conjugal rights or for a divorce *a mensa et thoro*, and in either case for proper alimony; and consequently that, after the Act of 1857 was passed, jurisdiction in divorce might be exercised in the same circumstances. There appears to their Lordships to be an obvious fallacy in that reasoning. It is not doubtful that there may be residence without domicile, sufficient to sustain a suit for restitution of conjugal rights, for separation or for alimony but it does not follow that such residence must also give jurisdiction to dissolve the marriage. Their Lordships cannot construe section 27 of the Act of 1857 as giving the English Court jurisdiction in all cases where any other matrimonial suit would previously have been entertained in the Bishop's Court.

It must follow that the Indian Courts have not a more extended jurisdiction than the English Courts. Undoubtedly a country by its Municipal Law may lay down its own tests for creating jurisdiction within its own boundaries even in cases where the status of the parties is involved. Their Lordships in *Le Mesurier* v. *Le Mesurier* (7) when dealing with the question of matrimonial domicile, said at p. 537. "It is a circumstance not undeserving of notice that the learned Judges whether English or Scotch, who have expressed judicial opinions in favour of a matrimonial domicile, have abstained from reference to those treatises on international law which are generally regarded as authoritative, in the absence of any Municipal Law." And that it would be competent for Municipal Law to create jurisdiction valid within its own boundaries is clear from the following passage in the judgment at p. 527. "In order to sustain the competency of the present

(11) (1899) 3 C.W.N. 250.

suit it is necessary for the appellant to show that the jurisdiction assumed by the District Judge of Motara was derived, either from some recognised principle of the general law of nations, or from some domestic rule of the Roman Dutch Law. If either of these points were established the jurisdiction of the District Court would be placed beyond question; but the effect of its decree divorcing the spouses would not in each case be the same. When the jurisdiction of the Court is exercised according to the rules of International Law, as in the case where the parties have their domicile within its forum its decree dissolving their marriage ought to be respected by the Tribunals of every civilized country."

But with regard to the dissolution of marriage the provisions of the Indian Divorce Act are with a few variations identical with those of 21 and 22 Vic. Ch. 85. Under section 27 of that Act any husband may petition for dissolution of his marriage etc. but it may be taken now as settled that the Court in considering such a petition will follow the principles of International Law, whatever doubts may have been felt on the question until the decision in *Le Mesurier* v. *Le Mesurier* (7). As the Legislature has not directly given to the Indian Courts the power to dissolve marriages between non-domiciled parties, I do not think it is open to us to hold that we have the power by implication, even if I thought that the argument that residence has been made the test of jurisdiction was a sound one. I am prepared to go further and hold that section 7 of the Indian Divorce Act set out above directly excludes the idea that the Act gives jurisdiction to decree divorce in the case of non-domiciled parties. Professor Dicey in the second edition of his 'Conflict of Laws', considered that such a construction of sections 2 and 7 would be forced on two considerations. Residence was designedly made the basis of divorce jurisdiction in India regardless of domicile, and the Indian Courts exercised jurisdiction on that basis. The second consideration merely begs the question, the first is also open to that defect, unlesss it could be said that it was intended to recognise the doctrine of matrimonial domicile. Considering that nearly all Englishmen in India were non-domiciled and that it may have been intended by the Act to provide them with a forum for deciding their matrimonial disputes, it is quite possible that the Legislature thought that they were giving effect to such an intention, and were not enacting divorce legislation for the domiciled community only. But granting that was the intention, and admitting that for 50 years it was considered that effect had been given to that intention by the Act, the fact remains that we have to construe the Act as it stands now free from all such matters of prejudice. To my mind the same considerations on which it was held that the Indian Courts cannot grant divorces to non-domiciled parties which will be treated as valid in England must operate on the validity of such divorce in India. I can see no difference in terms between the provisions of the Indian Divorce Act and the Matrimonial Causes Act, certainly no difference which gives the Indian Courts a wider jurisdiction. After the decision in *Keyes* v. *Keyes* (4) Act 11 and 12 Geo. V. c. 18 was passed, whereby any decree granted under the Act of the Indian Legislature known as the Indian Divorce Act, 1869 and confirmed or made absolute under the provisions of that Act for the dissolution of a marriage the parties to which were at the time of the commencement of the proceedings domiciled in the United Kingdom, and any order made by the Courts in relation to any such decree shall, if the proceedings were commenced before the passing of the Act, be as valid and be deemed always to have been as valid in all respects as though the parties to the marriage had been domiciled in India. But the power to grant divorces in such cases in the future was withheld.

In my opinion, therefore, the District Court of Poona had no jurisdiction to pass a decree for dissolution of marriage in this case.

But it is also necessary to consider the question of fact, whether it was

proved that the respondent had committed adultery with the co-respondent. Disregarding the allegation that adultery had been committed at Poona, there can be no doubt that a certain relationship existed between the respondent and the co-respondent before the former came to Bombay on the 22nd August. It also seems clear that she was not turned out of the house by the petitioner but left of her own accord with Captain D' Arcy. But I do not think the evidence discloses facts which must lead the Court to the inevitable presumption that adultery was committed that night.

Undoubtedly Captain D' Arcy accompanied Mrs. Wilkinson to the Apollo Hotel, but there is no evidence that he occupied the same room or even stopped the night in the Hotel. He was living at that time with Mr. Gove in Byculla. Mrs. Wilkinson said "Captain D' Arcy and the Manager took me to the door of the room, said 'Good Night' and went away. The Manager was an Englishman. Captain D' Arcy behaved all along as a friend". None of the Hotel staff were called as witnesses and it seems to have been suggested to the Court that the Manager was dead, although as a matter of fact he had been summoned to appear on the 7th June and had written to the Judge to say that the Rs. 10 sent for expenses were insufficient. He has now filed an affidavit corroborating the petitioner's statement that Captain D'Arcy did not go into Mrs. Wilkinson's room and did not stop the night at the Hotel. The Judge must have been told that the Manager was dead and that is stated as a fact in the judgment. This casts little credit on the conduct of the petitioner's case. The statement of the petitioner regarding his observations when he went to the room next day and the fact that Captain D'Arcy was found to be in possession of the key of the room are not sufficient in my opinion to found a presumption that the respondent and the co-respondent spent the night together in that room. There is no evidence therefore on which the Court is entitled to presume that adultery was committed in Bombay.

But undoubtedly the respondent after her return to Poona wrote a letter to the petitioner on the 1st September which affords a strange contrast to the affectionate letter she wrote to him on the 25th August. She began. " I wish to inform you for good and all that I shall never live with you again as your wife and the sooner we are separated or divorced the better for us both " and continued " my life with you is misery to myself and must necessarily be so to you, when you know I cannot even like you and I can only see one thing to do *viz.* 'Divorce me' which eventually must come". It has been argued that the latter sentence could only mean one of two things, either that the respondent had already afforded the petitioner grounds for divorce or intended to do so. But it does not necessarily follow that the respondent had been guilty of adultery or intended to commit adultery ; she may well have thought that the mere fact of her going off with the co-respondent would be sufficient evidence. On the 2nd September the respondent left Poona with her children and went to stop at the Hamilton Hotel at Lonawla. The co-respondent joined her there on the 6th. The respondent's mother came on the 7th and left again with the children. The respondent and co-respondent left on the 8th. As the petition was filed on the 7th nothing was said therein about the visit to Lonawla as though the petitioner had heard from his father-in-law that his wife had left Poona he did not know where she had gone. No amendment to the petition was asked for. No particulars of the alleged acts of adultery were asked for or furnished, and there is nothing on the record to show how evidence as to an alleged act of adultery committed after the petition was filed and nowhere referred to in the proceedings was admitted. The case was very badly conducted throughout and it does not appear whether the respondent had any notice that adultery at Lonawla was alleged until towards the close of the petitioner's evidence. The co-respondent was at Columbo and was unable to be present at the first hearing on

the 7th June, and though on the 9th June the hearing was adjourned till the 28th June to procure the evidence of the Manager of the Hotel at Lonavla, the co-respondent has said he could not leave Columbo owing to his duties as Starter of the Ceylon Turf Club. The Manager of the Hotel said that Mrs. Wilkinson arrived on the 2nd September with two children. On the 6th of September Captain D'Arcy arrived about 11 A. M. At first he was assigned No. 2 bed-room, but wanting a large one he was moved to No. 4, the bath-room door of which faced the front door of room No. 5 which was occupied by Mrs. Wilkinson. An old lady came to see Mrs. Wilkinson on the 5th and again on the 7th when she took the children away. Mrs. Wilkinson and Captain D'Arcy left on the 8th. There was a lady visitor in the room next to Mrs. Wilkinson.

In her examination the respondent said she went to Lonavla on the 2nd September because she was afraid of her father and husband She said nothing about the co-respondent's visit. In cross-examination she said. "I did not inform Captain D'Arcy that I was going to Lonavla. I wrote to him from Lonvala to come there. He came on the 6th and left the same night for Poona at 10 P. M., and returned to the Hotel at mid-night on the 7th and left in the morning of the 8th with me. The learned Judge was of opinion that these facts which were not disputed taken in conjunction with the respondent's letter of the 1st September were conclusive evidence of adultery. Now if the case had been undefended it might have been urged that the respondent must have intended, at any rate, to create evidence from which the Court would be entitled to presume that adultery had been committed. But I doubt very much whether a Judge in England would direct a Jury that on evidence, such as we have in this case, the presumption was inevitable. The case of *Grant* v. *Grant* (12) to which the learned Judge refers is an authority for saying that the mere fact that two people of opposite sexes are together under the same roof is not sufficient. From the reports of Divorce cases, as far as I know, it has always been considered that there must be some evidence that they occupied the same room. Undoubtedly adultery may have been committed in this case, but it is just as possible that the respondent, though she must have known she was compromising herself and may even have intended the worst to be believed, had no desire to enter into sexual relationship with the co-respondent, until she could marry him. Thereafter when she had time to consider the situation she does not seem to have been prepared to be relegated to the status of a divorced wife, and so lose the right to the custody of her children, without a contest, with the result that in her written statement while denying that adultery was committed she asked for a judicial separation.

In these circumstances my opinion is that the petitioner has failed to prove facts from which the Court would be justified in holding that adultery was committed at Lonavla.

As my learned Brothers are of a contrary opinion there will be a decree for judicial separation, the questions relating to alimony and the custody of the children to be determined by the District Judge. The costs of respondent 1 must be paid in the first instance by the petitioner but he will be entitled to recover those costs and his own from respondent No. 2.

Marten, J.—This is a husband's petition for divorce on the ground of his wife's adultery with the co-respondent. The wife in her answer has prayed for a judicial separation on the ground of her husband's cruelty. The learned trial Judge found in favour of the husband on all points, and the decree for dissolution of the marriage which he has passed is now before us for confirmation under section 17 of the Indian Divorce Act, 1869.

The two main points before us are (1) whether the wife committed adultery with the co-respondent, and (2) if so, whether the Court has jurisdiction to grant a divorce, as opposed to

(12) 2 Curt. Rep. 57.

a judicial separation, should it be the fact that the matrimonial domicile was English. The defences of cruelty and condonation were not persisted in before us, and it is clear that they were rightly decided in favour of the husband.

On the first main point, the detailed judgment of the learned trial Judge relieves me from the necessity of dealing with the facts elaborately. It will be seen that the main events in 1921 are confined to three stages, *viz*, (1) the events at Poona from the 13th to the 21st August; (2) the events at Bombay on the 23rd and 24th August; and (3) the events at Lonawla from the 2nd to the 8th September. There is an important correspondence, and in particular a letter, Exhibit 46, written on the 1st September from the wife to the husband, intimating her intention to separate and suggesting a divorce.

With regard to the first stage, it is common ground that there was a serious quarrel between the husband and wife at Poona with reference to the co-respondent. The wife was then staying in her parent's house, where the co-respondent was a boarder. Incriminating letters are alleged to have been found, which have since been destroyed. Further, it is alleged that the wife admitted misconduct, and that the co-respondent admitted he loved the wife. This latter incident was at a later date than the wife's letter, Exhibit 41 of the 19th August, in which she asks to be forgiven the past, and would try and beg a new life. The letter may therefore refer only to her running into debt. Be that as it may, it is clear that the husband got rooms for his wife and children at Bombay, and took her away from Poona on the 22nd August, and she admits that she then promised not to have anything more to do with the co-respondent.

The second stage, *viz*, the events at Bombay, are to my mind extremely important. It is common ground that on the 23rd August about 2-30 p. m. the wife left these rooms in a taxi with all her luggage and in company with the co-respondent, and that it was not till the next day that her whereabouts were discovered, when she was taken back to Poona by her father, who had in the meanwhile been telegraphed for by the husband. Now here I quite agree with the learned trial Judge when he says in para 14 of his judgment that "the important question is, which of the two conflicting versions is to be believed. "Did the wife go away of her free will, or was she turned out by her husband?". After weighing carefully the evidence on this point, I am satisfied that the learned Judge came to the correct conclusion, *viz*, that the wife went away of her own free will, and that she did so despite all efforts to stop her, and because, as Mrs. Parish says, she was going where her affections were.

It is common ground that the wife spent the rest of the day upto midnight in the company of the co-respondent, though not necessarily exclusively so. She first went with him to the bungalow of Mr. Gove where apparently the co-respondent was then living in a "chummery." In the evening they went to a theatre. About midnight she was escorted back to the Apollo Hotel where the co-respondent had obtained a room for her. It is not suggested that the co-respondent had a room at that Hotel. But it is significant that next day, the 24th, the wife admitted that he was in possession of the key of her room. Some of her clothes were apparently at the Hotel, and some at Mr. Gove's bungalow.

On the 24th August, the wife was traced to Mr. Gove's bungalow by her father and husband, and when they found her there with the co-respondent late in the afternoon, they proceeded to assault the co-respondent and to take the wife away. They accordingly returned to Poona, and the evidence is that her father effected a reconciliation between the wife and her husband, and that both decided to make a new start. The wife's letter Exhibit 45 of the 27th August, and the husband's letters, Exhibits 51, 52, and 53 of 27th, 31st August and 1st September are quite consistent with that.

But then on the 1st September the wife wrote the important letter

Exhibit 46. In it she says "I wish to inform you for 'Good and all' that I shall never live with you again as your wife and the sooner we are separated or divorced the better for us both. I dislike you more than I can possibly describe ... I can only see one thing to do viz, 'divorce me' which eventually must come .. Do not think for one minute I have only just decided, because it is not true and I made up my mind long long ago. If in the future you interfere in any way whatever in my doings 'Beware' as things will not be so peaceful on the next occasion. You have your recourse viz, the law. Do not correspond in future with me or ask to see me, but only through my solicitors .. I also wish to impress on you that I am perfectly in my right senses, as you have inferred at different times 'I could not be'. And this is my final decision." That letter she sent by registered post to her husband, and she sent a copy to her solicitors.

The next day *viz*, the 2nd September, the wife left her parent's house secretly with the two children and went to Hamilton's Hotel Lanowla. There she wrote to the co-respondent to join her, and he came on the 6th and left with her on the 8th September. The parties there occupied adjoining rooms, viz, rooms 4 and 5. It is in evidence that the room No. 2 which was originally allotted to the co-respondent was further off, and that he was shifted to room No. 4 at his own request. On the 7th September the husbund signed his petition. The learned Judge is, I think, in error in stating in para 24 that the husband had previously been to Lanowla and seen the visitors' book. As I read his evidence at para 10 he did not know where his wife was until the morning after Mrs. Mikhan had brought the children away from Lonawla. That would be the 8th September, for the hotel-keeper says the children were taken away on the 7th. His petition for the custody of the children was presented on the 8th September. An *interim* order was made on the 9th September, which was subsequently varied on the 20th October 1921.

On these main facts and on the remaining details in the case, I have come to the conclusion (1) that the wife had formed a guilty affection for the co-respondent and he for her; (2) that there were ample opportunities for gratifying their improper affections; and (3) that the true inference on the evidence is that the parties committed adultery.

One main objection raised before us on behalf of the wife was that adultery at Lonawla was not pleaded, and that accordingly the Lanowla incidents should be disregarded. Effective criticisms may no doubt be passed on the pleadings, and to some extent on the course of the trial. But if the figures of the taxed bill of costs mentioned at the end of the judgment are looked at, they will, I think, afford some clue as to the professional standard that might reasonably be expected. This is not a case on the Original Side, where the presiding Judge has the advantage of the assistance of Advocates and Attorneys. Be that as it may, para 7 of the petition pleaded adultery in wide and vague terms, viz, that while the husband was employed in Bombay, his wife became familiar with the co-respondent, "and on various occasions committed adultery with him." Further at the trial the wife and the co-respondent appeared by separate pleaders, and no objection was raised to the evidence as to the events at Lonawla. On the contrary the husband's witnesses were cross-examined on these and other incidents. Further it would appear from the affidavit of the co-respondent dated the 1st March 1923 and presented to us, that there was an adjournment of the suit from the 9th June to 28th June in order to enable the husband to call the Manager of the hotel at Lonawla. This is borne out by the dates given in the Court below for the respective depositions of witnesses Nos. 7 and 8 for the husband, and by the reference in para 25 of the judgment to the non-appearance of the co-respondent although a long adjournment was given.

In my opinion, therefore, it is not now open to the wife and the co-respondent to object to this evidence. If any such objection had been raised

at the trial, no doubt the Judge would have granted leave to amend or to file a supplementary petition, seeing that the original petition was only sworn on the 7th September, and the wife and the co-respondent did not leave Lanowla till the 8th September. But presumably the parties at the trial thought this unnecessary, having regard to the wide pleading and the equally wide nature of Issue No. 1. Nor do I attach any importance to the suggestion by counsel for the co-respondent that although his pleader may have told him that there was an adjournment to the 28th June, he did not tell him that it was for the purpose of calling further evidence as to the Lanowla incidents.

Before us, counsel for the co-respondent applied to have his evidence taken now. But in my opinion the learned trial Judge gave him all reasonable opportunities for entering the witness-box , and it is now too late. His excuse that he was detained by his duties as Starter at the Colombo Races, I do not accept At most he need only have missed one day's racing, viz, the 1st July. He does not say that he even asked the local officials for the requisite leave. If he had, surely it would have been granted. His conduct, even if viewed in the most favourable light, had gravely compromised the honour of a married woman, to say nothing of his own. A gentleman would therefore at all costs return to protect her honour and his own, provided at any rate he could truthfully say that no misconduct had occurred.

Nor do I accept the suggestion of counsel for the wife that she merely sent for the co-respondent at Lanowla in order that he might intervene between her and her father, and effect a reconciliation. As the father had only assaulted the co-respondent a fortnight before, it is not likely that he would regard the co-respondent as a welcome negotiator. If she wanted to negotiate, she could have done that through her mother, for it is not suggested that she was afraid of her. On the contrary she wrote a letter to her mother at Poona and it is in evidence that her mother or her aunt Mrs. Howard came to Lonawla on the 5th and 7th September and took away the two children on the latter date. She has deposed that she was anxious to deny any admission of misconduct to her solicitors in Bombay. But how could any prudent woman send for the very man in respect of whom such serious scandals had arisen, and allow him to occupy an adjacent room at a country hotel for the alleged object of discussing this admission of misconduct. In considering her conduct, it must be remembered that we are dealing with a married woman of 7 years standing and a mother of two children and who had finally decided to leave her husband and had suggested a divorce. In my opinion, therefore, the proper inference to draw from all the facts of the case is that the parties committed adultery at Lonawla.

Then as regards the Bombay incidents, it is said that certain letters written by the wife's father were admitted in evidence on counsel's statement that the father would be called as a witness for the husband, and that they have been improperly referred to by the learned Judge. For the purposes of my Judgment I eliminate those letters. I have not even read them, and they have in no way influenced me. The father's opinion of the co-respondent is sufficiently indicated by the admitted fact that he assaulted him in Bombay at Mr. Gove's bungalow.

Next, it was said that the husband's counsel misled the Court by stating that the hotel-keeper at Bombay was dead, and consequently could not be called. As to that it would appear that some confusion has arisen between the Assistant Manager who died on the 7th of January 1922, and the Manager who is still alive. Further, the Manager states in his affidavit of 27th February 1923 that this Assistant Manager was not engaged by the hotel till October 1921. Be that as it may, I do not think it essential that the Manager should now give evidence before us. The wife has admitted that the co-respondent accompanied

her to her room, so that contradicts the Manager's statement that the co-respondent only stepped into his office and left the hotel as soon as the luggage was removed from his office. It is not essential for the husband's case to prove that the parties committed adultery after midnight that night in that particular room, when there were other opportunities both earlier in the day and also on the next day. So one need not go into the husband's story as to what he found in his wife's room in the hotel, nor decide on the other hand whether the Manager is accurate in stating that the husband only made inquiries in the office. But in passing I may notice that the wife towards the end of her evidence described the Manager as an Englishman. This description would more likely apply to the deceased Assistant Manager Mr. Ormand, than to the Manager Mr. Adelhardi Rosverg who gives his nationality as Danish.

It was also objected that at the solicitors' office the wife did not admit misconduct. But the husband does not say she did so on that occasion. What he says is she was taxed there with misconduct but did not admit it. The fact that all the three parties went off together to the solicitors may at first seem strange whether they were innocent or guilty. But one desire of the husband may have been to gain time, and so prevent his wife taking the fatal step This is borne out by the fact that he asked third parties, such as Mrs. Parish to intervene and stop his wife running away. Even at Bombay, it will be noted, that it was the wife who had a telephonic message sent to the co-respondent on the 23rd August. This was the very man over which the trouble had arisen a short while before at Poona, and personally I do not accept her explanation that he was summoned in order to deny the allegations of misconduct at Poona. If so, why should she pack up her luggage and go away with him in a taxi to an undisclosed destination.

On a consideration then of all the circumstances I am of opinion that on the first main point the learned trial Judge rightly decided that the wife had committed adultery with the co-respondent.

I now turn to the second main point in the case, viz. the question of jurisdiction. The want of jurisdiction was not pleaded, nor was any issue raised upon it. On the contrary the wife made a cross-claim for a judicial separation. But at the trial the point was raised, though I regret that it was not dealt with in the way which its great importance deserves. In the first place, no proper evidence was taken as to domicile. Before us both the husband and wife have put in affidavits on that point, and the husband applied for a remand to produce further evidence. It was admitted, however, that his domicile of origin was English, he having been born in Egland of English parents and having lived there till he came out to India as an assistant in the chemists' firm of Thomson and Taylor. Counsel also stated that on that demand, if granted, he could not put the case higher than is contained in the husband's affidavit.

It was not seriously suggested that the husband had abandoned his domicil of origin prior to his return to India in 1921. The very fact that in 1920 he gave up his business appointment in India and apparently tried to make a living in England is almost sufficient to negative that despite his alleged purchase of return tickets. Moreover in his evidence he states that he only returned to India, because his wife insisted on his returning. It also appears from the learned Judge's judgment of the 26th July on the application for custody of the children that the husband proposed on the termination of the proceedings to send his children to his sister in England. In my opinion, therefore, the husband's affidavit falls far short of what is required to effect an abandonment of his domicil of origin, and an acquisition of an Indian domicil of choice. I am satisfied that the husband never intended to make his permanent home in India. Consequently the case must be decided on the basis that the husband's, and therefore the matrimonial domicile, was English.

This then raises a most important question, viz, whether this Court has jurisdiction to dissolve a marriage, as opposed to granting a judicial separation, in cases where the parties are not domiciled in India. That depends on two points, viz, (1) whether the Indian Divorce Act 1869 purports to confer that power upon the Indian Courts, and (2) if so whether that Act was within the legislative powers conferred upon the Indian Legislature by the Indian Councils Act 1861 (24 and 25 Vic. ch. 67).

I will deal with these points in the above order, which is the order in which they were presented in argument to Sir Henry Duke in *Keyes* v. *Keyes* (4). The learned trial Judge does not however appear to have considered the second point. He seems to have thought that the jurisdiction was clear and depended on the Indian Divorce Act 1869, and that so long as that Act was in force, the Court could not decline jurisdiction. But that was not the *ratio decidendi* in *Keyes* v. *Keyes* (4). What the learned President held there was that the Indian Divorce Act, 1869 was *ultra vires* the Indian Legislature as not being within the powers conferred on that Legislature by the Indian Councils Act, 1861. But he gave no express decision as to the true construction of the Indian Divorce Act, 1869.

Taking then the first point, the argument against the jurisdiction of this Court under the Indian Divorce Act, 1869 may be put in two alternative ways. The first is that having regard to section 7, the word "reside" in section 2 should be construed as equivalent to "domiciled", seeing that according to the priniciples now accepted in England, domicile alone can confer jurisdiction in divorce. That was argument presented to the learned President by the Attorney-General in *Keyes* v. *Keyes* (4). For reasons which I will state later, I do not accept that argument. It is sufficient to state here if it were accepted, it would prevent this Court from exercising its jurisdiction to grant decrees for judicial separation on the ground of cruelty or other adequate reason, in cases where the parties are resident, though not domiciled, within the jurisdiction. This jurisdiction over residents, with reference to judicial separation as opposed to decrees for dissolution of the marriage itself, is now well recognised by the English Courts as a principle of private international law (see *Le Mesurier* v. *Le Mesurier* (7) and *Armytage* v *Armytage* (5) and a similar jurisdiction has been exercised by this Court or its predecessor, the Supreme Court, for 100 years. (See Supreme Court Charter 1823, Clause 42).

The alternative argument is that assuming the word "reside" in section 2 means what it says, viz, reside and not domiciled, even then the dominating words of clause 7 and the general principles of private international law compel this Court to give a limited construction to the Indian Divorce Act. despite its wide wording, in just the same way as English Courts have eventually limited the even wider wording of the Matrimonial Causes Act, 1857.

To appreciate this argument, one must I think make some enquiry into the history of Divorce legislation in England, and as far as practicable put one-self in the position of the English and Indian legislators, who framed the Matrimonial Causes Act 1857, the Indian Councils Act 1861, the Indian High Courts Act 1861, and the Indian Divorce Act 1869. It is vital to remember that up to 1857 there was no jurisdiction in England for any Court to dissolve a marriage. A special Act of Parliament alone could effect that. In 1857 a new Court called the Court for Divorce and Matrimonial Causes was founded by the Matrimonial Causes Act 1857. And in 1873 this new Court became part of the Probate, Divorce and Admiralty Division of the High Court as established by the Judicature Act 1873 (See section 16). But up to 1857 Ecclesiastical Courts alone had any jurisdiction in matters matrimonial, and they could only grant a divorce *a mensa et thoro*, which is the epuivalent of the modern decree for judicial separation. Further, the Ecclesiastical Courts rested their jurisdiction on the residence of the parties, and not on their domicil. Thus in *Niboyet* v. *Niboyet* (9); Lord Justice James said as follows:—"Can there be any doubt

that before the English Act of Parliament transferring the jurisdiction in matrimonial causes, from the church and her Courts to the sovereign and her Court, the injured wife could have cited the adulterous husband before the bishop, and have asked either for a restitution of conjugal rights or for a divorce a *mensa et thoro*, and in either case for proper alimony? The jurisdiction of the Court Christian was a jurisdiction over Christians, who, in theory, by virtue of the baptism, became members of the one Catholic and Apostolic Church. The church and its jurisdiction had nothing to do with the original nationality or acquired domicile of the parties, using the word domicile in the sense of the secular demicile, viz, the domicile affecting the secular rights, obligations, and status of the party. Residence, as distinct from casual presence on a visit or in itinere, no doubt was an important element; but that residence had no connection with, and little analogy to, that which we now understand when we endeavour to solve, what has been found so often very difficult of solution, the question of a person's domicile. If a Frenchman came to reside in an English parish, his soul was one of the souls the care of which was the duty of the parish priest, and he would be liable for any ecclesiastical offence to be dealt with by the Ordinary, *pro salute animae* * * *. And although the laws of the State sometimes interfered by way of coercion, regulation, or prohibition, with the Courts Christian, the latter acted *proprio vigore*, and they administered their own law, not the law of the State, and they administered it in their own name and not in the name of the Sovereign. The language of the Act creating the existing Court strikingly illustrates this, when it anacts that all jurisdiction vested in or exercised by any Ecclesiastical Court or person in England, &c., shall belong to and be vested in her Majesty It was not previously vested in her, although she had appellate jurisdiction as supreme Ecclesiastical Judge".

Accordingly when the English Legislature by the Act of 1857 founded the new Court, two separate jurisdictions were conferred on it, viz, the old Ecclesiastical jurisdiction of divorce a *mensa et thoro*, or judicial separation as it was thenceforward to be called, and the new statutory jurisdiction of divorce *a vinculo* But the 1857 Act gave this new jurisdiction in the widest terms. "It shall be lawful for any husband to present a petition to the said Court, praying that his marriage may be dissolved, on the ground that his wife has since the celebration thereof been guilty of adultery * * *" runs section 27. As regards this new jurisdiction, the only express limitation to be found in the Act is the preamble which states that "it is expedient to amend the law relating to divorce, and to constitute a Court with exclusive jurisdiction in matters matrimonial in England, and with authority in certain cases to decree the dissolution of a marriage". As regards the old jurisdiction, section 22 runs "In all suits and proceedings other than proceedings to dissolve any marriage, the said Court shall proceed and act and give relief on principles and rules which in the opinion of the said Court shall be as nearly as may be conformable to the principles and rules on which the Ecclesiastical Courts have heretofore acted and given relief, but subject to the provisions herein contained and to the rules and orders under this Act".

In effect therefore the Legislature was not prepared to lay down any very clear guiding principles on the question of jurisdiction, but left it to the Courts to say how the Act should be construed and applied in practice. As to this, there were at least three possible but different views, *viz*, (1) to make domicile the test both for divorces and judicial separations, or (2) to make residence the test for both, or (3) to make domicile the test for divorce, and residence the test for judicial separations. But it took the English Courts some 40 or 50 years to decide which of these views was the correct one The first view was that adopted in 1878 by Lord Esher in *Niboyet* v. *Niboyet* (9) at p. 19. The second view was that adopted by the majority of the Judges in *Niboyet* v. *Niboyet* (9) *viz.*, Lord Justices James and Cotton. And as that was a considered decision of the Court of Appeal, it must be taken to be the

then prevailing view of the law. Substantially it was to the same effect as *Brodie* v. *Brodie* (13) decided by the Full Court in 1861. The third view was that laid down in 1895 by the Privy Council in *Le Mesurier* v. *Le Mesurier* (7) and subsequently adopted in 1898 by Lord Gorell in *Armytage* v. *Armytage* (5) and in 1906 by the Court of Appeal in *Bater* v. *Bater* (14). And this third view may now be said to represent the true principles of English law on this all important question of jurisdiction.

What course then was open to the Indian Legislature in 1869? It had to legislate not only for Englishmen but also for Scotsmen and Irishmen, the laws of whose countries on the subject of divorce differed from those of England. It almost must have felt some uncertainty as to what view the English Courts would eventually take on the questions of domicile and residence. But this much is clear, *viz.*, that in section 2 of the Indian Divorce Act, the Indian Legislature imposed certain conditions precedent to the exercise of any jurisdiction whatever under the Act, for it enacted that "Nothing hereinafter contained shall authorise any Court to grant any relief under this Act except in cases where the petitioner professes the Christian religion and is resident in India at the date of the petition." And if the petition is one for divorce, it is a further condition precedent that either the marriage shall have been solemnized in India, or else that the adultery shall have been committed there, or else that the husband has exchanged his profession of Christianity for some other religion.

Then comes section 7 which I regard as the dominating clause in the Act. It runs as follows:—"Subject to the provisions contained in this Act, the High Courts and District Courts shall, in all suits and proceedings hereunder, act and give relief on principles and rules which, in the opinion of the said Courts, are as nearly as may be conformable to the principles and rules on which the Court for Divorce and Matrimonial Causes in England *for the time being* acts and gives relief."

In my opinion the Indian Legislature intended by this clause to ensure reasonable uniformity between the various High Courts of this country and the English Courts, and as far as practicable to avoid the scandal of parties being regarded as married persons in one Indian Province but not in another. I think it also intended to provide for the then uncertainty of the law on the subject, and for the possibility that the principles of the English Courts might be modified in course of time. Accordingly the Indian Courts are to give relief "on principles and rules which are as nearly as may be conformable to the principles and rules on which the Court for Divorce and Matrimonial Causes in England "*for the time being* acts and gives relief." I draw particular attention to the words "for the time being." In my opinion, they were inserted to prevent the principles of law being rigidly fixed as at 1869.

It cannot be said that the "principles" referred to in section 7 do not iuclude such a vital principle as the foundation of jurisdiction itself. Section 7 is evidently modelled closely on section 22 of the Matrimonial Causes Act 1857 which I have already quoted, except that it applies to divorce as well as all other proceedings, and that the principles to be adopted are those of the English Divorce Court *for the time being* and not those "on which the Ecclesiastical Courts have *heretofore* acted." In *Armytage* v. *Armytage*, (5) the point for decision was whether the English Divorce Court had jurisdiction to grant a judicial separation on the ground of cruelty in a case where the husband was domiciled in Australia, but was living in England at the date of the suit. Lord Gorell held in effect that this was a question of principle within the meaning of section 22, and that its answer depended on what were the principles of the old Ecclesiastical Courts. After quoting section 22, the learned Judge said at page 186: "There are no

(13) 2 Sw. & Tr. 259; 164 E. R. 995; 30 L.J., Mat. 185; 4 L.T. 307; 9 W.R. 815.

(14) (1906) P. 209; 94 L. T. 835; 22 T.L.R. 408; 75 L. J. P. 60.

special provisions of the Act or rules or orders which directly affect the present question. The present suit is for judicial separation on the ground of cruelty. Before the Act, it would have been a suit for divorce *a mensa et thoro* on the same ground. and enquiry is as to the principles and rules on which the Ecclesiastical Courts would have acted in the circumstances." Then after exhaustively considering the authorities on the subject including the various text books on private international law, the learned Judge held at page 194 as follows: "In my opinion if the parties had a matrimonial home, but were not domiciled within the jurisdiction of an Ecclesiastical Court, that Court would have interfered, if the parties were within the jurisdiction at the commencement of the suit to protect the injured party against the other party in respect of the adultery or cruelty of the latter...." And then at page 195 he said: "It may be objected that a decree of judicial separation affects the status of the parties, and that a change of status ought on principle only to be effected by the Courts of the domicil. But the relief is to be given on principles and rules which, in the opinion of the Court, shall be as nearly as may be conformable to the principles and rules on which the Ecclesiastical Courts gave relief. According to those principles and rules, cruelty and adultery were grounds for a sentence of divorce *a mensa et thoro* which did not dissolve the marriage, but merely suspended either for a time or without limitation of time some of the obligations of the parties. The sentence commonly separated the parties until they should be reconciled to each other." Lord Gorell then concluded his learned and interesting judgment by holding that domicil was not the test for jurisdiction in cases of judicial separation: that in that particular case a decree for judicial separation ought to be made: and that consequently the Court had jurisdiction to provide for the custody of the children of the marriage.

Turning again to the Indian Divorce Act 1869, the qualifying opening words in section 7 viz, "subject to the provisions contained in this Act" must of course receive their full effect. But they can be given their full effect by considering the express conditions laid down in the Act. The conditions precedent in section 2 are an example of this. Another example will be found in section 10, which entitles a wife to a divorce, should her husband exchange his profession of Christianity for some other religion, and go through the form of marriage with another woman. In both these examples, the English divorce law is expressly varied.

I also recognise fully that if clause 2 be construed apart from clause 7, it might well be argued that on the express conditions laid down in section 2 being satisfied, the Court was intended to have jurisdiction. I however regard Clause 7 as imposing yet a further condition, viz, to act and give relief on the principles of the English Divorce Court for the time being. And in determining this difficult question of construction, I may call in aid the principle of construction which was conceded by Lord Justice James in *Niboyet* v. *Niboyet* (9) at p. 7. He there says: "Of course it is always to be understood and implied that the Legislature of a country is not intending to deal with persons or matters over which, according to the comity of nations, the jurisdiction properly belongs to some other sovereign or state". So, too in *Armytage* v. *Armytage* (5). Lord Gorell says at pp. 185-6: "The jurisdiction to dissolve marriages was conferred upon this Court by the Martrimonial Causes Act, 1857, and although that Act does not expressly make domicil a test of jurisdiction, that test is applied by the Court to the exercise of jurisdiction in cases of dissolution of marriage. It it derived from the principles of private international law, an adherence to which is necessary, as Lord Penzance said in *Wilson* v. *Wilson*, (6) in order to 'preclude the scandal which arises when a man and woman are held to be man and wife in one country and strangers in another'. These principles are expounded by many jurists in this and other countries. They are based on the principle that a person's status

ought to depend on the law of his domicil, though there may be limitations and exceptions to this principle ; see Dicey's Conflict of Laws, 1896, Cap. 18, p. 474 et seq. (Cf. Savigny, s. 362, Guthrie's translation 2nd Ed p. 148)".

It may be objected that this construction of the Act would give different results at different dates. But that objection applies equally to England as to India. In *Niboyet* v. *Niboyet* (9) the English Court of Appeal in 1878 dissolved a marriage between non-domiciled parties. According to the decision of the Courts in and after 1895, there was no jurisdiction to grant that decree. But technically *Niboyet* v. *Niboyet* (9) was not overruled until the decision of the Court of Appeal itself in 1906 in *Bater* v. *Bater* (14) for *Le Mesurier* v *Le Mesurier* (7) was a decision of the Privy Council So here in India the Courts in effeet adopted the same principles as those in *Niboyet* v. *Niboyet* (9). And though the point arose in some cases, it was not until 192 that the decision in *Keyes* v. *Keyes* (4) shewed that the matter required serious reconsideration. If, therefore, the Indian jurisdiction be now limited as the English jurisdiction is limited, the history of litigation in the two countries will be very similar. Nor will Divorce be the only subject to exemplify the uncertainty of litigation. Leading cases such as, *The Taff Vale Railway* v. *Amalgamated Society of Railway Servants* (15) or *Bourne* v. *Keane* (16), illustrate that other branches of the law have also had their ups and downs.

On the other hand there will be this advantage in adopting this construction. It will be consistent with the principles of private international law as now laid down by the highest Courts of the British Empire Accordingly it will not enable a Scotsman with Scottish domicil to be divorced by an Indian Court according to obsolete principles of the English Divorce Court. Nor will the Indian Courts be asked as in *Giordano* v. *Giordano* (17), to divorce Italians with an Italian domicil, although by the law of Italy divorce is not permissible, and nationality as opposed to domicil is alone recognised as conferring jurisdiction in matrimonial matters in that country. (See Dicey, 1896, Ed. p. 276, Note 1 and pp. 390-1 and p. 753.)..... And this construction is I think consistent with the course adopted by Parliament itself. By the Indian Divorces (Validity) Act 1921, Parliament has ratified the past decrees of the Indian Courts as regards parties domiciled in the United Kingdom. The future, it has so far refused to legislate about.

My conclusion then is that the main principles of divorce jurisdiction in England having now been well established and brought to our express attention, we ought in India to follow those main principles, having regard to clause 7 of the Indian Divorce Act, 1869, and no longer to claim jurisdiction to dissolve the marriages of persons not domiciled in India. This casts no reflection either on the Indian Legislature or on the past decisions of the High Courts of this country. On the contrary the construction of the Act which I would adopt shews that the Indian Legislature dealt with a very difficult question in a most skilful manner, for by its flexibility it enable all Courts both in India and in England to act on the same principles, despite the passage of time and the change of circumstances. And as regards our High Courts, their past decisions can well be justified by clause 7. The Act obliges them to follow the principles of the English Courts. That they have done. But if, as is the case, the principles of the English Courts as laid down from time to time in those Courts have altered in a vital particular, then it is not the fault of the Indian Courts if they have to make corresponding changes. No doubt in theory the law as finally laid down by the English Courts

(15) [1901] A. C. 426--85 L. T. 147--50 W. R. 44--70 L. J. K. B. 905--65 J. P. 596--17 T. L. R. 6'8.

(16) [1919] A. C. 815--89 L. J. Ch. 17—121 L. T. 426--63 S. J. 606--35 T. L. R. 560.

(17) [1913] 40 Cal. 215--17 C. W. N. 491--20 I. C. 512.

must be taken to have been the true view of the construction of the Matrimonial Causes Act, 1857 all along. That Act can only have one right construction. If different constructions are given at different dates, both cannot be right. But that does not imply that the earliest construction must be adopted whether right or wrong. The final and true view of the English Courts is now shown to us, and section 7, assists us materially in adopting it

Accordingly in my judgment this Court has now no jurisdiction to dissolve the marriage of the present parties. On the other hand I am clearly of opinion that it has jurisdiction to grant a judicial separation, as the parties were resident within the jurisdiction at the commencement of the suit. Therefore, in my judgment, a decree for a judicial separation ought to be granted on the ground of the wife's adultery with the co-respondent, and the order of trial Judge should be varied accordingly.

It follows from what I have just said that I disagree with the argument of the Attorney-General in *Keyes* v. *Keyes* (4) to the effect that "reside" in section 2 means domiciled. Further it becomes unnecessary for me to come to a conclusion on the *ratio decidendi* of the learned President in that case, viz, that the Indian Councils Act 1861 itself did not give power to the Indian Legislature to pass any Law for the divorce a *vinculo* of non-domiciled persons. But in deference to the judgment of the learned President, and to the arguments of Counsel before him and before us, and having regard to the importance of the subject, I venture to state my own views on those points.

In the first place as regards section 2 of the Indian Divorce Act, it is generally quite erroneous to regard domicile and residence as synonymous terms. They are far from that, and the clear legal distinction between the two is illustrated by the cases I have already cited shewing that in general the test for jurisdiction is domicile in divorce cases, and residence in judicial separation cases. It may be that in the United States the Courts there have required such a high standard of residence for the purposes of divorce under their local Acts, that the word residence as there used has become in practice to be closely akin to our notion of domicil. [See *Bater* v. *Bater* (14)]. But that is hardly a reason why in the Indian Divorce Act we should give to the word reside, what to a lawyer is an unnatural meaning.

Another reason why we should not adopt this forced construction is that *primâ facie* the word reside in section 2 must have the same meaning as in section 3, where in the definitions of "High Court" and "District Court" there are references to the Court "within the local limits of whose..... jurisdiction the husband and wife reside or last resided together". The word "resided" here surely cannot mean domiciled. It would be a novel experience to me to hear persons described as being "domiciled together".

And normally one speaks of domicile with reference to a country as a whole, and not to the local limits of one or other of its superior or subordinate Courts. But in fact the words "reside or last resided together" are clearly borrowed from section 17 of the Matrimonial Causes Act, as for the matter of that is the greater portion of the Indian Divorce Act *mutatis mutandis*. Thus section 17 provides that petitions for judicial separations may either be presented to the new Court itself " or to any Judge... at the assizes held for the country in which the husband and wife reside or last resided together." Residence here must mean residence and not domicile and none the less so because as we know from *Armytage* v. *Armytage* the test of jurisdiction in judicial separations is residence and not domicil. This is further borne out by section 21, which enacts that " a wife...may...if resident within the metropolitan district apply to a police magistrate or if resident in the country to justices in petty Sessions or in either case" to the new Court .....for a protection order in certain cases. Does any lawyer ever speak of being domiciled in the country or in a metropolition district?

But if any doubt still remains, it must surely be dissipated by considering the point I have already mentioned, viz. that this construction of clause 2 would deprive our High Court of part of its old jurisdiction and be contrary to the principles of international law. Section 4 of the Indian Divorce Act provides that the then existing jurisdiction of the High Court of divorce a *measa et thoro* and in all other matters matrimonial should be exercised subject to the provisions in that Act and not otherwise. Section 22 provides that decrees are to be made for judicial separation and not for divorce a *mensa et thoro* but are to have the same effect as under the existing law and certain other effects. This corresponds to section 7 of the Matrimonial Clauses Act.

What then was the jurisdiction of the High Court and of its predecessor the supreme Court ? It is perhaps unfortunate that in *Keyes* v. *Keyes* (4) the High Court then in question, viz. that of the Punjab was not established till 1918. But in Bombay the Supreme Court, and its successor the High Court, has exercised a wide jurisdiction not only in matrimonial matters but in practically every other branch of the law, except revenue matters, for over 100 years. Speaking very generaly it was given in 1823 within certain local limits the same extensive jurisdiction as that given to the High Court in England when first established in 1873 by the Judicature Act, 1873 but which up to that date no single Court in England had possessed. Thus the Supreme Court Charter of 1823 conferred upon the Supreme Court of Bombay thereby established, a general jurisdiction over "all such persons as have been heretofore described and distinguished, in our Charters of Justice for Bombay, by the "appellation of British subjects, who shall reside within any of the Factories subject to or dependent upon the Government of Bombay". (See clause 23). So, too, by clause 5 a jurisdiction similar to that of the King's Bench in England, and by clause 36 an equitable jurisdiction similar to that of the Court of Chancery was conferred on the Supreme Court, while clause 37 conferred jurisdiction over infants and lunatics and clause 38 gave a wide criminal jurisdiction. Then clause 42 provides: "That the said Supreme Court of Judicature at Bombay shall be a Court of Ecclesiastical jurisdiction, and shall have full power and authority to administer and execute, within and throughout the Town and Island of Bombay, and the limits thereof, and the Factories subordinate thereto. and all the territories which now are, or hereafter may be subject to or dependent upon the said Government, and towards and upon all persons so described and distinguished by the appellation of British subject as aforesaid, there residing the Ecclesistical Law, as the same is now used and exercised in the Diocese of London in Great Britain, so far as the circumstances and occasion of the said town, island, territories, and people shall admit or require." Then after conferring powers to grant Probate and Letters of Administration, clauses 48 and 59 gave full jurisdiction in Admiralty matters. I should explain that the clauses of the Charter itself are not numbered, but for convenience I have numbered them, beginning from the operative part.

The Bombay High Court was established in 1861, and if the High Courts Act and Letters Patent be looked at, it will be found that the old powers of the Supreme Court are still to a substantial degree retained. Thus the Indian High Courts Act, 1861, section 9 provided that the High Courts should have all such Civil Criminal, Admiralty, Testamentary, and Matrimonial jurisdiction as His Majesty by Letters Patent might direct. By the Letters Patent of 1862 the old Ecclesiastical jurisdiction of the Supreme Court was to cease except as thereinafter mentioned, and by clause 35 the High Court was to have "jurisdiction in matters matrimonial between our subjects professing the Christian religion". Clause 35 of the amended Letters Patent of 1865 was to the like effect except that the jurisdiction was extended to the Presidency of

Bombay. Further, section 130 of the Government of India Act 1915, expressly provides that the repeal of the Acts there mentioned is not to affect "the validity of any ... ... Charter or Letters Patent.....under any enactment thereby repealed and in force at the commencement of this Act." In practice, therefore, we have still sometimes to refer to the charter to ascertain our present-day jurisdiction though not in matrimonial cases.

That being briefly the history of our Courts, it follows that in 1861 Parliament had had some 38 years' experience of their practical working before it passed the Indian Councils Act, 1861. The Indian High Courts Act 1861 was therefore no new experiment Substantially it effected an amalgamation of the King's Court then existing in the City of Bombay with the Courts of the East India Companyin the rest of the Presidency. But what is there in that amalgamation or in the previous history to suggest that the old judrisdiction to grant judicial separations to residents was to be taken away. To do so would not only be contrary to the guiding principles referred to in clause 7 of the Indian Divorce Act 1869, but it would also be contrary to the accepted principles of private international law. Thus in *Le Mesurier* v. *Le Mesurier* (7) Lord Watson says at p. 526. "There are unquestionably other "remedies for matrimonial misconduct, short of dissolution, which, according to the rules of the *jus gentium* may be administered by the Courts of the country in which spouses, domiciled elsewhere are for the time resident. If, for instance, a husband deserts his wife, although their residence be of a temporary character, these Courts may compel him to aliment her ; and, in cases where the residence is of a more permanent character, and the husband treats his wife with such a degree of cruelty as to render her continuance in his society intolerable, the weight of opinion among international jurists and the general practice is to the effect that the Courts of the residence are warranted in giving the remedy of judicial separation, without reference to the domicil of the parties." And in *Armytage* v. *Armytage* (5) Lord Gorell says at p. 197; "Could anything be more unreasonable than for this Court to hold that it has no power to suspend the wife's obligation to live with her husband while in this country, and leave her to proceed in the Courts in Australia to protect herself against her husband in England ? It may, I think, be safely laid down that the Ecclesiastical Courts would formerly, and this Court will now, interfere to protect a wife against the cruelty of her husband, both being within the jurisdiction when the necessities of the case require such intervention."

In *Keyes* v. *Keyes* (4) the learned President has referred tó Sir Charles Wood's Despatch dated the 14th May 1862, which will be found in the 1907 Edn. of our High Court Rules at page 41 to 50. That was the Despatch accompanying the Letters Patent for the High Court of Bengal which are similar to our own. I find nothing in that Despatch to warrant the suggestion that some of the old powers of the Supreme Court were to be curtailed in matters matrimonial. On the contrary in para 33 the Secretary of State wrote ; "Her Majesty's Government are desirous of placing the Christian subjects of the Crown within the Presidency in the same position under the High Court, as to matters 'matrimonial' in general, as they now are under the Supreme Court + +. But they consider it expedient that the High Court should possess, in addition, the power of decreeing divorce, which the Supreme Conrt does not possess ; in other words,that the High Court should have the same jurisdiction as the Court for Divorce and Matrimonial Causes in England × × × × I request that you will immediately take the subject into your consideration, and introduce into your Council a Bill for conferring upon the High Conrt the jurisdiction and powers of the Divorce Court in England, one of the provisions of which should be to give an appeal to the Privy Council in those cases in which the Divorce Court Act gives an appeal to the House of Lords".

The construction which I venture to adopt of the Indian Divorce Act

1869 is in strict compliance with the intentions of Government as expressed in that Despatch of 1862. It receives some support from Sir Henry Duke himself when he says in *Keyes* v. *Keyes* (4) at p. 217: "To create a jurisdiction in divorce such as is exercised in the Courts of this country (i. e. England) was I have no doubt within the powers conferred upon the Governor-General in Council by the Indian Councils Act 1861". And I attach importance to the fact that the learned President nowhere expresses any approval of the argument which Sir Gordon Hewart addressed to him on section 2. Its acceptance would mean that the Courts of this country could not even grant a protection order under section 27 or alimony under section 36, unless the parties were domiciled in this country, but would have to say to perhaps the Indian wives of English engine drivers or clerks that they must travel to England some 6,000 miles away before they could obtain any redress. This answer would mean that in many cases there would in practice be no redress. And I am glad to think that in the view I take of the construction of the Act, no such hardship is enforced on the residents of this country. In my judgment, the word "resides" in section 2 means resides and not "is domiciled". Domicil involves the intention to establish a permanent home in a particular country. For residence a temporary home suffices, and perhaps less. In *Wadia* v. *Wadia*, (18) at p 602 [of 15 Bom L. R.] Sir Basil Scott said 'The residence of the Petitioner must be *bona fide*, and not casual or as a "traveller".

I will now consider the true construction of section 22 of the Indian Councils Act 1861, and the decision which Sir Henry Duke has given. This section is in very wide terms. It empowers the Governor-General in Council to "make laws and regulations for all persons, whether British or native, foreigners or others, and for all Courts of Justice whatever, and for all places and things whatever within the Indian territories now under the dominion of Her Majesty... Provided always that the said Governor-General in Council shall not have power of making any laws or regulations...which may affect the authority of Parliament.....or any part of the unwritten laws or constitution of the United Kingdom of Great Britain and Ireland, whereon may depend in any degree the allegiance of any person to the Crown of the United Kingdom, or the sovereignty or dominion of the Crown over any part of the said territories".

How then has this Act to be construed? On that point the learned President expressed his views in *Keyes* v. *Keyes* (4) at pp. 216 and 217 as follows:-"Without this proviso I should have thought it to be clear that the enacting words which I have quoted, reading them in their every-day meaning, could not be deemed to warrant the making of laws by the Indian Government to interfere with the status of subjects of the Crown not domiciled in India. The laws to be made are to be of local operation. The status of a citizen domiciled elsewhere is not a condition having local effect in India, or local limitations.... ... ... A statute must be construed with due regard to its subject-matter and object and the object of this Act is to provide for the Government of India by laws binding upon persons and things in India. As between two possible constructions, that which is conformable to international law as declared in our own tribunals is to be preferred to that which would involve infringement of the rights of other communities. In other words, Sir Henry Duke was, I think, of opinion that the Act ought to be construed as if it contained a priviso to the effect that the Indian Legislature should only have power to pass laws which were in conformity with the comity of nations."

Even accepting such a proviso, the English Court of Appeal thought as late as 1878 that Comity of nations was not violated by legislation for the divorce of residents within the jurisdiction. In *Niboyet* v. *Niboyet* (9) Lord Justice James said at page 7: "But I do not find any violation of that comity in the legislation of a country dealing as

(18) (1913) 38 Bom. 215-15 Bom. L. R. 593-20 I. C. 492.

it may think just with persons, native or not native, domiciled or not domiciled, who elect to come and reside in that country, and during such residence to break the laws of God and of the Land". No doubt in 1895 the comity of nations was held to require domicil and not residence, but we are dealing with an Act of 1861 at which date the new jurisdiction of divorce *a vinculo* had only been in operation some 3 years. On the other hand it would seem clear that the learned President was of opinion that section 22 gave the requisite legislative powers as regards persons domiciled in India, for at page 217 he says: "To create a jurisdcition in divorce such as is exercised in the Courts of this country (*i. e.* England) was, I have no doubt within the powers conferred upon Governor-General in Council by the Indian Council Act 1861".

In this connection I will refer to the leading case of the *Queen* v. *Burah*, (10) where the Privy Council laid down the principles which should guide our Courts in Indian in determining the legislative powers of the Indian Legislatures. Their Lordships had there to consider whether a certain Act of the Indian Legislature was inconsistent with the Indian High Courts Act 1861, or with the Charter of the Calcutta High Court. In delivering the judgment of the Board, Lord Selborne stated at pages 903-4 as follows :— "The ground of the decision....of the majority of the Judges of the High Court was, that the 9th section was not legislation, but was a delegation of legislative power. ..... But their Lordships are of opinion that the doctrine of the majority of the Court is erroneous, and that it rests upon a mistaken view of the powers of the Indian Legislature, and indeed of the nature and principles of legislation. The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can, of course, do nothing beyond the limits which circumscribe these powers. But, when acting within those limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation, as large, and of the same nature, as those of Parliament itself. The established Courts of Justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question ; and the only way in which they can properly do so, is by looking to the terms of the instrument by which, affirmatively, the legislative powers were created, and by which, negatively, they are restricted. If what has been done is legislation, within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited (in which category would of course, be included any Act of the Imperial Parliament at variance with it), it is not for any Court of Justice to inquire further or to enlarge constructively those conditions and restrictions".

Adopting that test, does a law for the divorce of non-domiciled persons come "within the general scope of the affirmative words which give the power" viz, section 22 of the Indian Councils Act, 1861? In my judgment, such a law is *prima facie* within the wide terms of section 22, for that section gives power to make laws for all persons within British India. Then adopting the second branch of the same test, does this law violate any "express condition or restriction by which that power of legislation is limited ?". The only express limitations in section 22 which I need mention are those dealing with the authority of Parliament, and the allegiance of the subject. But nobody contends that the Indian Councils Act affects the authority of Parliament. The power of Parliament still remains supreme. (See for instance sections 65 and 131 of the Government of India Act 1915 which Act consolidated a mass of previous legislation and is consequently convenient for reference).

It was however argued before us that as marriage conferred a status, the allegiance of the subject to the Crown depended in part on that status not being altered. This argument I do not accept. Section 22 refers to "the unwritten laws or constitution of the United Kingdom".

But up to 1857 no English Court had power to dissolve a marriage. Divorce *a vinculo* could only be obtained by a private Act of Parliament as is or was until recently the case in Ireland, and that was a remedy only open to persons of ample means. Accordingly in 1861 it could not, I think, be said that this status of marriage depended on the unwritten laws of the United Kingdom, for those laws had been altered by Parliament. Nor I think can it be said that this status formed part of the constitution of the United Kingdom either written or unwritten. Even if I am wrong in this, I think it would be going too far to say that the very allegiance of the subject depended on this status.

In the result, therefore, in the view I take, there is no such express condition or restriction to be found in section 22 as is referred to in *The Queen* v. *Burah* (10) at p. 905. Why then should the *prima facie* meaning of the wide operative words of section 22 be cut down In construing the Act as a whole ?

One main ground relied on by the learned President was that "no one would suppose that the legislative authority created by section 22 could extend to the making of a law which should affect the heritable capacity of a man resident in India in respect of land in England, or control his conduct in any matter of purely English concern". One answer to this is that presumably the British Parliament anticipated that the wide powers thereby conferred on the Indian Legislature would be exercised reasonably, both as regards domiciled and non-domiciled persons. The wide words of section 22 would enable oppressive laws to be passed, even if they were to be confined to domiciled persons. But the practical checks were that even if the Indian Legislature was so minded, there would still be safe-gaurds, having regard to the powers of the Secretary of State, and Parliament and the Crown. (See for instance section 21 of the Indian Councils Act, 1861 and sections 68 and 69 of the Government of India Act, 1915). Further, section 131 of the Government of India Act, 1915 runs (1) "Nothing in this Act shall derogate from any rights vested in His Majesty or any powers of the Secretary of State in Council, in relation to the Government of India. (2) Nothing in this Act shall affect the power of Paliament to control the proceedings of the Governor-General in Council, or to repeal or alter any law made by any authority in British India, or to legislate for British India and the inhabitants thereof".

Again, section 112 of the Government of India Act, 1915 expressly provides that Original Side suits "against inhabitants of Calcutta, Madras, or Bombay, ...in matters of inheritance and succession... and in matters of contract and dealing between party and party" are to be decided according to the personal law or custom of the parties. The practical answer, therefore, is that though Parliament gave wide powers with the one hand, it retained strong practical checks with the other hand. So any real injustice should be sure of a remedy.

The other main ground urged by the learned President was that as between two possible constructions of the Indian Councils Act, 1861, one should prefer that which is conformable to international law as declared in the British tribunals. Now we are dealing with an Act of 1861, and if at that time there were old established Divorce Courts in England in which the principles of jurisdiction had long been laid down with abundant clearness, I should be disposed to attach more weight to this argument than I in fact do. But what are the real facts ? As I have already pointed out the English Divorce Court only dates from 1857 or to be more precise the 1st January 1858 which was the earliest date for the Act to come into operation. (See Matrimonial Causes Act 1857, section 1). Consequently it cannot be said that by 1861 sufficient time had elapsed to see on what principles this new jurisdiction of dissolving marriages would be exercised by the Court.

Further to my mind the authorities show that at that time and up to a very much later date there was much difference of opinion or confusion as

to the principles on which the Court should act. If, for instance, in *Niboyet* v. *Niboyet* (9) at pp. 4 to 6, 19 and 21, Judges of the eminence of Lord Justice James, Lord Justice Cotton and Lord Esher could hold these differing and to some extent incorrect views of the law in 1878, how can one say that the law on the subject was clearly settled some 17 years before. A reference to Dicey's Conflict of Laws 1896, Appendix Notes 8 and 9, pages 753 to 759 will shew that the theories or principles on which divorce should be granted have been the subject of much difference of opinion in earlier days. And even now difficult cases may arise as to the effect of the law of a foreign domicil, See *Rex* v. *Hammersmith Superintendent Registrar of Marriages*, (19).

As regards the earlier English authorities, it must be remembered that rightly or wrongly it was at one time thought that the Scottish Courts claimed to dissolve English marriages, provided the parties had resided in Scotland. As the English Ecclesiastical Courts had then no jurisdiction to make such a decree themselves, it is perhaps not surprising that they objected to the Scottish Courts assuming such a jurisdiction in the case of English domiciled persons. But as I have already indicated, it was really after 1857 when the new jurisdiction of divorce *a vinculo* was created, that the question of domicil became of importance. Lord Gorell thus sums up the position in *Armytage* v. *Armytage* (5) at p. 189: "Most of the writers on private international law and the conflict of laws treat at length the question of the laws and principles upon which the dissolubility or indissolubility of marriage depends, but there is little to be found in the works of such writers on the question of jurisdiction to decree the separation or divorce a *mensa et thoro* of married persons who are residing but not domiciled in the country of the forum. The reasons are not far to seek. Dissolution of marriage has been permitted in some States and not in others, and has been allowed in some States on grounds different from those on which it would be obtained in others. There has been want of unanimity as to the forum which ought to take cognisance of the question of divorce, and as to the laws to be applied and the recognition to be accorded in one State to a decree of dissolution of marriage pronounced in another. Persons domiciled in a country where divorce has not been permitted or only permitted on certain grounds, have, in order to obtain divorces, temporarily resided or assumed domicil in another country where divorce has been permitted or more easily obtained than in the former country. Hence numerous difficult and varied questions have arisen and been discussed "in reported cases and by different "jurists upon the question or dissolu-"tion of marriage. But in practice suits for judicial separation of divorce "a *mensa et thoro* and restitution of "conjugal rights do not appear to "have given rise to similar difficul-"ties, and, therefore, cases and dis-"cussions as to jurisdiction in these "suits are not often met with. Such "suits generally occur before the tri-"bunals of the country in which the "parties are in fact domiciled, and a "case like that before me was not so "likely to occur in former days as at "the present time, when large num-"bers of people are to be found resi-"ding for more or less lengthy "periods away from the place of "their domicile".

If then the Indian Councils Act 1861 had been expressly restricted to legislation in conformity with private international law as then understood, I think it by no means follows that such restriction, if written out in full, would have excluded non-domiciled persons. At that date there were at least two conflicting decisions. As Lord Watson says in *Le Mesurier* v. *Le Mesurier*, (7) at p. 536 "*Tollemache* v. *Tollemache* (20) was decided by three Judges in 1859 shortly after the passing of the Divorce Act. The learned Judges sustained the jurisdiction

(19) [1917] 1 K. B. 634-86 L. J., K. B. 210-115 L. T. 882-81 J. P. 49-15 L. J. R. 83-61 S. J. 130-33 T. L. R. 78.

(20) 1 S. W. and Tr. 557-30 L. J. Mat. 113-2 L. T. 87.

" of the English Court which was " the forum of the husbands' domicil " and disregarded as incompetent a " decree of the Court of Session dis- " solving his marriage although he " had a matrimonial domicil in Scot- " land where he had *bona fide* resided " for 4 years with his wife, neither " casually or as a traveller. Then in " *Brodie* v. *Brodie* (13) in the year 1861, " three learned Judges decided the " opposite, holding that residence of " the kind which had been found in " *Tollemache* v. *Tollemache* (20) to be in- " sufficient to give jurisdiction to a " Scottish Court where the domicil " was English, was nevertheless suffi- " cient to give jurisdiction to them- " selves when the domicil was Aus- " tralian".

The learned President has laid stress on *Shaw* v. *Gould* (21) which was decided in 1868. But that case did not necessarily negative the right of divorce if *bona fide* residence was proved, although falling short of domicil. On the contrary there are some observations from Lord Colonsay at p. 96 which though obiter would tend to support the view that residence alone was sufficient. But the precise point did not arise, and on the facts of the case it is not surprising that the English Courts refused to accept the validity of the divorce that had been obtained in the Scottish Courts. One Buxton had married a minor by fraud, for which he was sentenced to three years imprisonment. After the end of his sentence he lived with another woman. His wife wanted to marry some one else, and after first presenting a petition for divorce to the English Ecclesiastical Court, a collusive agreement was made with Buxton by which he was for a money payment to cross the border into Scotland, and submit to a divorce there as soon as practicable. This he did, and then returned to England. It appeared that a 40 days' stay in Scotland was then sufficient to give the Scottish Courts jurisdiction in any suit whether for divorce or otherwise. The decision of the House of Lords was mainly based on the ground that an English marriage between domiciled English spouses could not be dissolved in this collusive way by a short trip over the Border. Thus Lord Chelmsford said at p. 79: " My opinion in this case is founded " entirely upon the peculiar circum- " stances attending it, the first marri- " age having taken place in England " between parties having an English " domicil which they never changed, " and the divorce in Scotland having " been obtained by preconcerted ar- " rangement, the parties resorting to " the Scotch Courts for the sole pur- " pose of making it instrumental to " the attainment of their object. If " this does not amount to collusion.... " I do not think that the tribunals of " this country can regard a divorce there obtained as binding on their judgment".

Lord Colonsay's decision was based on much the same grounds (see p. 95). So also I think was Lord Cranworth's. At p. 70 he said: " The domicile to " produce that result (i. e,) found juris- " diction, must be a *bona fide* domicile " for all purposes, not that which " alone existed in this case, a mere " residence of 40 days, so as to give " jurisdiction to the Scotch Courts". " And Lord Westbury in referring to " *Lolley's case* said at p. 86: " There " are other and legitimate grounds of " decision to which the judgment in " Lolleys case may and ought to be " referred. Throughout the Scotch " proceedings the domicil of both par- " ties was English and the residence " in Scotland was temporary only and " intended only for the purpose of " having a suit for divorce instituted. " The Judge therefore was not the " Judge of the domicile: the suit was " not *bona fide* and the whole proceed- " ing was in fraud of English law and " injurious to English interests".

I cannot therefore regard *Shaw* v. *Gould* (21) as a clear authority against the sufficiency of *bona fide* residence. If it had been, the Court of Appeal in *Niboyet* v. *Niboyet* (9) would have been obliged to follow it instead of deciding as they did after full arguments and four months of deliberation that *bona fide* residence was sufficient.

I appreciate to the full the importance of so far as practicable construing legislation so as to comply with

(21) L. R. 3 H. L. 55-18 L. T. 833-37 L. J. Ch. 433.

the comity of nations. I have already cited what Lord Justice James and other Judges have said on that point. But I do not think that that principle binds one down to a limited construction of the Act of 1861. Nor do I think that there is necessarily any inconsistency in applying that principle on the other hand to assist the wide construction I give to section 7 of the Indian Divorce Act 1862. If one holds that the Act of 1861 finally bound the Indian Legislature to accept the principle of domicil as opposed to that of residence, what might have been the result, supposing the principles laid down in *Niboyet* v. *Niboyet* (9) in 1878 had been eventually adopted by the Privy Council in 1895 instead of the decision which their Lordships in fact gave. The result in such a case would have been a hopeless variance between the Indian Courts and the Home Courts, unless further legislation was passed on the subject by the British Parliament.

With very great respect, therefore, to the learned President, I prefer the view that the British Parliament intended to give the widest powers to the Indian Legislature, and that though relying on the latter's good sense not to abuse those powers, it yet retained practical checks in case of necessity. As I have already pointed out, in the view I take of the Indian Divorce Act 1869, the Indian Legislature framed its divorce laws in such a way as to comply with the principles of the comity of nations as enunciated from time to time in the English Courts. If in some respects it went further and imposed restrictions which are now-a-days not essential in the English Courts, that after all was only keeping well within the wide powers conferred upon it by the Act of 1869.

The conclusion then which I have arrived at is that the Indian Divorce Act 1869 is, and always has been, within the legislative powers conferred upon the Indian Legislature by the Indian Councils Act 1861.

For simplicity I have so far not dealt with any of the exceptions to the modern theory that jurisdiction in divorce is founded on domicil. One of those alleged exceptions is where a guilty husband deliberately changes his domicil in order to prevent his wife obtaining relief against him in the country where their domicil has hitherto been. That exception does not arise here, and I need not therefore deal with it.

But one other alleged exception I should mention to shew that it has not been overlooked, although it was not referred to in argument. I have already stated that both the wife and the co-respondent have appeared absolutely and without protest ; that the wife counter-petitioned for a judicial separation ; and that the question of jurisdiction was not raised till the trial. In the 1896 Edition of Diecy the case of *Zycklinsky* v. *Zycklinsky* (22) was quoted as an authority for holding that in such a case where the parties have appeared without protest, the Court has jurisdiction to entertain the proceedings, even though the parties are not domiciled within its jurisdiction (See Dicey, p. 276 Exception to Rule 49 and p. 394, Note 1)

But that case was decided in 1862 when the jurisdiction in divorce was of recent date; it would seem wrong in principle: and no detailed reasons are given. Further the proposition in question has been expressly dissented from in *Armitage* v. *The Attorney General* (23) by Lord Gorell who says at p. 141 "That (proposition) is not I think in accordance with the law of this country." In my judgment therefore, the Court in the present case has not any jurisdiction to dissolve the marriage by reason of the appearance of the parties without protest So I need not consider the possible operation of Section 45 of the Indian Divorce Act and the relevant provisions of the Code of Civil Procedure.

At the trial a further point was raised, viz, that the parties had last resided together at Bombay, and that the Poona Court had no jurisdiction. That contention was negatived by the learned trial Judge, and as it

(22) 2 Sw. & Tr. 420—31 L. J. Mad. 37—5 L. T. 690.
(23) [1906] P 135.

was not renewed before us, I need say no more about it except that in my opinion there is no substance in it.

I may also state that having regard to the express terms of the Indian Divorce Act, I consider that the fact that the present case arises in the District and not on the Original Side of the High Court is immaterial on the question whether there is any jurisdiction to grant a divorce between non-domiciled persons.

It may be convenient if after this lengthy judgment I summarize my conclusions. They are; (1) that the wife committed adultery with the co-respondent. (2) That the husband's and consequently the matrimonial domicil is English. But that on the other hand both spouses were at all material dates *bona fide* resident in India, and professed the Christian Religion. (3) That the domicil of the spouses being English, this Court has no jurisdiction to dissolve their marriage, notwithstanding that it was solemnized in India and that the adultery in question was committed in India. (4) But that on the other hand the Court has jurisdiction in these circumstances to grant the husband a decree for judicial separation and to provide for the custody of the children. This is because the word " reside " in section 2 should be construed as such, and not as meaning " domiciled". and because under section 7 we should apply the principles of the English Courts which in such cases will grant judicial separations to non-domiciled parties. (5) That having regard to section 7 our Courts give or withhold relief on the principles of jurisdiction now finally established in the English Courts, and it is no objection to their so doing, that those principles as now enunciated are not the same as those enunciated in the English Court of Appeal in *Niboyet* v. *Niboyet*. (9) In this connection it must be borne in mind that the jurisdiction to dissolve a marriage as opposed to granting a judicial separation, did not exist until it was given by the Matrimonial Causes Act 1857. (6) Accordingly the decree of the lower Court should be varied by granting a judicial separation instead of a divorce. In other respects the decree of the lower Court should in my opinion be confirmed, including the findings as to damages and costs.

As regards the costs of the confirmation proceedings before us, I would direct the co-respondent to pay the whole of these costs having regard to section 35 of the Act. In my judgment, he has committed adultery with the respondent, and I see no adequate reason why he should escape paying the costs, because we think the appropriate jurisdiction in this country is to grant a decree for judicial separation and not for divorce having regard to the domicil of the injured husband. I however agree with the Chief Justice's proposal that the costs here and below of respondent No 1. be in the first instance paid by the petitioner, and then be recovered by him from the co-respondent.

If the husband wishes to obtain a divorce, it will be necessary for him to petition the English Courts for that relief. I recognise the hardship that this causes, but possibly the Probate Division might allow the evidence to be given by affidavit and thus avoid the expense of a commission to India, at any rate if the fact of adultery was then no longer contested.

The question as to the custody of the children has not been argued before us.

Crump, J:—On September 7th, 1921 the petitioner Alfred Wilkinson filed a petition in the Court of the District Judge of Poona wherein he prayed for a decree for the dissolution of his marriage with the respondent Grace Emily Norah Wilkinson on the ground that she had committed adultery in British India with the co-respondent D'Arcy. The petition stated that the marriage was solemnized in St. Paul's Church, Poona, and further that the petitioner and his wife last resided together in Poona. The written statement of the respondent was filed on December 15th, 1921, It contains a denial of the allegation of misconduct, alleges cruelty and puts forward a prayer for a judicial separation. The

written statement of the co-respondent was filed on December 7th, 1921 and is substantially to the same effect on the question of fact.

Upon these pleadings two main issues were raised,

I. Whether plaintiff proves adultery between the respondents.

II. If plaintiff proves adultery, had he condoned it by subsequent conduct?

There were certain minor issues which need not be considered now. There was no issue as to jurisdiction. The plea of condonation has been abandoned before us. The learned District Judge upon the evidence recorded before him held that adultery was proved and made a decree *nisi* for dissolution of marriage. That decree comes before us for confirmation as required by section 17 of the Indian Divorce Act, 1869.

In the ordinary course the only question for our decision would be one of fact viz., whether adultery is proved, but though there was no defence in the pleadings on the point of jurisdiction, it appears that that defence was raised at the hearing- The learned District Judge has dealt with it in his judgment, and has held that his Court has jurisdiction. The point has been fully argued before us, and it is necessary that we should decide it for if there was no jurisdiction we cannot deal with the case.

Procedure in cases under the Indian Divorce Act is regulated by the Code of Civil Procedure. Section 45 of the Act lays down that "subject to the provisions herein contained all proceedings under this Act shall be regulated by the Code of Civil Procedure." There is nothing in the Act which lays down any special rule as to pleadings. Section 7, as I understand it, applies, not to points of procedure, but to the general principles and rules on which the Court will act in giving relief These are rules of quasi-substantive rather than of adjective law. It is therefore unnecessary to consider whether under the stricter system of pleading in force in England the respondents would be taken to have submitted to the jurisdiction, The only rule which need be considered is contained in section 21 of the Code of Civil Procedure, and that rule has never been held to confer jurisdiction where jurisdiction is completely absent, In such cases, as remarked by their Lordships of the Privy Council in *Ledgard* v. *Bull* (24) When the Judge has no inherent jurisdiction over the subject matter of the suit, the parties cannot by their mutual consent convert it into a proper judicial process. It is the settled practice of our Court to entertain objections to the jurisdiction taken for the first time even in second appeal, and even in England the Court can raise the question of jurisdiction at any time in proceedings for divorce.

The point of jurisdiction may be shortly stated. It is contended that the petitioner has an English domicil. The domicil of the wife is the domicil of the husband, and in the case of persons not domiciled in India it is contended that the Indian Courts have no jurisdiction to give a decree for dissolution of marriage.

The question of fact involved in plea viz, the domicil of the petitioner does not (in my opinion) present much difficulty. It is clear that before the District Judge there was no contest on this matter, and the petitioner's evidence is too clear upon the point to leave any room for doubt. It is indeed conceded that the petitioner's domicil of origin was English. He came to India for business purposes some twelve years ago. He returned to England with his family on February 14th, 1920 and did not intend to return to India. He returned to India for business purposes on March 13th, 1921. There is no evidence of an *animus manendi* which can suffice to change the domicile of origin. An affidavit has been put in here, but it is no more than a bare assertion of the petitioner's intention. The point must be taken to be concluded against the petitioner for the purposes of this case.

The parties have therefore an English domicil, and the question is whether as between such parties the

(24) (1885) 9 All 191-13 I. A. 134-4 Sar 741 (P, C.)

Indian Courts have jurisdiction to decree dissolution of marriage. That question must be determined on a consideration of the Indian Divorce Act, 1869 There are two aspects of the matter.

(1) Did the Indian Legislature intend to confer jurisdiction in such cases?

(2) Had that Legislature power to do so ?

There is no doubt a third question which may arise elsewhere viz,

(3) What is the effect of a decree granted by an Indian Court outside British India?

But this third question does not and cannot arise for determination here. If the Indian Courts can give a decree valid throughout British India, we are bound to grant that relief if due cause is shown. Whether our decrees will or will not receive extra-territorial recognition is a matter for those Courts before whom they are cited for any purpose outside our jurisdiction. We can have no judicial opinion upon that matter. But so far it concerns the first two questions these are matters for our determination and for our determination alone within this Presidency--subject of course to correction by a Court of appeal. The opinions of jurists, however eminent, are entitled to our respectful consideration but we are not bound by those opinions, and the judgments of English Courts stand in the same category.

Before coming more closely to these two points, it is not out of place to observe by way of preface that the jurisdiction which is now questioned has been exercised uninterruptedly since the Legislature enacted the Act of 1869. So far as I am aware it has never been doubted that our Courts had jurisdiction in the cases now under consideration—at least within the territories comprised within British India, and between European British Subjects. It is unnecessary to cite cases in which that jurisdiction has been exercised. Nay more, the decrees granted by our Courts have received extra-territorial jurisdiction without contest. Thus the point which is now taken involves a novel doctrine, and very substantial grounds would have to be made before it could be conceded. The doubt has however arisen and as it is based upon a decision by the President of the Probate, Divorce, and Admiralty Division of the High Court of Justice of England, we are bound to re-solve it in one sense or the other, and cannot rest upon the uninterrupted practice since 1869.

The question arose in the case of *Keyes* vs. (4) *Keyes*. The petitioner there had obtained in 1918 a decree for dissolution of marriage from the Chief Court of the Punjab. Nothing turns on the status of that Court at the date of the decree as compared with the status of a Chartered High Court such as ours. In 1921 the petitioner filed a petition in the High Court of Justice in England. Clearly if the Indian divorce was good in England, there was no subsisting marriage which could be dissolved. It is material to note that the action was undefended. The King's Proctor was heard, and counsel was allowed to address the Court on behalf of the Secretary of State for India as *amicus curiae*. There was, it would seem, a conflict of views. The King's Proctor urged that the Indian divorce was bad in toto while for the Secretary of State it was argued that the Indian divorce was good not only in India, but also extra-territorially. The learned President, Sir Henry Duke, held that the Indian Divorce Act 1869 was *ultra vires* of the Indian Legislature in so far as it purported to give jurisdiction to decree dissolution of marriage between parties not domiciled in India. The decision is not confined to the extra-territorial validity of such decrees—a matter with which as I have said this Court is not concerned. It lays down in express terms that such decrees are invalid even in India. " The Indian Divorce Act, 1869 accordingly furnished no sufficient authority for the divorce of the petitioner and the respondent which has been decreed by the Chief Court of the Punjab." A decree for dissolution of marriage was pronounced. There was no appeal: indeed there could be no appeal for the

Secretary of State, who alone was interested to contest the point, was not a party, and in any event the decree could not be impugned so long as it was conceded that an Indian divorce had no extra-territorial operation. The pronouncement was indeed to some extent *obiter* but it cast grave doubts on the validity of the Indian decrees since 1869 In consequence legislation became necessary, and a validating Act was passed by the Imperial Parliament. [The Indian Divorces Validity Act 1921] No argument can be based on this legislative reversal of a judicial decision : it involves no admission that the decision is correct. No appeal was possible, and the decision affected or might affect the status of many persons not parties to the case who could not challenge it. Unfortunately the Act of Parliament does not assist the solution of the question before us. In substance it declares that past decrees granted by Indian Courts for the dissolution of marriage between parties domiciled in the United Kingdom are as valid as they would have been, had such parties been domiciled in India. But the question whether the Courts in India have or have not jurisdiction to grant divorces valid in India between such parties is not answered.

Now as to the first question that the Indian Legislature intend to confer jurisdiction in these cases. The relevant portion of section 2 of the Act of 1869 runs as follows :—

" Nothing hereinafter contained shall authorize any Court to grant any relief except in cases where the petitioner professes the Christian religion, and resides in India at the time of presenting the petition,"

or to make decrees for dissolution of marriage except in the following cases :—(a) where the marriage shall have been solemnized in India, or (b) the adultery complained of shall have been committed in India.

The above words are intended to restrict the powers of the Court. For those powers we must look to that which is " hereinafter contained." For the present purpose section 10 is relevant. The jurisdiction given is so to speak universal " Any husband may present a petition..." From that we come back to the conditions or restrictions laid down in the words of section 2 set out above. Of those restriction one only need be considered here viz,

That the petitioner at the time of presenting the petition resides in India.

In the alternate analysis the whole matter turns on the word " resides".

The word " resides " has no technical meaning and must be taken to be used in its ordinary sense. It would have been easy enough for the Legislature to have substituted for " resides " the words " is domiciled in India." The Legislature did not do so. It is impossible to suppose that the Legislature was not aware of the distinction. The Bill was introduced by no less eminent a jurist than Sir Henry Maine and it contains the solution of this very question of jurisdiction which had delayed the measure for eight years. What was that solution? " Courts are bound to construe a section of an Act according to the plain meaning of the language unless either in the section itself, or in any part of the Act anything is found to modify, qualify or alter the statutory language even if absurdity or anomaly be the result of such interpretation " [*The vestry of the Parish of St John, Hampstead* v. *Henry Horace Cotton* (25) "The proper course in interpreting an Act intended to codify a particular branch of the law is first to examine its language for its natural meaning uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view " per Lord Herschell in *The Governor and Company of the Bank of England* vs. *Vagliano Brothers* (26). There is (in my opinion) nothing in any other part of the Act to modify, qualify or alter the plain meaning of the word " resides ". That which is enacted in section 7 cannot

(25) (1886) L. R. 12 A. C. 1 (6)
(26) (1891) L. R. A. C. 107.

be invoked for that section is expressly stated to be " subject to the provisions contained in this Act....." Where a statute is plain in itself, it is out of place to consider the presumed intentions of the legislature but any argument of that nature favours the plain construction. The Government of India must have been well aware that to lay down domicil as the test would be to deny relief to those persons professing the Christian religion who were not domiciled in India. In 1869, even more than at the present time, there would have been in many cases difficulties almost insurmountable in the way of a petitioner who was barred from recourse to the Indian Courts. The cost would have been prohibitive, the evidence in many cases impossible to procure. There was nothing in the state of the law in 1869 which could have deterred the Indian Legislature from enacting " residence " as the test. That is a point to which reference may conveniently be made later. I cannot find in the judgment in *Keyes* vs. *Keyes* (4) any definite pronouncement as to the intention of the Indian Legislature. I am not aware that any doubt has hitherto been cast on the true construction of the Indian Divorce Act so far as this matter is concerned. Certainly I find nothing in *Keyes* v. *Keyes* (4) bearing up this question viz, the construction of the Indian Act. I do not know whence the doubt has arisen.

I do not overlook the possibility of reading into section 7 an intention on the part of the Legislature to adopt whatever test the Court of Divorce in England might from time to time lay down upon this matter but that is, in my opinion, a forced and unnatural construction. Also it would be necessary to omit the words " Subject to the provisions contained in this Act—" Indeed, had the Legislature intended any such result, it would have been easy to say in express terms that the provisions of the Act must be read as subject to the rules and principles applied from time to time by the Matrimonial Courts in England. They have chosen to say precisely the contrary. Any such construction would introduce an element of uncertainty where certainty is essential. The doctrine of the English Courts has varied from time to time upon this point. Since 1895 domicil alone is recognized as conferring jurisdiction. It is perhaps an extreme hypothesis that the English Courts should ever revert to " residence " as the test, but it is not illegitimate to test in this way the suggested construction of the Indian Divorce Act. It is difficult to see how a statute can mean one thing in 1869, another in 1895, and possibly a third in 1930. I prefer the plain construction supported as it is by a long and uninterrupted current of decisions.

Now as to the second question. Had the Indian Legislature power to enact that which it has enacted. It is upon this point, not upon the constructionof the Indian Act, that the decision in *Key s* v. *Keyes* (4) is in reality based. The question is thus formulated "whether upon a true construction of the Imperial Statute of 1861 power is by that statute conferred upon the Governor-General in Council to legislate for British subjects merely resident in India so as to affect their status as to marriage in the country of their domicil ?" So stated the answer does not necessarily affect the power to decree divorce valid in India, but the penultimate paragraph of the judgment, portion of which is cited above, goes far beyond this. The *ratio decidendi* is as follows. Up to 1878 when the case of *Niboyet* v. *Niboyet* (9) was decided the doctrine of the English Courts was unsettled, but that case laid down that residence of the parties gave jurisdiction. This decision must however be held to have been incorrect in view of the decision of the Privy Council in *Le Mesurier* v. *Le Mesurier* (7) in 1895. Therefore when Parliament enacted the Indian Councils Act of 1861 it must be supposed that the true doctrine was present to their minds, and that therefore Parliament could not have intended to empower the Indian Legislature to enact that residence should suffice to confer jurisdiction. Further, it is clear from section 22 of that Act that Parliamenet could not have intended to give the Indian Government power to make

laws to interfere with the status of subjects of the Crown not domiciled in India.

To follow this decision would be to escape from an undesirable conflict of laws but with all due deference I am unable to do so. I would however point out that this conflict can equally well be avoided if, as hitherto, the decrees of Indian Courts receive extra-territorial recognition. As I have already said the first canon of statutory interpretation is that the words of the statute should be read in their natural meaning. The general legislative powers of the Government of India were considered by the Privy Council in the leading case: *Queen Empress* v. *Burah* (10). Lord Selborne expressed himself as follows:

"The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it and it can of course do nothing beyond the limits which circumscribe these powers. But, when acting within these limits it is not in any sense an agent or delegate of the Imperial Parliament but has, and was intended to have, plenary powers of legislation, as large, and of the same nature, as those of Parliament itself. The established Courts of justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question; and the only way in which they can properly do so, is by looking to the terms of the instrument by which, affirmatively, the legislative powers were created, and by which, negatively, they are restricted. If what has been done is legislation within the general scope of the affirmative words which give the power, and if it voilates no express condition or restriction by which that power is limited (in which category would, of course, be included any Act of the Imperial Parliament at variance with it), it is not for any Court of Justice to inquire further, or to enlarge constructively those conditions and restrictions".

This decision is binding on us, and it appears to me conclusive on the point. The powers are conferred affirmatively by section 22 of the Indian Councils Act 1861. They include power "to make laws and regulations for all persons whether British or native foreigners or others and for all Courts of Justice whatever and for all places and things whatever" within the Indian territories. The express conditions and restrictions are set out in the same section, and in sections 19 and 24. There are other statutory enactments bearing on this question which will be found fully set out at page 202 of Ilbert's Government of India, but nowhere is there any express restriction against "the making of laws to interfere with the status of subjects of the Crown not domiciled in India". It would not be difficult to cite instances where the Indian Legislature has made laws "which may affect the heritable capacity of a man resident in India" who was a domiciled British subject. (*e. g.* section 31 of the Indian Succession Act). No doubt that Act only affects succession to immoveable property in British India in the case of such persons (vide section 5) but its validity within British India has never been questioned. There is thus in the present case no express restriction, and the question is in the words of their Lordships of the Privy Council whether "the legislation is within the general scope of the affirmative words which give the power". With all respect I do not see that the answer admits of any doubt. The power could hardly be expressed in wider terms.

If it is admissible to consider the state of the law in England when Parliament enacted the Indian Councils Act of 1861, is there anything from which an intention can be presumed to restrict the powers of the Indian Legislature in the manner suggested? In 1878—17 years later—the English Courts held that residence within the jurisdiction was sufficient to empower the Courts to give a decree for divorce: *Niboyet* v. *Niboyet* (9). If in that year it had been suggested that Parliament could not have intended to empower the Indian Legislature to give jurisdiction to the Courts to grant a divorce between British subjects domiciled in England, *Niboyet* v. *Niboyet* (9) would

have been conclusive to the contrary. How can the statute law of this country be affected by the later decisions of the English Courts? Had the Indian Legislature thought fit to do sö, they could have amended the Indian Divorce Act to bring it into conformity with the views expressed in *Le Mesurier* v. *Le Mesurier* (7). They have not done so, and in no other way save by an Act of the Imperial Parliament can the Act of 1869 be altered or modified There has been no such legislation.

I find myself unable to hold that even restriction in the sense suggested was imposed by the Imperial Parliament on the powers of the Indian Legislature, nor can I hold that the true construction of the Indian Divorce Act 1869 is open to any doubt. Still less can I hold that in enacting section 7 of that Act the Legislature intended that the power of the Courts to entertain a petition for dissolution of marriage should depend upon the views which might from time to time prevail in the English Courts as to matrimonial causes. I hold that the jurisdiction, whatever it may be, is conferred by the Act in express terms, and that provisions which confer that jurisdiction are not in any way subject to any rules or principles which may from time to time be laid down by English Courts. Those provisions, in my opinion, confer upon the Courts in India jurisdiction to give decrees for dissolution of marriage between British subjects domiciled in England who in other respects are within the conditions prescribed by the Act.

I regret that I am unable to agree with my Lord the Chief Justice and my learned Brother Marten as to the true construction of the Indian Divorce Act. I have already dealt with what appears to me to be the main principles on which that Act should be construed. I would willingly have rested my conclusions upon those principles, but in this conflict of views I find it necessary to add a few words on the doctrine of private international law. It is not necessary to attempt to define that much-debated phrase. The principles invoked, as I understand it, may be stated as follows :—

It is a scandal when a man and a woman are held to be man and wife in one country and strangers in another. That scandal arises from a conflict of laws. That scandal can be avoided, if the Courts of one country decline to assume jurisdiction over the subjects of another country, who are merely resident within their jurisdiction. Alternatively if the Courts of all countries agree to accept domicile as the test that scandal is avoided.

It is conceded that Municipal Law can confer jurisdiction on the ground of residence but it is argued that in considering the intention of the Legislature the principle stated must be kept in mind.

I agree that this is so. I do not propose to rely on the obvious difference in the position of a British subject as compared with the subject of an independent Sovereign State. I would only point out that British subjects whether in India or in England owe allegiance to the same Crown and are subject to the authority of the same Legislative body, the Imperial Parliament, and if the Imperial Parliament so wills, the scandal on which the argument rests can be avoided by enacting that the decrees under consideration shall have extra-territorial recognition. This they cannot do in the case of the subjects of an independent Sovereign State. The object of these remarks is to elucidate what I believe to have been the true intention of the Indian Legislature.

I concede as I have said that the Indian Legislature desired to avoid the scandal stated above, and that it is reasonable to interpret their intention in that light. But, in my opinion, the Indian Legislature acted in the belief that the decrees of the Indian Courts would receive extra-territorial recognition, and they chose that method of avoiding the difficulty. Nor were they unsuccessful. For over fifty years there was no scandal for until the decision in *Keyes* v. *Keyes* (4) so far as I am aware, there is no case in which the English Courts refused to recognize the validity of those decrees. The intention which I deduce from the principle of avoiding scandal leads

me therefore to the conclusion not that the Indian Legislature desired or intended to exempt British subjects domiciled in England from the jurisdiction of the Indian Courts, but rather that they intended that the decrees of those Courts should be valid outside India.

I do not desire to burden this judgment by reference to cases. I would, however, emphasize once again that it has been consistently affirmed by eminent Judges in India that the test of jurisdiction in these cases is residence not domicile. I also desire to add a few remarks on the scope of section 7 of the Indian Divorce Act It is true that in construing the Matrimonial Causes Act of 1857 the English Courts have—not without hesitation—arrived at the conclusion that the general words of section 27 must be cut down in view of the principles of Private International Law, but I must admit that for reasons which I have endeavoured to indicate I doubt if the argument is in the special case of the Courts of India as strong as is supposed. But apart from that the Indian Act contains what the English Act does not contain, that is to say, a clear and definite statement (vide section 2) of the conditions upon which jurisdiction can be exercised—*expressio unius est exclusio alterius.* I see no warrant for reading into the Act what is not expressed. If then section 2 is exhaustive upon the point it is clear that section 7 can lay down nothing more by any process of implication. If section 7 is to have the dominating force, which is suggested, the rest of the Act might have been expressed in a few sections. With all deference I doubt whether it is safe to apply the decisions of the English Courts as to the meaning of another statute.

But it may be said what is then the scope of section 7? It is, in my opinion, a residuary section intended to provide for any matters which by inadvertence or otherwise are not expressly dealt with in the Act. It is not unusual in statutory drafting to insert provisions of this nature *ex majore cautela* more especially where an attempt is being made to codify in this country an unfamiliar branch of English Law. In the words of Mr. Justice Jenkins (now Sir Lawrence Jenkins). "Tho expression 'rules and principles' points rather to the rules and principles on which the Court deals with these matrimonial causes in requiring a certain degree of evidence and other cognate matters" *Bailey* v. *Bailey* (27) Upon this construction of section 7 that learned Judge declined to apply to the case before him a ruling of the Probate Court in England. In *Ramsay* v *Boyle* (28) the same view was taken of the scope of this section.

I would conclude with a reference to a matter which has at least some historical interest. Since I wrote this judgment my attention has been attracted to the speech in which Sir Henry Maine moved the third reading of the Bill which became the Indian Divorce Act. The Bill had then passed through the hands of the Select Committee and it is interesting to note that this legislation was delayed for about eight years over this very question of jurisdiction. Maine clearly intended to have the jurisdiction on residence not on domicile, and expressed a confident hope that the decrees of the Indian Courts in the case of persons domiciled in England would receive extra-territorial recognition. He further expressed himself as to the scope of clause 7 of the Bill in terms not dissimiliar to those which I have used in discussing section 7 of the Act. I do not seek to support my views by these observations. Indeed, as I have said, the history of the legislation attracted my attention after my judgment was written. But the point is not without interest and this contemporaneous exposition of what was then believed to be the law, is not without value in considering the intention of the Legislature.

I now come to the facts of this case. At the outset it is necessary to remark that the decision proceeds to some extent on allegations of fact which go beyond the pleadings. The petition was filed on September 7th, 1921 and para 11 says that "the respondent has disappeared from her

(27) (1903) 30 Cal. 490.
(28) (1903) 30 Cal. 489.

father's house". That was the petitioner's state of knowledge at that date. After that date it is alleged that he discovered that on September 6th, and September 7th respondent and the co-respondent stayed together in an Hotel at Lonawla on nights of September 6th and September 7th. Strictly there should have been an amendment of the pleadings, but no objection was taken to evidence going on as to this matter. The case stood adjourned for that evidence without objection, and no substantial injustice has been done by the failure to conform to the strict rules of procedure. That evidence must therefore be read as good evidence for the purposes of the issue of fact.

It is necessary to state briefly the sequence of events. The parties were married in 1914. There are two children. On March 13th, 1921 they returned from England to India and stayed with the wife's parents Major and Mrs. Wickham in Poona. On May 1st, 1921 the petitioner entered the service of Messrs. Thomson and Taylor in Bombay. The respondent and the children remained at Poona. In June 1921 the co-respondent became a boarder in Major Wickham's house. While in Bombay the petitioner received certain anonymous letters which excited his suspicions. On August 13th, 1921 the petitioner went to Poona. There was some discussion on this matter. The details depend on the uncorroborated evidence of the petitioner, but it is clear from the respondent's evidence that she became aware of his suspicions. She says. "I think I promised not to have anything to do with Captain D'Arcy" On August 15th the petitioner returned to Bombay taking the elder child with him. On August 20th he returned to Poona and on August 21st he returned with the respondent and the two children to Bombay. They took rooms in a boarding house. The co-respondent was also in Bombay at this time. On the morning of August 23rd the petitioner left his place of business about 10 a. m. and returned to his rooms. He found the respondent and the co-respondent together on the Verandah. There was a quarrel. The parties then went together to a solicitor. At 2-30 p. m. they returned together to the boarding house, and the respondent and the co-respondent went away together leaving the petitioner with the children. The respondent and co-respondent appear to have gone to the house of one of Gove where the co-respondent was staying. They spent the rest of the day together, went to a theatre in the evening and the respondent then took the co-respondent to the Appollo Hotel about midnight where she spent the night. The petitioner telegraphed to his father-in-law at Poona. Major Wickham arrived at Bombay on the morning of August 24th. They found the respondent and the co-respondent together at Gove's house. There was a violent altercation. Thence they took the respondent to the Apollo Hotel. The door of the room was found locked, and respondent admitted that the co-respondent had the key. The door was broken open, and the respondent's luggage removed. That night her father took her to Poona leaving the petitioner in Bombay.

There is not so far as I can find any dispute as to these facts. As to the reasons which actuated respondent in leaving her husband there are two conflicting stories. The husband says in effect that she left him to join her lover: the wife, that her husband turned her out of the house and that the respondent merely acted as a friend. Now the learned District Judge says—and I think most pertinently-"why did the respondent not go back to her father". The distance from Bombay to Poona is 114 miles by rail, and there is a frequent service of trains. The plea of want of money is futile in view of what actually happened. Further there is independent evidence which the learned District Judge has believed as to the circumstances in which respondent left her husband's protection. This witness is Mrs. Parrish who kept the boarding house. This lady says "I begged her not to go but she said she must go where her affections were". The respondent admits that Mrs. Parrish was present. The facts therefore plainly are that respondent knew that her conduct with the co-respondent had excited her husband's suspicions ; that she openly

expressed a guilty affection, and went away with the co-respondent: that she did not take the proper course which was open to her viz, to return to her father, but stayed with the co-respondont all day, went with him to the theatre, and allowed him to escort her to an Hotel at midnight. Next day she rejoined him. It is difficult to regard this conduct as consistent with innocence. Whether it would be safe to infer adultery need not be decided in view of the subsequent history of the case. But should it become necessary to do so, I should find it impossible to say that the District Judge was wrong in inferring adultery.

It appears that on the evening of August 24th there was some kind of reconciliation between the parties, though as I have said there was admittedly nothing which can amount to condonation as defined in section 14 of the Indian Divorce Act. After respondent returned to Poona on August 24th, certain letters passed. There is nothing in the petitioner's letters, as I read them, which helps the decision of this case. Put shortly they are the letters of a man suffering from acute agony of mind, who desires to be reconciled with his wife. But there is a letter from the respondent dated September 1st, 1921 which is very significant. The respondent had then made up her mind to leave her husband. She writes as follows :—

"I wish to inform you for 'Good and all' that I shall never live with you again as your wife and the sooner we are separated or divorced the better for us both....My life with you is misery to myself and must necessarily be so to you when you know I cannot even like you and I only see one thing to do viz, 'divorce me' (the word 'me' is not perfectly clear but I read it so.) Which eventually must come. I have always been afraid of you and Daddy but I do not intend to be any longer, as all you and Daddy think of is your name and what people will say &c not my happiness.....If in future you interfere in any way whatsoever in my doings 'Beware' as things will not be so peaceful on the next occasion. You have your recourse viz, the Law".

Now I have every desire to be scrupulously fair to the respondent but read in the light of the past events what does this letter mean ? Is it not fair to express the meaning thus "I am leaving you to seek my own happiness and you had better divorce me". I take it that the respondent who is twenty eight years of age and had been married for seven years knew that a husband cannot divorce his wife without cause, and had she intended to give him cause she could hardly have acted in a more appropriate manner. On September 2nd she left her parents' house with her two children and went to an Hotel at Lonawla 40 miles away by rail. She stayed there from September 2nd to September 8th. She sent for the co-respondent who came to Lonawla and occupied the bedroom next to hers. Whether he was there for one night or two nights is to my mind immaterial. I do not find it necessary to add any details to this narrative. They will be found in the judment of the learned District Judge. The inference seems to me irresistible. I must hold that adultery is proved.

Held by a majority :—

That the District Court of Poona had no jurisdiction to pass a decree for dissolution of marriage.

That adultery of the respondent 1 with respondent 2 was proved.

Decree for judicial separation.

The District Court to determine question of alimony and the custody of the children.

The petitioner to pay the costs of respondent 1 and to recover such costs and his own from respondent 2.

Petition dismissed.

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✱ 1923 BOMBAY 358

MACLEOD C. J. AND CRUMP, J.

Raghunath Vithal Bhat—Appellant.

v.

Purnanand Saraswati Swami–Respondent.

S. A No. 630 of 1921 dated 10th Nov. 1922 against the decision of Dt. Judge of Kanara in Appeal No. 119 of 1920.

Hindu Law—Religious endowment—Alienation of office of Pujari.

Fifty years ago a Guru owned a temple at Sadasivagad and he appointed a certain person as a priest to perform "Puja" and other services to the deity on receipt of a certain quantity of paddy. The plaintiff was the 3rd Guru in order of descent. The defendant was the son of the original Pujari who had two sons, the defendant and Dattatraya, the plaintiff's case being that Dattatraya having a half interest in the office of Pujari, transferred or surrendered it to him. *Held* that the alienation of a share in a pujari right by one member of the family is invalid whether it is made in favour of an out sider altogether or whether it is made in favour of the original grantor of the office. *Obiter* if one of the members of the family wishes to get rid of his duties as well as his rights he could only do so in favour of the remaining mem ers of the family. 6 P. A. 76 Ref. [P 359 C 1]

G. S. Rao—for the Appellant.

H. C. Koyajee with G. S. Mulgaokar—for the Respondent.

Judgment.—This appeal raises a question on which there does not appear to be any direct authority. The facts are simple. Fifty years ago a Guru owned a temple at Sadashivgad, and he appointed a certain person as a priest to perform "Puja" and other services to the deity on receipt of a certain quantity of paddy. The present plaintiff is the 3rd Guru in order of descent. The defendant is the son of the original Pujari who had two sons, the defendant and Dattatraya, the plaintiff's case being that Dattatraya having a half interest in the office of Pujari, transferred or surrendered it to him. It has been held in this Court in MANCHARAM v. PRANSHANKAR (1) that hereditary offices, whether religious or secular, are no doubt treated by the Hindu text writers as naturally indivisible; but modern custom, whether or not it be strictly in accordance with ancient law, has sanctioned such partition as can be had of such property by means of the performance of the duties of the office and the enjoyment of the emoluments by the different co-parceners in rotation. The Court said that "there was no reason why the alienation of a religious office to a person standing in the line of succession and free from objections relating to the capacity of a particular individual to perform the worship of an idol or do any other necessary functions connected with it, should not be upheld." It was, therefore, in favour of alienations in the family of the original grantee of the office.

In KUPPA v. DORASAMI (2) it was held that the sale of a religious office to a person not in the line of heirs, though otherwise qualified for the performance of the duties of the office, was illegal. MANCHARAM v. PRANSHANKAR. (1) was discussed and the Court was not prepared to go so far as to say that a purchase by a person standing in the line of heirs or otherwise qualified should be upheld.

We have been referred to no decision which differs from those cases, and therefore, unless there is direct evidence of custom, it should be taken that the transfer by one member of the family entitled to an hereditary office to an outsider would be considered by the Courts invalid. The transfer by one member of his share to another member of the family could not be considered in any way objectionable. It would only reduce the number of members who were entitled to the office and a share in the emoluments

The other question that arises is whether one member of the family entitled to an hereditary office can surrender his share to the original grantor. If all the members of the family agree to give up the duties of performing worship and receiving emoluments, then there could be no objection to their doing so. But there is a great difference between the whole group of members surrendering their rights to the grantor, and one

(1) (1882) 6 Bom. 298.

(2) (1883) 6 Mad. 76.

member purporting to give up his rights to the grantor which would cause an interference with the rights amongst the remaining members of the family. It seems to us that the matter is entirely one of first impression, and it can only be decided in accordance with the principles which would be most consistent with the proper performance of an office of this nature. We do not propose to decide any thing which might cause disputes in future or interfere with the harmonious performance of the duties appertaining to the office. It seems to us that the duties of the office and the emoluments appertaining thereto remain within the family of the original grantee, and those members of the family, who wish to retain the office and share the emoluments, are entitled to do so, and if one of the members of the family wishes to get rid of his duties as well as his rights, he could only do so in favour of the remaining members of the family, and he cannot evade the ordinary rule as to alienations by purporting to surrender his share to the original grantor, or, put in other words, the alienation of a share by one member of the family is invalid whether it is made in favour of an outsider altogether or whether it is made in favour of the original grantor of the office.

It seems to us that this aspect of the case has not been considered by the lower Courts. The District Judge has treated the matter as a question of contract. No doubt every promisee may dispense with or remit the performance of any promise made to him. But we do not think that is a proper principle to apply to the decision of this case.

Then it was argued that the plaintiff lay under an estoppel because Dattatraya who was a plaintiff in a suit against the Guru, admitted that he had parted with his share in favour of his brother. There would be no case of estoppel. It would be a question of proof whether Dattatraya had, as a matter of fact, transferred his share to his brother, the present defendant, for it is difficult to say that in consequence of that statement the defendant altered his position for the worse. However that may be, it is hardly necessary for the purposes of this case to decide, when sitting in second appeal, that as a matter of fact Dattatraya when he purported to assign his share to the plaintiff had as a matter of fact already surrendered it to his brother. We decide the case on principles that are already recognized in this Court. Dattatraya, although he could have given up his share in the office to his brother, could not endeavour to alienate it either to a person outside the family or to the original grantor or a descendant from him. The appeal, therefore, must be allowed and the suit dismissed with costs throughout.

Appeal Allowed.

1923 BOMBAY 359

MARTEN AND FAWCETT, JJ.

Krishnalal Chunilal Majumdar—Original Plaintiff—Appellant

v.

Dhirajlal Navnitlal Jhaveri—Original Defendant—Respondent.

S. A. No. 653 of 1921, D. 10th November 1922, against the decision of Acting Dt. J., of Broach in Appeal No 43 of 1917.

Landlord and tenant—Rent—Abatement—Uniform abatement for 53 years.

Where it was found that the abateme claimed by the defendant had not been fluctuating but was uniform throughout, and had been uniformly allowed every year since 1868, that it was not a deduction allowd to the old Khatedars personally, but was allowed to particular holdings. *Held*—There is nothing illegal in apportioning this abatement to more than one holdings after partition of the original holdings and it is not necessary that 60 years should lapse after such apportionment to complete user. [P. 359 C 1]

G. N. Thakor with R. J. Thakor—for the Appellant.

H. V. Divatia—for the Respondent.

Judgment:—The point on this appeal is whether the defendant is entitled as of right to deduct Rs. 3 from his assessment payable to the plaintiff Inamdar. The lower appellate Court differing from the Judge of first instance has found that the abatement claimed by the defendant has

not been fluctuating but was uniform throughout, and that it has been uniformly allowed every year since 1868, that is, for a period of 53 years, and that it is not a deduction allowed to the old Khatedars personally, but is allowed to particular holdings.

Mr. Divatia has put before us very clearly the material facts, and it will be found that looking at the material Exhibits for the years 1867, 1906 and 1908; viz., Exhibits 125, 122 and 128, there was a consistent deduction of Rs. 8 in respect of the suit and other lands. Further, it is described as a deduction in respect of loss of pasturage. We thus get a constant deduction for some 41 years on this alleged ground;and after this lapse of time, no explanation is forthcoming from the Inamdars as to why it has been allowed, apart from the ground stated in the receipts themselves.

Stopping there,one would think that that would be a good reason for inferring a legal origin to that consistent deduction; for, as the learned Judge has pointed out, the Court is always anxious to find a legal origin for acts, when it finds that they have been consistently spread or exercised over a long series of years.

Then when we come to 1908, a change comes over the scene, because some of the original lands were then parted with by the Khatedars. Accordingly we get the area of the land reduced first of all from 52 Bighas of land, to say 32 Bighas of land and the deduction comes down to Rs. 6 Similarly, if we look at Exhibits 129 and 99 for the years 1910 and 1911, we find the deductions are of Rs. 6 only.

In 1912 there was a formal transfer to the defendant of the suit land which in fact he had purchased in 1905, and then we find that there is a remission made to him of Rs 4-5-0 That was the Samvat year 1968, and the point made by the appellant is that the deduction allowed for that year was not Rs. 4-5-0 but only Rs. 3. However, there is another book for that year or another account for that year, Exhibit 149, which shows the remission as being Rs. 4-5-0. Then when we come to 1913, we find Rs. 4-5-0 is in fact deducted in Exhibit 100 so I am disposed to think that there is some mistake about Exhibit 91. The probabilities are that Exhibit 149 is correct.

Next we find that in 1915—that is an important date—the two Inamdars came to a partition, and the suit Survey Numbers 19 and 33 fell to the share of the plaintiff, and Survey No. 102 to the share of Motilal. Further, on that occasion a document, Exhibit 97, was prepared of a formal nature, in which the deductions are shown. They are shown no doubt not in respect of particular fields but as against the names of the Khatedars. I think that makes no substantial difference. As regards the Khatedars in question, we find the total allowance of Rs. 4-5-0 of which Rs. 3 is apportioned to the plaintiff and Rs. 1-5-0 is apportioned to Motilal.

Accordingly in effect we get this that landlords partitioning property amongst themselves are admitting that there is a certain deduction in respect of the rents otherwise payable to them. We further find that this particular deduction has been agreed to by the defendant ; and that in 1915 (Exhibit 16) the amount of Rs. 14-2-11 was paid by the defendant, which payment is on the assumption that Rs. 3 was to be deducted. It is now said that the balance of Rs. 3 was carried forward in the plaintiff's accounts, and that therefore this receipt should be disregarded. That argument seems to me to be one which is not well founded. The defendant is naturally entitled to rely on the receipt which he obtained from the Inamdar.

On those facts, what error of law has the learned Judge made in arriving at the conclusion which he has ? In the first place, I do not think it can be said that there is no evidence here to warrant the learned Judge in arriving at the decision which he did. As I have already pointed out, down to 1908 we get long uniform deduction of Rs. 8. Then as regards the later years, I personally consider that it was open to the learned Judge on the evidence to arrive at the decision which he did. In effect the decision amounted to this. He finds a deduction not in respect of all the

lands but in respect of certain particular lands, and then when those particular lands, are split up he finds the parties agreed to apportion this deduction amongst the lands, giving at any rate a specific sum to the suit lands. What is wrong in that? If I may make the matter clear supposing there was a deduction in respect of 10 particular holdings down to 1910 of say Rs. 10, and then some of these holdings are split up, what is there illegal in the landlord and tenant agreeing to apportion this deduction in respect of 3 of the holdings at a particular sum? What would be the result if a law suit were brought to have this deduction apportioned? The argument presented to us is really this that because this apportionment is not made for 60 years, there is no evidence of user or custom. In my opinion that argument is not well founded. Until 1908 or thereabout it had never become necessary to apportion the deduction of Rs. 8.

I accordingly think that nothing has been shown here which would lead me to the conclusion that the learned Judge has committed any such error either of law or otherwise, as would justify us in second appeal in reversing or altering the decision which he has arrived at.

I would, therefore, dismiss the appeal with costs.

Appeal dismissed.

1923 BOMBAY 361

MARTEN AND FAWCETT, JJ.

Kashinath Gyanoba Kikle—Appellant.

v.

Ganesh Sitaram Kulkarni and another—Respondents.

S. A. No. 716 of 1921 dated 15th Nov. 1922 against the decision of the Asst. Judge of Satara in Appeal No. 151 of 1920.

(a) Lim. Act Art 142—Burden of proof.

As far as the paper titles went it appeared that the plaintiff on the one hand and the defendants on the other hand were to devide survey No. 58 into equal moieties of 12 acres and 5 gunthas each. But in 1915 when a survey party came to measure the fields it was found that the defendants were in actual possession of more than half of the land namely about one acre and 10 gunthas in excess of the moeity shown under the paper title. *Held* that there being no evidence at all to show at what period the discrepancy in area between the title deeds and the actual occupation crept in, plaintiff must prove that the dicrepancy arose within the last 12 years.

(b) Evidence Act S. 110–Converse if true.

The presumption, that the plaintiff having the title, also has possession can properly be made in the case of the jungle or waste land, where there is no proof or very little proof of acts of ownership having been exercised on either side, or in cases where the evidence as to such acts of such ownership is very nearly equal. Though the S. 110 recognised a presumption that the person in possession also has a good title there is no corresponding section saying that the person with the title should be presumed to be in possession. This presumption is one that can only come under S. 114 of the Evidence Act which allows the Court to presume the existence of any fact which it thinks likely to have happened regard being had to the common course of natural events &c. [P. 363 C. 2]

K. N. Koyaji—for the Appellant.

S. Y. Abhyankar and G.S. Mulgaonkar—for the Respondents.

Marten, J:—The plaintiff's case is based on the allegation in his plaint that he is the owner of the land in dispute, and in possession of the same till dispossessed by the defendants about 4 years ago. That being so, it is incumbent on him under article 142 of the Limitation Act to prove that he has been in possession of the property within 12 years from the suit. Accordingly as held in *Faki Abdulla* v. *Babaji* (1) and *Tarubai* v. *Venkatrao* (2) he must prove that possession, and cannot rely merely on his paper title. If on the other hand the suit comes under article 144, then it is for the defendants to establish adverse possession as against the plaintiff. This is roughly speaking the effect of those two decisions.

Now in the present case, as far as the paper titles go it would appear that the plaintiff on the one hand and the defendants on the other hand were to devide Survey No. 58, which is now Survey No. 62 and consists of 24 acres 10 gunthas, into equal moieties of 12 acres and 5 gunthas

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(1) [1890] 14 Bom. 458.
(2) [1903] 27 Bom. 66.

each. But it is plain that in 1915 when a survey party came to measure the fields, it was found that the defendants were in actual possession of more than one moiety of the land, viz., about one acre and 10 gunthas in excess of the moiety shown under the paper title. The findings of the lower appellate Court are: "It seems clear that either the number was not correctly divided into halves at the original partition, or that at some subsequent period encroachments were made by the occupants of the northern (defendants') shares; but there is no evidence at all to show at what period the discrepancy in area between the title deeds and the actual occupation crept in. In order to succeed plaintiff must prove that the discrepancy arose within the last 12 years and this he has failed to do; indeed all the probabilities in the case point to the presumption that the discrepancy is of long standing."

The main argument of the appellant is that it is incumbent upon us to presume that possession went with the paper title, and that it continued with it down to 1915 in the absence of evidence to the contrary. But if this proposition was accepted without any qualification, it would seem to negative the propositions which are clearly laid down in 14 Bom. p. 458 and 27 Bom. p. 66. It would only be necessary, if that argument was correct, for the plaintiff to prove his paper title, and then ask the Court to presume possession as from the date of that paper title, and further that possession continued down to the material date. If so, there would be no substantial difference between article 142 and 144. On the other hand, their Lordships of the Privy Council have pointed out in *Rani Hemant Kumari* v. *Maharaja Jagadindra Nath Roy* (3) that when the plaintiff comes to prove his pessession under article 142 his paper title comes to his aid with greater or less force according to the circumstances established in evidence. That proposition I respectfully accept, but it seems to me to be far removed from an absolute presumption that possession always follows the paper title.

Similarly in one other case which was relied on by the appellant, viz., *Raj Coomar Roy* v. *Govind Chunder Roy* (4) in support of the proposition that the legal presumption is that possession follows the title, there was a very material difference between the facts of that case and the facts of the present. In 19 I. A. p. 140 it was clear that the plaintiff or his predecessors had obtained physical possession in 1857. Accordingly the decision of the Board amounted to this that there was a presumption that that possession continued with the title down to the material date. There again I quite appreciate that proposition. If once you could find it definitely established here that the plaintiff or his predecessors-in-title had obtained physical possession of the disputed land, I agree that one would infer that that possession continued until it was shown to have ceased.

But that is not the only distinction between the present case and 19 I. A. p. 140. After the date in 1857 when the land was shown to have been taken possession of by the plaintiff in that case, it appears to have become largely sub-merged, and at other times portions of it were wild jungle land. Further, there were peculiar circumstances connected with the fact of establishing possession on the one side or the other, and under the circumstances of the case the Court held there was no reliable evidence to prove possession either the one way or the other in the later years. But in the present case we have the parties enjoying two portions of one field and cultivating their land side by side, and the fact as to who was in physical possession of any particular portion of the land must have been within the clear knowledge of both parties.

It is clear that in 1915 when the measuring party came, the parties were in possession of unequal shares; and personally I think that that fact cannot be ignored in considering whether the plaintiff has satisfied the

(3) [1906] 8 Bom. L. R. 400.

(4) [1819-92] 19 I. A. 10-149 Cal. 660-6 Sar. 140 (P. C.)

onus of proof as to possession in the present case. I further think that an inspection of the plan of this property affords some possible clue to the division which was found to be in existence in 1915. It is an irregular four-sided plot of land, and if one takes what I will call the top portion and the bottom portion it will be seen that the actual division adopted divided those boundaries, viz, the top boundary and the bottom boundary of the whole Survey number very nearly into two equal portions, and that what is alleged to be that true division line does not appear to be so as far as those top and bottom boundaries are concerned, therefore as far as merely the eye is concerned the parties may easily have accepted this particular division either for the sake of convenience or even possibly by mistake It is only when one sees the physical configuration of the right hand half and the left hand half of the land, that one realizes that the mode of division actually found in 1915 resulted in the one half getting a larger area of land. However that is largely guess work based on the plan, and not having seen the property I only mention it as being a possible clue to the actual facts. Personally I entirely agree with the learned appellate Judge that all the probabilities in the case point to the presumption that the discrepancy is of long standing. I think the probabilities are that but for the measuring party both parties would have remained quite happily in possession of the land which they were actually in possession of in 1915.

Taking all the facts of this particular case into consideration, and after giving due weight to the paper title, I am of opinion that the plaintiff has not satisfied the burden of proof which lies on him to prove his possession of the disputed land within 12 years of the suit, and that consequently his suit was rightly dismissed by the learned Judge.

Under these circumstances it is unnecessary for me to consider the appellant's second point, which was based on the question of adverse possession, and on the allegation that the defendants not having intentionally taken possession of the land in dispute, it could not be adverse possession within the meaning of article 144 of the Limitation Act.

In my judgment, the appeal should be dismissed with costs. Only one set of costs allowed.

Fawcett J.--I do not think that the decision of the lower appellate Court is shown to be erroneous on the facts of this case. The main contention of the appellant's pleader is that the Court should presume that the plaintiff having the title also had possession. No doubt there are cases where such a presumption can properly be made. One is that of jungle or waste land where there is either no proof of or very title proof of acts of ownership having been exercised on either side. Another case is where the evidence as to such acts of ownership is very nearly equal.

The case relied upon by Mr. Koyajee in *Raj Coomar Roy* v. *Gobind Chunder Roy* (4) is one of the former class of cases, and as pointed out in the judgment of their Lordships, the condition of the land was such as to create great difficulty in the proof of possession. Also in that case there was an admitted possession of the plaintiff in 1857. It is therefore a very different case from the present. And in the case at 8 Bom L. R. p. 400 their Lordships were careful to say that this presumption came to the aid of the plaintiff with greater or less force according to the circumstances established in evidence. In other words, it is not an absolute presumption of law, but a purely discretionary one depending upon the particular circumstances of each case. This conforms with the provisions of the Evidence Act, for though section 110 recognised a presumption that a person in possession also has a good title, there is no corresponding section saying that the person with title should be presumed to be in possession. This presumption is one that can only come under section 114 of the Evidence Act, which allows the Court to presume the existence of any fact which it thinks likely to have hap-

pened, regard being had to the common course of natural events &c. In this particular case the circumstances are such that it is not at all improbable that the mistake discovered in 1915 was first made at the time of the original partition, and I do not agree with Mr. Koyaji's contention that the Court should also draw in his favour a presumption that his predecessors-in-title then got possession. It is possible that each of the two parties partitioning the land did then obtain an equal half and that the discrepancy came into existence later on. But the probabilities in favour of that view are not sufficient to justify the Court in presuming that it was actually so. And the fact that in 1915 the defendants were in possession of the land in suit is a very cogent circumstance against raising the presumption that this Court is asked to draw.

I agree, therefore, in holding that the learned appellate Judge was correct in his view that it was incumbent on the plaintiff in the first place to show possession within 12 years; and as he has failed to do so, this suit must be dismissed. As the onus of proving adverse possession has not been shifted to the defendants, we are not concerned with the question whether their possession was actually adverse within the meaing of article 114 of the Limitation Act.

1 agree therefore with my learned Brother that the appeal should be dismissed with costs.

Appeal dismissed.

1923 BOMBAY 364

MACLEOD C. J. AND CRUMP J.

Pandurang Wasudeo Chate — Original Plaintiff—Appellant.

v.

Basappa Bin Shiddappa Ganiger and another — Original Defendants — Respondents.

S. A. No. 731 of 1921, D. 25th Jan. 1923, against the decision of Dt. J. of Bijapur, in Appeal No. 57 of 1919.

(a) *Evidence Act S. 90—Kabja receipt—Forty years old.*

From the Kabja receipt, the Court is entitled to presume that on the person named therein as purchaser had obtained possession through the Court, and although it is possible that when Kabja receipts are passed, physical possession of the land may not always be given to the purchaser, there is no reason why the Court should presume that no possession was given in a particular case. [P. 364 C, 2]

(b) *Limitation Act Art 141—Onus of proof.*

Art 141 is inapplicable when time has once commenced to run against the last full owner, as in such a case, it continues to run and is not suspended or in any way affected by the mere circumstance that the owner is succeeded by a female entitled to a woman's qualified estate; after the statutory period has run out, all persons claiming through the owner are barred (See Rustomji's Limitation Act, 2nd Edition p. 449.) The article makes it clear that the reversioner has 12 years after the death of a Hindu or Mohammadan female to establish his right as heir to the last full owner; and it lies upon the party in possession to prove that he has got a better title. [P. 365 C. 1,2]

G. N, Thakor with R. A. Jahagirdar—for the Appellant.

A. G. Desai—for the Respondents.

Judgment:—In this suit the trial Court passed an order that the plaintiff should recover from the defendants possession of the plaint land and costs. The appellate Court reversed that decision and dismissed the suit on grounds which we think were wrong. Tamaji was the purchaser at a Court sale in 1875. The Kabja receipt, Exhibit 85, has been produced from which the Court was entitled to presume that Tamaji had obtained possession through the Court. That was a document over 40 years old and although it is possible that when Kabja receipts are passed, physical possession of the land may not always be given to the purchaser, there is no reason why the Court should presume that no possession was given in this case. In our opinion the Kabja receipt raises a presumption in Tamaji's favour; and as far as the evidence goes, it has not been proved that Tamaji lost possession before his death. Laxmibai is said to have sold the lands by an oral sale to Basappa, the original mortgagor. Laxmibai died in 1905, and plaintiff claimed as the next reversioner of Tamaji. Altough it was alleged that there had been an

oral sale by Laxmibai, which would not be binding on the next reversioner, it does not appear that any sale was proved.

The question then arises whether the defendants could establish a title against the reversioner who was suing as the next heir of Tamaji, the defendants could establish a title against the reversioner who was suing as the next heir of Tamaji, alleging that Tamaji was in possession until the date of his death. It is clear that if some one got into possession against the widow only, time will not be running against the reversioner. Art. 141 is inapplicable when time has once commenced to run against the last full owner, as in such a case, it continues to run and is not suspended or in any way affected by the mere circumstance that the owner is succeeded by a female entitled to a woman's qualified estate; after the statutory period has run out, all persons claiming through the owner are barred. (See Rustomji's Limitation Act, 2nd Edition p. 449, and the cases which he has cited under note 4). Art. 141 in the Second Schedule of the Indian Limitation Act makes it clear that the reversioner has 12 years after the death of a Hindu or Mahomedan female to establish his right as heir to the last full owner,

The learned District Judge seems to us to have placed the onus on the wrong party. He says "This is an action in ejectment, and the plaintiff suing as the next reversioner to Tamaji, must show, affirmatively, that his predecessor was in possession; within the period of limitation that is to say, in this case, that Tamagi, at the time of his death, was in possession of the land in suit. This he has failed to prove, and the suit is clearly time-barred."

We think the learned Judge has erred in two ways. He has drawn an inference, which he was not entitled to draw, against the plaintiff from the Kabja receipt, and he had thrown the onus on the plaintiff, who was suing on title, to prove that the defendants had not acquired a title by adverse possession. No doubt if the plaintiff alleged that he had been dispossessed, and was suing for possession, then he must show that his cause of action had arisen within 12 years of the suit. But if he is suing on title, then Art. 141 applies, and it lies upon the party in possession to prove that he has got a better title. The defendants could not prove any possession further back than 1880 after the death of Tamaji, the Court ought to have held that Tamaji was in possession up to the date of his death. Therefore time did not begin to run against the reversioner and would not begin to run during the widow's life time, and he is entitled to bring a suit against any body who is found in possession of the property after the widow's death within 12 years. The appeal must, therefore, be allowed, and the decree of the trial Court restored with costs throughout.

Appeal allowed.

1923 BOMBAY 365

MACLEOD C. J. AND CRUMP. J.

Shankar Ramchandra Kulkarni—Appellant.

v.

Ramchandra Annaji Kulkarni—Respondent.

A. O. No. 23 of 1922, D. 15th Feb. 1923, from an order passed by First Class Sub. J. at Dharwar, in Suit, No. 56 of 1919.

Civil P. C. Sch. II Para 20—Submission pending probate proceedings.

There is nothing to prevent the parties going to private arbitration with regard to the division of the estate although probate proceedings are pending in a Civil Court in respect of a Will concerning the same estate, (22 Bom.L. R. 1048 Ref.) The mere fact that it was entered upon before the probate proceedings had come to an end cannot possibly affect the question of its legality.

[P. 366 C. 1,2]

G. N. Thakor with G. P. Mardeshwar—for the Appellant.

H. C. Coyajee with A. G. Desai—for the Respondent.

Judgment :— This is an appeal from the decision of the Subordinate Judge who pronounced judgment in terms of the award, Exhibit 22. One Gurunath Balaji died on the 30th September 1918 leaving a will. Probate proceedings with regard to the will were

pending in the District Court at Dharwar instituted by the 1st defendant, in whose name the will in question had been passed. On the 5th January 1919, the parties concerned with the will executed a submission paper, exhibit 23. What was submitted to the arbitrators was the dispute with regard to the estate of Gurunath Balaji The arbitrators made an award, which is Exhibit 22, in which they recite that in order that the two parties should not ruin themselves unnecessarily by going to litigation in respect of this dispute existing between them with reference to the estate of Gurunath Balaji, the disputes were referred, and various properties were allotted to the disputing parties by the award. Clearly although the submission paper is in a general form, it was never considered that the arbitrators were to decide whether Gurunath had as a matter of fact executed a will. It is apparent on the face of the award that the arbitrators were in no way ousting the jurisdiction of the Court before which probate proceedings were pending. They made no attempt whatever themselves to decide whether or not probate should be granted. Obviously that could not be decided by them.

But it is contended by the appellant that because probate proceedings were pending, therefore the award was illegal. No authority was cited for that proposition. But the appellant relied upon the decision of this Court in *Manilal Motilal* v. *Gokaldas Rowji* (1). That decision could only be applicable if there had been a suit pending between the parties, the issues in which had been referred to arbitration without the intervention of the Court. There was nothing whatever to prevent the parties going to arbitration with regard to the division of the estate, leaving the Court to decide whether or not probate should be granted of the will That was a question entirely outside the functions of the arbitrators, while the actual questions regarding the division of properties in dispute between the parties, would properly be referred to them. The simple test in this case would be to consider what would have happened if the parties had waited until probate had been issued to refer to arbitration the question how the properties of the deceased should be divided. It could not possibly be said then that the submission to arbitration would be illegal. The mere fact that it was entered upon before the probate proceedings had come to an end cannot possibly affect the question of its legality or illegality. The order of the lower Court was right and the appeal must be dismissed with costs.

Appeal dismissed.

(1) (1920) 22 Bom. L.R. 1048 59 I.C. 53.

✱ 1923 BOMBAY 366

MACLEOD C. J., AND CRUMP. J.

(*Sayad*) *Usuf Alli Walad Mujawar Alli Khatib*—Plaintiff—Appellant.

vs.

Sayad Amin and others—Defendants Respondents.

S. A. No. 29 of 1922, D. 9th March 1923, against the decision of Asst. J., at Sholapur in Appeal No. 56 of 1921.

Limitation Act Art 182—Step-in-aid—Application against one party only—Effect against others.

An application for the ascertainment of mesne profits awarded by a decree, prior as well as subsequent to its date, is not a proceeding in the suit but a proceeding in execution and comes within Article 182 and therefore such an application made against the judgment debtor alone, without joining the sureties would not save limitation against the sureties. 23 B. L. R. 263 Foll [P. 367 C. 2]

P. B. Shingne—for the Appellant.

G. S. Mulgaokar—for the Respondent No. 5.

Judgment.—The plaintiff obtained a decree in Suit No. 871 of 1906 in the Court of the First Class Subordinate Judge of Sholapur on the 10th December of 1907 by which he was awarded possession with past and future mesne profits of the property in suit. In March 1908 he filed a Darkhast for executing the decree for recovering possession and the past mesne profits. Meanwhile the defendant preferred an appeal, but the appeal was dismissed. The defendant preferred a second appeal and in the second appeal

further execution of the decree was stayed under the orders of the High Court, after three sureties passed security bonds for the due fulfilment of the decree that might be eventually passed against the defendant. The High Court confirmed the decree of the first Court on the 14th September of 1915, and the execution proceedings that had been stayed were continued. The plaintiff recovered possession and the past mesne profits in July 1916, and the proceedings terminated. Since then the question of future mesne profits had not been agitated.

The decree was passed in 1907 under the Civil Procedure Code of 1882 according to the provisions of which mesne profits would have to be ascertained in execution. The appellate Court might have passed a decree under the Code of 1908 directing an inquiry as to mesne profits under Order 20, rule 12 but it refrained from doing so In April 1918 the plaintiff made an application for determination of the future mesne profits from the date of the decree. This application was treated as an application in the suit and the decree was made final in February 1919 determining the amount of mesne profits from 1906 to 1916. It was wrong to consider that application as an application in the suit and it must be, for the purpose of this appeal, treated as a proceeding in execution. The sureties were not made parties in this proceeding. But when the mesne profits had been ascertained, the present Darkhast was taken out by the plaintiff on the 3rd January of 1920 for recovering the amount of future mesne profits so determined from the judgment-debtor or from the three sureties. Both the lower Courts have held that the Darkhast was time-barred as against the sureties.

It may be that the sureties were not necessary parties in the plaintiff's application for ascertaining the mesne profits ; see *Raj Raghubar Singh* vs. *Thakur Jai Indra Bahadur Singh* (1) But it does not follow that although the sureties were not necessary parties to the application to ascertain the amount of mesne profits, the decree had been kept alive against them by reason of that application. In *Puran Chand* v. *Roy Radha Kishen* (2) it was held that neither Article 178 nor Article 179 of the Indian Limitation Act applied to an application to ascertain the amount of mesne profits awarded by a decree in accordance with the provisions of Section 211 or 212 of the Code of Civil Procedure. The learned Judges there seemed to have thought that although the proceedings for the ascertainment of mesne profits were proceedings in execution, still they were of an interlocutory nature and that there was nothing that could be executed under Section 225 of the Code until the actual amount of mesne profits had been found and determined. All the authorities on that question were referred to by this Court in *Gangadhar* v. *Balkrishna* (3) in which it was held that an application for the ascertainment of mesne profits awarded by a decree, prior as well as subsequent to its date, was not a proceeding in the suit but a proceeding in execution and came within Article 182 of the Indian Limitation Act of 1908. The decision in 37 Madras 186 was followed in preference to the decisions of the High Courts of Calcutta and Allahabad. Then in *Narayan* v. *Timmaya* (4) it was held that the application to execute the decree against the surety was barred by time since the decree could not be treated as passed jointly as against the judgment debtor and the surety, within the meaning of Article 179 explanation 1, paragraph 2 of the Second Schedule to the Limitation Act.

In this case therefore the limitation as against the sureties ran from the date of the High Court order of 14th September of 1915. Though the application to ascertain the amount of mesne profits was made to keep the decree alive against the judgment-

(1) (1920) 42 All. 158-22 O. C. 212-66 L. J. 682-38 M. L. J. 302-18 A. L. J. 263-22 Bom. L. R. 521-55 I. C. 550 (P. C.)

(2) (1892) 19 Cal. 132 (F. B.)

(4) (1921) 45 Bom 819-23 Bom. L. R. 263 61 I. C. 448.

(4) (1907) 31 Bom. 50-8 Bom. L. R. 807.

debtor it would not keep the decree alive as against the sureties as this application was made more than three years after 14th September of 1915. Therefore the application against the sureties was time-barred. If the contention of the appellant is right, it would follow that the decree-holder might keep the decree alive against the sureties by making applications for the ascertainment of mesne profits, which might extend to the full time allowed for the execution of the decree. It seems to us that under the provisions of the Code of 1882 the period for executing the decree would not be extended unless proper steps were taken for ascertaining the mesne profits within the period prescribed for taking steps in execution.

The appeal, therefore, fails and must be dismissed with costs.

Appeal dismissed.

1923 BOMBAY 368

MACLEOD C. J. AND CRUMP J.

Chanbasappa Mallappa Warad—Applicant.

v.

Malkappa Lingappa Surpur—Defendant—Opponent.

Civil Application No. 136 of 1922, D. 9th March 1923, for reversal of the decree passed by First Class Sub. J., of Bijapur in S. C. S. No. 827 of 1921.

Civil P. C. O. 30, R. 1—Title of the suit.

The plaintiff who was a minor was described in the title of the plaint as "owner of the shop C". It was stated in para 4 of the plaint. "As the plaintiff the owner of the shop is a minor, this suit is not barred by limitation" The suit was dismissed by the trial Court holding that the plaintiff was the 'shop' and not the minor, *Held* the dismissal was clearly wrong. [P. 368 C. 2]

N. V. Gokhale—for the Applicant.

S. B. Jathar—for the Opponent.

Judgment.—The plaintiff brought this suit through his guardians appointed by the District Court of Sholapur. He was described in the title of the plaint as "owner of the shop Chanbasappa Basappa Warad." It was stated in para 4 of the plaint, "As the plaintiff, the owner of the shop is a minor, this suit is not barred by limitation." In the written statement the defendant said :- Plaintiff is a minor and trustees have been appointed for him by the District Court of Sholapur. Therefore the Vahiwatdar of plaintiff's shop cannot bring this suit." The defence is unintelligible. The following issues were raised :—(1) Whether the Khata is proved ; and (2) whether the suit is in time. The learned Judge found on the second issue in the negative and said that all the debit items were more than 3 years old at the date of the suit. Then he said that the suit was brought in the name of the plaintiff's shop and not its owner personally and so the suit was dismissed. That order of dismissal is also unintelligible. As the plaintiff is clearly named in the plaint he is entitled to have the suit decided on the merits. Whether there was any defect in the verification of the plaint is another matter on which there was no issue raised and on which we have not got a decision of the learned Judge. The suit was dismissed because the plaintiff was the 'shop' and not the minor. That decision in our opinion is wrong and therefore the suit will be remanded for trial on the merits. Defendant should pay costs of the rule.

Costs in the lower Court to be costs in the cause.

The same order will govern Civil Extraordinary Application No. 139 of 1922.

Appeal allowed, Case remanded.

1923 BOMBAY 369

MACLEOD C, J., AND CRUMP. J.

Devichand Chatraji—Original Plaintiff—Applicant.

v.

Jamashedji Shapurji—Original Defendant—Opponent.

Extraordinary Civil Application No. 281 of 1922, D-19th Jan. 1923, praying for the reversal of the decree passed by First Class Sub. J., at Surat in Small Cause Suit No. 1331 of 1921.

Limitation Act S 20-Joint debtors-Payment by one in presence of the other-Signature of the other affixed.

Where two persons are liable on a debt embodied in a Khata and they make payments towards the satisfaction of the debt, then it should be absurd to suppose that the law required that it would be necessary that both persons should make entries in the creditor's book. Where Defendant No. 1 authorised the 2nd defendant to make payments towards the reduction of the joint debt and signified that authorisation not only by being present when the payment was made but by signing underneath: *Held*: that clearly amounted to an acknowledgment, that the liability was continuing and a new period began against both. [P. 369 C. 1]

M. B. Dave—for the Applicant.

M. K. Metha—for the Opponent.

Macleod, C. J.:—One Sorabji Rustumji and Jamshedji Shapurji signed an entry in the plaintiff's book to the effect that they had borrowed Rs. 599, which they promised to pay. Payments were made on account which appeared in the hand-writing of Sorabji, with the signature of Jameshedji Shapurji added. The plaintiff relied upon these entries as saving limitation under section 20 of the Limitation Act. The learned Judge held that the claim against Jamshedji, the 1st defendant in the suit, was time barred; and that although he was present at the time when the payments were made, still as he had not himself written the fact that he made the payment the payment could be of no use against him as part payment in his own hand. If that view were correct then it would be in my opinion, a very startling interpretation of the law. Where two persons are liable on a debt embodied in a khata, and they make payments towards the satisfaction of the debt, then it would be absurd to suppose that the law required that it would be necessary that both persons should make entries in the creditors' book. Section 20 of the Limitation Act prescribes that when part payment of the prinicipal of a debt is, before the expiration of the prescribed period, paid by the debtor, or by his agent duly authorised on his behalf, a new period of limitation shall be computed from the time when the payment was made; provided that in the case of part payment of the principal of a debt, the fact of the payment appears in the hand-writing of the person making the same.

By Section 21 (2) nothing in Sections 19 &20 renders one of the several joint contractors chargeable by reason only of a written acknowledgment signed or of a payment made by or by, the agent of, any other or others of them. The effect of that is that if one of two joint contractors has done any thing which starts a new period of limitation then that new period of limitation starts only as against him, not as against his joint contractor.

In this case however Jamshedji authorised the 2nd defendant to make payments towards the reduction of the joint debt and signified that by, not only being present when the payment was made but by signing underneath. In my opinion that clearly amounted to an acknowledgment that the liability was continuing.

Section 19 provides for an acknowledgment in writing. Section 20 prescribes other means by which a debt can be kept alive. But these acts which are mentioned therein, which if done by a debtor will start a fresh period of limitation, are acts which in effect constitute an acknowledgment of the liability. I think, therefore, that the rule must be made absolute and there must be a decree against the 1st defendant also with costs throughout.

Crump, J:—I agree, upon the facts of this case, I have no hesitation in holding that when defendant 2 paid the sum of Rs. 10 on Ashad Sud the 6th he made that payment as the agent of defendant 1. That defendant 1 authorised him in that behalf is clear from the circumstances that he

himself was present at the time, and that he affixed his signature below that of Sorabji. If follows, therefore, that as regards defendant there was a payment made by an agent duly authorised by him, and further that the fact of that payment appears in the hand-writing of the person making it, that is to say, the agent of defendant, therefore a fresh period of limitation starts as against defendant as from that date. I find nothing in Section 21, which has been invoked in argument to militate against that view. I agree, therefore, with the order proposed.

Rule made absolute.

1923 BOMBAY 370

MACLEOD C. J., AND CRUMP, J.

Daudkhan Musekhan. — Original Plaintiff.—Appellant.

v.

Chandulal Kanhayalal Bhujan. — Original Defendant.—Respondent.

S. A. No. 359 of 1922, D. 24th Jan. 1923, against the decision of Dt. J., of Ahmadnagar in Appeal No. 201 of 1920.

(a) *Spc. Rel. Act S. 56–Injunction–Refusal.*

Where the encroachment was small the Court did not order the defendant to pull down his wall on account of an encroachment of a few inches. But it declared that that portion of the defendants' brick building which went beyond the middle line of the wall belonged to plaintiff. [P. 370 C. 2

(b) *Co-sharers–Partition wall held jointly.*

The conditions attaching to a party wall are not very easy to define. But if the wall is joint, then each party is entitled to act as owner of his own half, and he cannot compel the owner of the other half, to bear any greater burden that he chooses to place upon it, so that one joint owner cannot encroach on the other half of the wall in defiance of the other owner's rights. [P. 370 C. 2.]

J. G. Kele.—for the Appellant.

Y. N. Bhandarker.—for the Respondent.

Judgment.-The defendant admitted the wall was joint, but in rebuilding his own house he built beyond the middle line of the wall. The plaintiff wished for a mandatory injunction that defendant should remove the encroachment, which after all is not a serious one. As a matter of fact the part of the wall on the plaintiff's side, would be improved by getting greater support from the defendants brick—building. At the same time defendant cannot be allowed to consider the encroachment as his own, on payment of compensation which was directed by the District Judge, unless the plaintiff is willing to accept compensation. Considering that the defendant was in the wrong, we do not think that the plaintiff could be forced in effect to sell his land. We do not order the defendant to pull down his wall on account of an encroachment of a few inches. But we declare, that that portion of the defendant's brick building which goes beyond the middle line is on the plaintiffs side of the party wall. The conditions attaching to a party wall are not very easy to define. But if the wall is joint, then each party is entitled to act as owner of his own half and he cannot compel the owner of the other half, to bear any greater burden that he chooses to place upon it, so that one joint owner cannot encroach on the other half of the wall in defiance of the other owner's rights. There has been no partition of this wall by metes and bounds. It still remains a party wall between the two houses, though it is brick on the defendant's side and mud on the plaintiff's side, and that condition cannot be altered until definite steps are taken to divide the wall. We therefore, set aside the decree of the District Judge, and declare that that portion of the wall encroached upon by the defendant belongs to the plaintiff's half of the party wall, and therefore, if at any time, hereafter the wall should be divided, that portion of the wall now encroached upon will belong to the plaintiff. The plaintiff will be entitled to his costs of his appeal.

Decree set aside.

✱ 1923 BOMBAY 371

MACLEOD C. J. AND CRUMP. J.

Maniram Peerchand Marwadi and another—Plaintiffs—Appellants.

v.

Vithu Kamji Patil Pande — Defendant Respondent.

S. A. No. 398 of 1922, D. 19th Jan. 1923, against the decision of First Class Sub. J. at Nasik in Appeal No. 70 of 1921.

Civil P. Code S. 41–Construction—Method of information.

Mecleod C. J. No particular method is prescribed for certifying the fact of execution and all that the section means is that the Court to which the decree is sent for execution should inform the Court which passed the decree what has happened in execution. [P 323 C 2]

Crump. J. When the Subordinate Judge is invested with Small Cause Court powers, and where in the exercise of the latter jurisdiction he makes a decree and the decree comes before him for execution in the exercise of his ordinary jurisdiction then, in such a case it is impossible to apply section 41 strictly, because that section clearly has in contemplation different Courts and not different branches of one Court presided over by the same individual. All that is necessary is that there should be sufficient compliance with the section such as an entry as to the result of the execution proceedings made in the Small Cause Suit Register. [P 324 C 1]

D. R. Patwardhan—for the Appellant.

Macleod, C J.–The decree in this case is a small cause decree and is ordinarily executable by that Court. In 1917 it was sought to be executed against the immoveable property of the defendants, and so the Darkhast was entered as a regular Darkhast on the ordinary side of the Court. There might be a certain amount of Confusion as the same Subordinate Judge was invested with Small Cause Court powers. But it was only as a Subordinate Judge and not as a Small Cause Court Judge that he could execute the decree against immoveable property. The decree was transferred from one Court to the other. After the sale was held by the Collector and the amount realised was paid to the decree-holders the Darkhast was struck off, copy of the decree was taken back by the decree holders and the result of the execution proceedings was entered in the Small Cause Suit Register. When the plaintiff sought again to execute the decree by the Darkhast now before us, the Subordinate Judge held that the decree had been adjusted. The plaintiff was absent, and had chosen to remain absent even although time had been allowed to him. I should have thought that was only necessary then to dismiss the Darkhast. But it was also held that the decretal debt had been satisfied by adjustment.

In appeal the first question was whether the appeal was competent, as there was no appeal against the order of the Small Cause Court Judge. It was argued that the decree was still with Subordinate Judge, because the Subordinate Judge had not certified to the Small Cause Court Judge. the fact of the previous execution. Section 41 of the Civil Procedure Code merely directs that the Court to which a decree is sent for execution shall certify to the Court which passed it the fact if such execution, or where the former Court fails to execute the same, the circumstances attending the failure. No particular method is prescribed for certifying the fact of execution, and all that that section means is that the Court to which the decree is sent for execution should inform the Court which passed the decree what has happened in execution and as we find that the result of the execution proceedings was entered in the Small Cause Suits Register, I think the requirements of section 41 have clearly been satisfied and the decree must be taken to have been returned to the small Cause Court Judge. There is no appeal, therefore, against this decision dismissing the Darkhast. This appeal will, therefore, be dismissed.

Crump, J.—As I understand this matter, we are asked to hold that where the Sub-ordinate Judge is invested with Small Cause Court powers, and where in the exercise of the latter jurisdiction he makes a decree and that decree comes before him for execution in the exercise of his ordinary jurisdiction, then section 41 of the Code of Civil Procedure comes into play, and he is bound to certify as Subordinate Judge to himself as a Small Cause Court Judge the fact of such execution, or where there is a failure to execute the decree

the circumtances attending such failure. It is quite clear that in such a case it is impossible to apply section 41 strictly, because that section clearly had in contemplation different Courts, and not different branches of one Court presided over by the same individual. All that is necessary is that there should be sufficient compliance with what the section really requires and that is that one side of the Court should be made aware of that which has been done upon the other, and it is perfectly clear in the present case that that was done by the entry which was made in the Small Cause Suit Register. It seems to me, therefore, that the point, which has been made before us possesses no substance, and that the decisions which have been cited are not really applicable to the peculiar facts of this case. I agree therefore that the appeal should be dismissed.

Appeal dismissed.

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MACLEOD C. J, AND CRUMP. J.

Vadilal Sarabhai — Defendant.—Appellant.

v.

Manekji Pestonji Bharucha Plaintiff.-Respondent.

O. C. J. Appeals Nos. 77 and 90 of 1922: O. C. J. Suit No. 1003 of 1920, D. 15th March 1923.

(a) *Contract Act S. 121—Delivery by vendor-Purchase money not received-Effect.*

Plaintiffs sold 129 shares to defendant 1. The documents were handed over to defendant No. 1 but were not transferred in his name. Plaintiffs were given a cheque for the price but it was dishonoured. Defendant No. 1 sold 25 of these to a third party and pledged 104 along with 201 similar shares to defendant No. 2. Defendant 2 put forward defendant 3 as party who was willing to advance money. In fact defendant 3 was a mere nominee of defendant No. 2. Defendant 2 got possession of these 105 shares fraudulently. The fraud was that he deceived defendant 1 by false pretences that he would use these shares for the purpose of raising a loan for the benefit of defendant 1 which he did not do and which he did not intend to do, his real object being to secure himself from loss as regards the money due to him by defendant No. 1. In a suit by plaintiffs to recover the shares or in the alternative the price, from defendants 1, 2 and 3, *held* that plaintiffs were entitled to a decree as against defendant 1 for their unpaid purchase money, but they could not recover the documents nor damages as against defendants 2 and 3. [P. 378 C. 2]

(b) *Contract Act S. 75-Goods-Shares in a Company-General Clauses Act Ss. 5, & 6.*

Shares in a company are goods within S. 76. [P 378 C 2]

Strangman, B. J. Desai and K. M. Munshi, — for the Appellant.

Jinnah with Setalvad—for Appellant (Defendant No. 3) in Appeal No. 90 of 1922

Kanga (Advocate General) and *Taraporevala* — for the Respondent.

Macleod C. J:—This is an appeal from the decision of Kajiji J. who passed a decree in favour of the plaintiffs against all the three defendants. The principal facts are not in dispute. Plaintiff 1 is a certified broker. Plaintiff 2 is said to be a sub-broker working under him. It is not clear what the term 'sub-broker' implies.There appears to have been some sort of arrangement between plaintiff 1 and plaintiff 2 that plaintiff 2 should induce business on behalf of plaintiff 1 and should obtain remuneration in the shape of a share in the brokerage for such business, but it is not disputed that in this case plaintiff No. 2 conducted the business in his own name. In my opinion the term 'sub-broker should not be used as it has no legal significance and may only lead to confusion of ideas. The learned Judge says that it is a fact of which even judicial notice can be taken that where a sub-broker issues contracts in his own name and the head broker allows him to do so, the party dealing with the sub-broker always looks to the head-broker for the performance of the contract With due respect I cannot agree. The terms 'head-broker' and 'sub-broker' may or may not be a convenient method of expressing the relationship between plaintiff 1 and plaintiff 2, but it is inadvisable to introduce into legal language terms which require explanation when the ordinary terms will suffice. Plaintiff 2 may have been the agent of plaintiff 1 to enter into contract in his behalf, or he may have been an employee of plaintiff 1 so that the law of principal and agent, or master and servant, respectively,

would be applicable. As the plaintiff 2 entered into contracts in his own name, it would depend upon evidence whether he was acting on his own behalf or on behalf of an undisclosed principal, or on behalf of a principal whose name was given to the other contracting party, and consequently on the facts proved the rights and liabilities of the various parties would have to be decided. I cannot see myself what interest plaintiff 1 had in this suit except to sue on Gora's cheque, unless it can be said that plaintiff 2 was acting as the agent of plaintiff 1. It was plaintiff 2 who contracted in March 1920 to sell 150 shares in Alcock, Ashdown & Co., Ltd., to the first defendant, Esmail Gora, a certified broker. Plaintiff 2 was not a certified broker and so we are not concerned with any terms which may be implied in a contract between certified brokers. In all the transactions in suit the parties acted as principals and not on behalf of clients. In pursuance of his contract plaintiff 2 handed over to Gora, on April 14, being payment day, certificates for 129 shares with their respective transfer forms signed in blank by the registered share-holders. The amount to be paid according to the rules, on that day, was Rs. 1,54,800, and about 8 P. M. Gora handed to plaintiff 2 a cheque for that amount drawn in favour of plaintiff 1. The cheque was dishonoured on presentation the next day.

It will be necessary to consider what were the dealings of Gora in shares in Alcock Ashdown and Co. for the April Settlement. He had been bulling the market, buying largely from defendants 2 and others. Exhibit 5 at page 2, Part III. is his account with defendant 2. Between February 13 and March 9, he had bought 460 shares: though Manilal said he had bought 463, at prices ranging from Rs. 1305 to 1505 of which thirty-one were sold before April 14. He took delivery on the 14th of 368 shares, and gave a cheque for Rs. 4,41,600 at Rs 1200 per share the rate fixed by the Association on payment day. The final adjustment was to take place on April 17 when a very considerable amount more would have to be paid to defendant 2 on the 368 shares, apart from what was due for differences on the shares of which delivery was not taken and on other accounts. In addition to the 368 shares, Gora had obtained 129 from the plaintiff 2, 56 from one Dave to whom he had given a cheque for Rs. 67,200 and 16 from other sources making a total of 569 shares. He delivered 264 to one Nemchand, receiving a cheque from him for Rs. 3,16,800 at Rs. 1200 per share. Out of the 264 shares 25 shares were part of the 129 he had received from plaintiff 2, Gora. Gora thus had 305 shares left with him of which 104 had come from plaintiff 2. His position was then desperate. Apart from other liabilities he had issued cheques on the 14th for Rs, 4, 41600 Rs. 154800 and Rs.67,200 a total of Rs. 6,63,60 which he could not hope to meet unless he realised the full value on the 305 shares. His own story is as follows. On April 15, he went with Nemchand's cheque for Rs. 3,16,800 and the 305 shares to the Bank of India. Whilst waiting to receive payment for the cheque he saw Manilal, a partner in defendant 2's firm. He explained his difficulties to Manilal, who said he had a friend who would advance money on the 305 shares at Rs. 1200. Gora gave Manilal the 3,16,800 rupees which he got for the cheque of Nemchand, and the 305 shares, in order that he might arrange the loan. Manilal knew the amounts of the cheques given to plaintiff 2 and Dave which had to be met. Gora met Manilal again in the evening at Manilal's residence when according to him he was asked to sign two documents which he did without reading them. One was a document of pledge, the other a promissory note for Rs. 3,50,000 Exs. M. and N. Both were made out in the name of Maganlal C. Ghia whom up to that time Gora had neither seen nor heard of. The pledge document referred to three cheques for Rs. 1,24,800, Rs. 75,200 and Rs. 1,50,000 as having been received by Gora but as a matter of fact no cheques were given to him. It certainly seems extraordinary that Gora should have left

without receiving any of the money, of which he was so urgently in need, in exchange for the 305 sharee. On the 17th he received a letter dated the 16th, Ex. V, from Mr. Kanuga, a pleader practising at the Police Courts purporting to act on behalf of Ghia. It alleged that Gora had already received two cheques from Ghia aggregating Rs. 2,00,000 but as his client had then received information which made him apprehensive that there would be a difficulty in getting the pledged shares transferred to his name, he had told Gora he would not pay the balance of Rs. 1,50,000 until the shares were transferred to his name. Gora was, therefore, to co-operate in getting the shares transferred. On the 19th Messrs. Soonderdas & Co. wrote a reply on behalf of Gora, Ex. 5, stating that the transaction referred to had not been correctly represented and asked for inspection of the writing and the two cheques. On the 16th Gora had written two letters for plaintiff 2 and Dave to deliver to Manilal, asking him to give cheques to plaintiff 2 and Dave for sums of Rs. 1,54,800 and Rs. 67,200 respectively. Exhibit D is the letter in respect of the cheque to be given to plaintiff 2. Manilal admitted he had received these letters asking for cheques : see page 94. Plaintiff 2 and Dave told Gora that Manilal had promised to pay them when the Bazar closed, but eventually when he heard the cheques had not been given he went to the office of defendant 2 where there was a meeting, at which Mr. Devidas, a partner in the firm of Motichand and Devidas, who had acted generally as Gora's solicitors, was present. After a long discussion no arrangement was arrived at. The following is the note in Mr. Devidas's diary :

"16th April. Attending with Esmail Gora at the residence of Mr. Mohanlal, having a long interview. Matter could not be amicably settled. Engaged three hours at night."

It is not necessary to detail further what happened thereafter. The 305 shares remained with defendants 2, and Gora received nothing for the document of pledge which he had signed. He was declared a defaulter on April 19. Sometime after August he left India from Porebunder for South Africa where his evidence was taken on commission. With regard to defendants 2 his main complaint is that Manilal promised to give him cheques for Rs. 1,54,800, and Rs. 67,200 to pay plaintiff 2 and Dave on pledge of the 305 shares and he did not do so. Before dealing with Manilal's evidence as to what happened between him and Gora with regard to the pledge of tho 305 shares, it is necessary to dispose of the third defendant who Manilal had finally to admit was his nominee. The case as first presented was that Ghia was the friend whom Manilal had induced to advance three and a half lacs on pledge of the 305 shares, out of which Rs. 2,00,000 were paid by Gora to defendant 2 towards the amount due to him. Ghia had an account with the Bank of Morvi into which Manilal paid Rs. 2,00,000 on April 16 against which Ghia drew two cheques for Rs. 1,24,000 and Rs 7 ,200 in favour of Esmail Gora dated April 15. He also drew a third cheque for Rs. 1,50,000 which was never used. We have here the old story of the money lender who has no money to advance himself but has a friend who will oblige the borrower,

Manilal in his evidence endeavoured to maintain the defence set up in the written statement, but the whole of his evidence may be discarded as an elaborate tissue of falsehoods. It is certain that he knew what Gora's position was on April 14 and 15. Whether or not he actually promised to enable Gora to pay the plaintiff 2 and Dave, he was solely concerned to secure himself and obtain possession of the 305 shares without paying Gora anything. Ghia had in fact no concern with any of the transactions and his name was only used by Manilal to cloak his own dealings. Reference may here be made to Ex. V, which was a letter written by Motichand and Devidas on behalf of defendant 2 to the agents of Alcock, Ashdown & Co., asking them not to transfer any of the 368 shares which they had sold to Gora, on the ground that the cheque for Rs. 4,41,600 had been dishonoured. The learned Judge came to the conclusion that instruc-

tions were given for that letter on the 15th though it is not quite clear why they could not have been given on the 16th. However that may be, defendant 2 had already received Rs. 3,16.800 on account of those shares on the 15th together with the certificates for the 305 shares on which a loan was to be obtained, so that the object in writing that letter could only have been a dishonest one. On the facts, therefore, I am entirely in accord with the conclusion of the learned Judge.

I now come to the actual terms of the decree passed by him.

1. The plaintiffs were held entitled to the 129 shares the numbers of which were annexed in Schedule A to the decree.

2 Gora was ordered to deliver to the plaintiffs 129 shares or to pay Rs. 1,54,000 and costs.

3. 104 shares out of the 129 were declared to be in the possession of defendants 2 and 3, defendant 3 being a nominee of the defendant 2.

4. Defendants 2 and 3 were ordered to deliver to the plaintiff the 104 shares.

5. Defendants 2 and 3 were ordered to pay to the plaintiffs by way of damages Rs. 71,500 being the difference between the rate of Rs. 1200 and the rate of Rs. 512-8-0, their value at the date of the decree.

6. Defendants 2 and 3 were to account for all dividends recovered by them on the 104 shares after April 20, 1920.

The grounds in law for this decree are to be found in the following passage in the judgment :

"Gora was only an ostensible owner and the plaintiffs who were the unpaid vendors had the equity in them and they could have stopped Gora from getting these shares transferred in his name in the books of the Company but if Gora had passed on these shares either by way of sale or by way of pledge to any third person who acted *bona fide* and without notice then I certainly think that such a person would have had a better title to these shares than the plaintiffs. But in this case it is abundantly clear that Gora himself felt that he was not the owner...Manilal had notice that these shares were not paid for and Ghia, being a mere nominee of Manilal, was in no better position than Manilal himself. They took these shares with this infirmity from Gora and therefore they cannot claim these shares in priority to the plaintiff."

Sir Thomas Strangman for the appellant, defendant 2, began his argument by contending that as shares were goods, S. 121 of the Indian Contract Act applied so that if the vendor of the shares sold them on credit his only remedy, if the purchaser defaulted, was to sue for the price, and he could not follow the goods into the hands of third parties. Admitting that shares are goods, the first question is how are they delivered in pursuance of a contract for sale ? Shares are a peculiar kind of moveable property which cannot pass from hand to hand like bales of cotton. The property in these shares belonged to the registered share-holder and could not be transferred to another except according to the articles of the company. Article 42 is as follows :

"The instrument of transfer of any share in the company shall be executed by the transferor and transferee, and the transferor shall be deemed to remain the holder of the said share until the name of the transferee is entered in the register of members in respect thereof."

Lord Waston said (p. 277) in *Colonial Bank* v. *Cady and Williams* (1) :—

"The appellants' witnesses say that delivery of the certificate, with the transfer executed in blank, 'passes the property' of the shares; but that statement must be accepted subject to the explanations by which it is qualified. The right of the holder appears from these explanations to be in the nature of a *jus ad rem* and not of a *jus in re*. Delivery does not invest him with the ownership of the shares in the sense that no further act is required in order to perfect his right. Notwithstanding his having parted with the certificate and transfer, the original transferor, who is entered as owner in the certificate and register, continues to be the only shareholder recognised by the Company as entitled to vote and draw dividends in respect of the shares, until, the transferee or holder for the time being obtains registration in his own name. It would, therefore, be more accurate to say that such dilivery passes, not the property of the shares, but a title, legal and equitable, which will enable the holder to vest himself with the shares without risk of his right being defeated by any other person deriving title from the registered owner."

As that case has been relied on for other purposes it is necessary to consider the facts in order to realise what it actually decided. The registered owner of shares in a New York Company died. His executors obtained probate and in order that the shares might be registered in their

(1) (1890) 15 A. C. 267.

own names signed as executors the transfers on the back of the certificates and without filling in the blank handed them to their brokers, who fraudulently deposited them with a Bank which took them *bona fide* and without notice as security for advances. The Bank took no steps to get themselves registered in the books of the Company. It was held that the conduct of the executors in delivering the transfers was consistent either with an intention to sell or pledge the shares or to have themselves registered as the owners and therefore did not estop them from setting up their title as against the Bank.

As Lord Watson said, the only question in the case was whether the respondents were estopped from saying that Blakeway (the broker) had not then authority to dispose of the certificates in question. That his Lordship answered in the negative because the documents were not 'in order', or in other words were not accepted in commercial circles as sufficient vouchers of title, unless they were accompanied by an extract of the probate and an attestation of the genuineness of the executors' signature by the United States Consul or other competent officer. When, therefore, plaintiff 2 parted with the certificates and blank transfers he was not the registered holder, nor had he any title left in him to enable him to vest himself with the shares. Having no title to anything it is thus difficult to see what cause of action he had against defendants 2 and 3. He had done all he could to deliver the shares, and if the blank for the transferee's name was filled in that person alone would have the right to apply to the Company to recognise him as the registered holder. As the blanks in the transfers for the said shares were never filled in it is not necessary to consider what the legal rights of the transferee would be against the registered holder if the company refused to recognise the transfer. Now the legal position as between the plaintiff 2 and Gora was entirely different from the legal position as between plaintiff 2 and defendants 2 and 3, and the failure to recognise that vitiates the whole of the Advocate General's argument before us. The plaintiff 2 could have filed a suit against Gora for the price, and by way of attachment before judgment would probably have been able to prevent him from dealing with the shares if he still held the certificates and transfers. The Advocate General argued that there were contesting equities between plaintiffs, Gora, and defendants 2 and 3, but the plaintiff 2 had no equity against the others, he had only a remedy against Gora on the contract for failure to pay the price. If he had asked the Company not to recognise a transferee who asked to be placed on the Company's register as a share-holder, he would have been told that the only person the Company recognised was the registered holder, and they had no concern with the various persons through whose hands the blank transfers passed before they were filled in.

The case of *France* v. *Clark* (2) was relied upon by the Advocate General. There the registered holder of shares in a Company deposited the certificate with C as security for £150, and gave him a blank transfer signed by F. C deposited the certificate and the blank transfer with Q as security for £250. C.died insolvent after which Q filled in his own name as transferee and sent in the transfer for registration. F. gave notice to the Company but whether before or after the transfer was registered was doubtful on the evidence. It was held that Q.had no title against F. except to the extent of what was due from F. to C. Lord Selborne said (p. 262):—

" The defence of purchaser for valuable consideration without notice, by any one who takes from another without inquiry an instrument signed in blank by a third party, and then himself fills up the blanks, appears to us to be altogether untenable. The person who has signed a negotiable instrument in blank, or with blank spaces, is (on account of the negotiable character of that instrument) estopped by the law merchant from disputing any alteration made in the document, after it has left his hands, by filling

(2) (1884) 26 Ch. D. 257.

up blanks (or othewise in a way not *ex facie* fraudulent) as against the *bona fide* holder for value without notice; but it has been repeatedly explained that this estoppel is in favour only of such a *bona fide* holder; and a man who, after taking it in blank, has himself filled up the blanks in his own favour without the consent or knowledge of the person to be bound, has never been treated in English Courts as entitled to that doctrine."

And at page 263.

"It was said that when a man, in a transaction for value, does what this plaintiff did, and delivers a blank form of transfer to a creditor by way of security, together with the certificate of shares, his meaning must necessarily be that the creditor may complete his security by obtaining registration of the shares, either in his own or, possibly, in some other's name and that he, therefore, entrusts him with the requisite authority for that purpose. Granting this, what follows? Only that the creditor to whom such an authority is given may execute it or not, for the purpose of giving effect to the contract in his own favour, as he pleases; but not that, if he does not execute it, he can delegate the like authority to a stranger for purposes foreign to and possibly (as in this case) in fraud of that contract..."

"But it was pressed on us that the plaintiff had, by the blank transfer and certificate, enabled *Clark* to represent himself as the true owner of the shares, or as having power to deal with the shares as owner. The documents themselves showed that *Clark* was not the owner. Nor was there any evidence of any mercantile usage to the effect that the holders of such documents as *Clark* handed over to *Quihampton* are treated as having the right to transfer shares referred to in the documents, as if such holders were the owners of such shares. In other words, there is no evidence that, as a matter of fact, blank transfers, accompanied by certificate of shares registered in the names of transferors pass from hand to hand like negotiable instruments."

It appears to have been suggested in *Fox* v. *Martin* (3) that *France* v. *Clark* (2) had been overruled by *Colonial Bank* v. *Cady and Williams.* (1) but Kekewich J was of opinion that was not the case, and although there may be one or two passages in the judgments of Lord Watson and Lord Herschell which may be said to countenance such a suggestion, I cannot see any inconsistency in the law as laid down in the two cases as appropriate to their respective facts. In both cases the holders of the documents were held to have been put on inquiry and therefore there was no estoppel against the true owner. The important point to notice is that the only representation which is made and can be made on the facts of the documents in such cases is by the true owner who signs the transfer as transferor. The various parties through whose hands the documents may pass before they come to the last holder, have made no representations. Sir Thomas was right in saying that the only inquiry that a holder can be put to, by reason of the nature or character of the documents which come into his possession, is with regard to the action of the registered holder. Did he intend to transfer, and had he authority to transfer ? He could not possibly be put to inquiry with regard to the rights and liabilities of intermediate holders.

But it has been contended by the respondents that Manilal knew that Gora had not paid plaintiff 2 for the shares, and therefore took the documents with notice of plaintiff 2's rights That is correct, but all that the plaintiff 2 was entitled to as against Gora was to receive the price. He had no title either in law or in equity to the shares, which was the proposition with which I started. The learned Judge thought that the plaintiffs as unpaid vendors had the equity in them, but as between the plaintiffs and Gora it was a matter of contract which could only be regulated by the provisions of the Contract Act. Assuming for the purposes of argument that delivery of the documents cons-

(3) (1895) 64 L. J, Ch. 473.

tituted the delivery of the goods, once they parted with the documents, they had no right to have them returned. If Gora had stolen the documents the case would be entirely different. But Gora's statement in his evidence, that he did not think he was the owner because he had not paid for the shares, cannot alter the legal position.

The defendants 2 and 3 rightly admit that they are not entitled to hold the shares except for what may be found due to them by Gora on a proper account being taken. As Gora has absconded and has made no attempt to have that account taken nothing can be done unless Gora is adjudicated insolvant.

On the question of costs defendants 2 and 3 have both filed false written statements. Defendant 2 persisted in maintaining what he had said in his written statement until he was forced to admit that Ghia was his nominee.

Ghia did not appear at the hearing, although he instructed counsel to argue the appeal. The appeal must be allowed and the suit dismissed as against defendants 2 and 3, but having regard to their conduct I think they should pay their own costs throughout.

Crump, J.—I have had the benefit of reading the judgment of the learned Cheif Justice in this case. I agree entirely with his cunclusion, but as we are reversing the judgment of the learned trial Judge I desire to state my reasons briefly.

It is unnecessary for me to recapitulate the facts. The position may be summed up shortly as follows:—Plaintiffs sold 129 shares to defendant 1. Defendant sold 25 of these to a third party and pledged 104 along with 201 similar shares to defendant 2. Defendant 2 put forward dafendant 3 as a party who was willing to advance money. In fact defendant 3 was a mere nominee of defendant 2. Defendant 2 got possession of these 105 shares fraudulently. The fraud was that he deceived defendant 1 by false pretences that he would use these shares for the purpose of raising a loan for the benefit of defendant 1 which he did not do and which he did not intend to do, his real object being to secure himself from loss as regards the moneys due to him by defendant 1.

On these facts it is not disputed that plaintiffs are entitled to a decree as against defendant 1 for their unpaid purchase money. They seek, however, to recover the documents and also damages as against defendants 2 and 3. The question is whether they can do this.

As regards the position of plaintiffs *inter se* I agree with what is stated in the judgment of my Lord the Chief Justice. It appears that plaintiff 2 and defendant 1 dealt as principals. Plaintiff 2 was not the registered holder of these shares.

It is not perhaps strictly accurate to speak of these transactions as sales of shares. Plaintiff 2 as vendor agreed to sell and deliver transfers and certificates with the interests and rights which they convey [*London Founders' Association* v. *Clarke* (4).] Such delivery passes not the property in the shares but a title legal and equitable which will enable the holder to vest himself with the shares (Per Lord Wetson in *Colonial Bank* v. *Cady and Williams* (1). On delivery of the documents there was no interest left in plaintiff 2 on which any equity can be founded. As between him and defendant 1 there was no fraud or misrepresentation which can vitiate the transaction. Plaintiff 2 had thus no lien for his unpaid purchase money and without such lien he cannot seek to follow the documents. He could not do so were they still in possession of defendant 1 and therefore the further history of these documents is not material. The same result follows from the statute law of this country. Whatever be the exact nature of the property sold it must be "moveable property" for the purpose of Chapter VII of the Indian Contract Act. The definition in the General Clauses Act (Act 1 of 1868) is applicable. The property is not "immoveable" property within that definition, therefore it is "moveable" property. It follows from S. 76 of the Indian Contract, Act that this property is "goods." The case therefore falls within S. 121 of the same Act.

(4) [1888] 20 Q. B. D. 576.

Plaintiff 2 delivered all that he had. He cannot, therefore, rescind the contract on the buyer's failing to pay the price unless it was stipulated by the contract that he should be so entitled. I agree that no special condition to this effect is proved. The statement of defendant No. 1 that he did not regard himself as owner until he had paid the purchase money cannot alter the legal relations of the parties.

Appeal allowed.

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MACLEOD C. J. AND CRUMP, J.,

Shriniwas Sarjerao Sholapurkar—Defendant-Appellant.

v.

Narayanrao Navlojirao Nimbalkar and another—Plaintiff and Deft—Respondents.

L. P. A. No. 48 of 1920, D-20th November 1922 against the decision of the High Court No. 250 of 1920 preferred against the decision of First Class Sub. J., with A. P. at Belgaum in Appeal No. 143 of 1918.

Decree—Setting aside—Fraud—Suppressing evidence.

Suppressing evidence by plaintiff as to the fact that a certain adoption which if proved would have defeated his claim, does not amount to such a fraud as would entitle his adversary to file a suit to have the decree obtained by plaintiff set aside especially when the onus of proving that adoption was on the adversary.

[P. 380 C. 1,2 P. 381 C. 1]

Bahadurji with Nilkant Atmaram—for the Appellant.

R. A. Jahagirdar—for the Respondent No. 1.

Judgment:—The plaintiff filed this suit asking for a declaration that the decree passed by the trial Court in Suit No. 270 of 1908, and confirmed by the District Court in appeal No. 179 of 1910, was null and void as it had been obtained as a result of fraud. The trial Court dismissed the suit. The lower appellate Court allowed the appeal and passed a decree for the plaintiff. The appeal in this Court was summarily dismissed, but was admitted under the Letters Patent, and we have now heard the arguments. The facts would appear at first sight somewhat complicated, but for the purposes of our judgment they can be set out very shortly. One Balvantrao died many years ago leaving a widow Gopikabai. She alienated various portions of her husband's property. Then she adopted or purported to adopt one Venkatesh. Gopikabai and Venkatesh both died in 1901. Venkatesh died leaving a son called Balvant. Thereafter Shriniwas, the reversionary heir of the husband of Gopikabai brought a number of suits against her alienees alleging that the adoption of Venkatesh was invalid, and therefore he was entitled to succeed as reversioner. Shriniwas succeeded in a number of suits, but in one suit, which went to the High Court, it was held that the adoption was valid. At that time suit No. 270 of 1908, which had been filed by Shriniwas, in which the present plaintiff was the 2nd defendant, had been allowed in both the lower Courts, and an appeal had been filed to the High Court. When the decision of the High Court in the other suit, that the adoption was good, became known to the present plaintiff he withdrew his appeal in the High Court and applied to the District Court for review. That failed. Then he filed this suit to set aside the decree on the ground of fraud. We find it extremely difficult to extract from the plaint what was the fraud alleged, but at page 17 of the paper book, it is very well summed up by the learned Judge at line 51: "Shortly put, the fraud consists of the facts that defendant 1 won over, by promises or bribes, Balaji Ramchandra, the guardian of Balvant and made him suppress the evidence as to the factum and validity of the adoption of Balvant's father, the evidence being in his possession, and it being his duty to produce it before the Court, and also made him depose that the adopted son was an orphan at the date of the adoption and thus got a fraudulent decree first in Belgaum, Suit No. 213 of 1906, declaring his right to succeed to the property of Balvant as a reversioner as against the son of the adopted son, and that on the strength of that decree he established his right as a re-

versioner in the suit No. 270 of 1908 also." After giving full cónsideration to the question of fraud the learned Judge came to the conclusion that even if plaintiff proved all he set out to prove, it did not amount to fraud which would entitle the Court to set aside the decree which was passed in suit No. 270 of 1908.

In appeal the learned Judge said "If we restrict ourselves to the case alone from beginning to end, it is not possible to infer fraud or ascribe fraud, because the Court has to decide a case on its own merits. The Court has to preserve *stare decisis*. The aggrieved party must set right matters according to law. If it does not, then what a Court decides (since Court has to decide rightly or wrongly) stands good for ever. All these facts are visible in the case. Therefore it is not easy to interfere." So far the learned Judge was perfectly correct. Then he went on to consider the question whether there had been collusion between Shriniwas and Balwant. He inferred from the results of the arbitration which took place between Shriniwas and Balwant after the High Court decision that there was a conspiracy in fact between Shriniwas and Balwant to defeat the rights of the alienees by suppressing the evidence which would prove the adoption of Venkatesh, with the intention, after the adoption had been declared invalid, to divide the properties recovered from the alienees. All that may very well have been the case. But it is quite possible on the other hand that as a result of the High Court decision, which went against the decision of the lower Courts, both in that case and in the other suits, Shriniwas and Balwant thought it better to settle the matter by dividing the properties between them without going to a higher Court. It seems to us difficult for the Court to necessarily infer from that arbitration that as a matter of fact there was collusion between Shriniwas and Balwant in the previous suits. But even supposing that Shriniwas had induced Balwant to suppress evidence regarding the adoption. or to give evidence in his favour on the question whether Venkatesh was an orphan or not when he was adopted, that would not amount to fraud which would justify the Court in setting aside the decree in Suit No. 270 of 1908. The plaintiff's remedy was, if he was dissatisfied with the decree in the Court below to appeal to the High Court, and it was certainly unfortunate that instead of prosecuting his appeal he endeavoured to get the lower appellate Court to review its previous decision. But it is quite possible that the decision of the High Court, if the question of adoption had been considered in another suit by other Judges, might not have been followed, and it is still impossible for us to say whether as a matter of fact the adoption of Venkatesh is valid. Therefore though we would be bound by the decision of the High Court that in that particular case the adoption was proved, still it would be open to other parties in any other case to prove on the evidence led in that case that the adoption was not valid, as the matter would not be *res judicata*. However at the most all that the present plaintiff can suggest is that Balwant was induced by Shriniwas to be extremely negligent in supporting the defence that the alienations were good against the plaintiff. The alienees on the other hand had taken a title from a widow, and it was for them to support their title by showing that the alienation by the widow would last beyond her lifetime, or in the alternative could not be defeated bythe reversioners whose claim as such could not arise owing to Balwant's adoption, and it would be going against established principles to accede to the respondents' argument that the Court would be justified in reopening the proceedings on the suggestions which have been made in this case that there was collusion between Shriniwas and Balwant. We doubt whether we are justified in holding that there was such collusion. The trial Court was not satisfied and it seems to us that the appellate Judge placed far too much reliance on the arbitration proceedings as leading to an irresistible inference that they were the last stage of the fraud which had been carried on for some years between Shriniwas and Balwant. Even putting the plaintiff's case at its very

highest he may have shown that the wrong evidence was given in that suit and that if the right evidence had been given, he would have succeeded. But no case has been cited to us where it has been held that it could be a sufficient ground for setting aside the decision of a Court on the ground of fraud.

We think, therefore, that the appeal must be allowed and the decision of the trial Court restored with costs throughout.

Appeal allowed.

1923 BOMBAY 381

MACLEOD C. J., AND CRUMP. J.

Chunilal Asharam—Plff.-Appellant.

v.

Kashibhai Nathabhai-- Deft. - Respondent.

F. A. No. 229 of 1921, D. 16th Feb. 1923, from the decision First Class Sub. J., at Ahmedabad, in Application in Darkast No. 382 of 1919.

Civil P. C. O. 21 R. 58—Premature application.

The plaintiff filed a suit against two defendants, who were father and son. The suit was dismissed against the first defendant, and decreed against the second defendant. The plaintiff applied to the Court to attach the property of the son. The first defendant then applied to the Court that the Court should not execute the decree against properties which he alleged belonged to him, but if the Court had granted execution and attached his properties, the attachment should be raised. *Held* that the application of defendant No. 1 was in effect a *quia timet* application to prevent that happening which he was afraid would happen if the Court after making an order for attachment of his property actually detained his property. The application was premature and ought not to have been entertained by the Court. [P. 382 C. 1]

G. S. Rao,--for the Appellant.

G. N. Thakor, with R. J. Thakor,—for the Respondent.

Macleod C. J.—This is an appeal from an order of the First Class Subordinate Judge on an application of a very curious nature. The plaintiff filed a suit against two defendants, who were father and son. The suit was dismissed against the first defendant, and decreed against the second defendant. The plaintiff applied to the Court to attach the property of the son. The first defendant then applied to the Court that the Court should not execute the decree against properties which he alleged belonged to him, but if the Court had granted execution and attached his properties, the attachment should be raised. The learned Judge allowed affidavits to be filed and came to the conclusion that the first defendant had proved his case for the purpose of the application, and that the relief of the decree-holder was to bring a regular suit and get it declared therein that the property was of the judgment-debtor and liable to be attached and sold. So he ordered that the property should not be attached, and if the view were taken that they were already attached, as the Court had passed an order for attachment, he ordered that the attachment should be raised and that the plaintiff should get it first declared in a regular suit that the properties he sought to attach were of his judgment - debtor and liable to be attached in execution of his decree.

Now if the claimant, the first defendant, had been an outsider he would have had to prefer a claim against the attachment which would have been investigated under rule 58. The decision of the Court on that application would not be appealable. The remedy of the dissatisfied party would be by a suit, and it would certainly seem from the remarks of the Judge in the Court below that he thought he was making an order under Order XXI, rule 60. But as the first defendant, although the suit had been dismissed against him, was still a party to the suit within the Explanation to S. 47, any question arising between him and the plaintiff with regard to the execution of the decree would have to be determined by the Court executing the decree, and not by a separate suit. Therefore the first defendant's claim to the property would have to be determined by the Court executing the decree.

But the real question is whether this application came within the provisions of S. 47 of the Code. It was open to the first defendant to

ask the Court to hold that a question had arisen between the parties and to decide it. But the first defendant was exactly in the same position as any ordinary outsider claiming against an executing plaintiff with regard to his cause of action. An outsider could not prefer a claim to the property until injury had resulted to him by the property, which he claimed to be his, having been attached. He could not ask the Court to decide any question relating to the property until his property had been attached. The order directing that the property should be attached effected nothing against the interest of the first defendant. His application was in effect a *quia timet* application to prevent that happening which he was afraid would happen if the Court after making an order for attachment of his property actually detained his property No authority has been cited to us which sanctions such an application. In our opinion the application was premature and ought not to have been entertained by the Court. When the property had actually been attached, then the first defendant could complain that his rights had been interfered with and ask the Court to remove the attachment.

We should like to point out that the question which may arise with regard to this property between the plaintiff and the first defendant and which may have to be tried by the Court executing the decree, is not a question which could possibly be tried by affidavits. Evidently the Court considered, in dealing with the first defendant's application, that it was competent to deal with the matter in a summary manner, the question between the parties having to be ultimately decided by a regular suit, so that if this matter comes eventually before the Court it will have to deal with the question on evidence, and that evidence would have to be taken in the same way as in a regular suit. The appeal must be allowed and the application dismissed with costs throughout.

Appeal allowed.

1923 BOMBAY 382

MACLEOD C. J., AND CRUMP J.

Gavarawa Kom Gaudappa and others—Defendants—Appellants.

v.

Mallangowda Chanagouda Patil and another—Plaintiffs—Respondents.

F. A. No. 274 of 1921. D. 15th March 1923, against the decision of First Class Sub. J., of Bijapur in Suit No. 126 of 1919.

(*a*) *Hindu Law—Succession—Bombay Vatan Act (V of 1886) S. 2—Daughters.*

According to Vatan Act neither the daughters of the deceased last male vatan holder, nor his brother's widow can claim priority over male members of the same vatan family. 19 Bom. L. R 730 Dist.

(*b*) *Specific Relief Act S. 42—Declaration of title and injunction—Plaintiffs in possession.*

Where plaintiffs are in possession as having some title to the lands, in a suit by them for declaration of ownership and injunction it is for defts to prove adverse possession for 12 years.

Tyabji with H. B. Gumaste—for the Appellants.

H. C. Coyajee with R. A. Jahagirdar—for the Respondents.

Judgment.—The plaintiffs sued for a declaration that they were the owners of the lands in suit and for a perpetual injunction restraining defendants from obstructing their enjoyment. The suit property admittedly was Vatan property which had been in the possession of Balappa as the last male holder. Balappa belonged to the third branch of the Vatan family, the pedigree of which is Exhibit 159. Balappa left two daughters and a brother's widow. It cannot be contended that under Section 2 of the Vatan Act (V of 1886) their claims to succeed are not postponed in the event of there being in existence any male members of the same family. The plaintiffs were such members, therefore *prima facie* they would be entitled, at any rate, to share the property left by Balappa. The plaintiffs belonged to the 1st branch of the Vatan family and they proved that they had acquired the right of the 2nd branch by agreement through arbitration which came to an end after the suit was filed.

The only question therefore in the suit would be whether the plaintiffs

had been in possession within 12 years of the suit, and of that there was ample evidence. The defendants did not even appear to give evidence in the trial Court. They confined their endeavours to instructing their pleader to argue that the plaintiffs' documents showing title were forged. The learned Judge has considered all those questions and came to the conclusion that the plaintiffs had proved their title and possession within 12 years. Why the elder branch should prove 12 years adverse possession we do not know. If they had title they could only have lost it if a third party could prove that he had acquired his title by adverse possession.

It has been argued in this Court that the plaintiffs had not proved their title because they had not pleaded that they belonged to the same Vatan family of Balappa. Plaintiffs said in the plaint that they were the Vatani Bhaubands of the deceased, and therefore under the Vatan Act, succession did not go to daughters nor to defendant 1 who was the widow of the deceased's brother. The plaintiffs also said that plaintiff No. 1's grand-father Bhimappa and plaintiff 2 Hanmantgauda were the Vatani Bhaubands of the deceased and were members of the eldest branch and that they alone were the nearest heirs under the Vatan Act. That would seem to be sufficient pleading to maintain the allegation that they belonged to the same Vatan family of Balappa and certainly defendants would be put on notice to deny that fact if they wished to assert that the plaintiffs were not members of the same Vatan family.

The case of *Bai Laxmi* v. *Maganlal* (1) is relied upon by the appellants. The original Vatandar was one Gopinath. When he died without issue, Government issued separate Sanads to two of his first cousins. So, there were two separate Vatans, and from that time the members of each Vatan would not be considered as members of the same Vatan family as having descended from the common progenitor. Here it has not been suggested that the pedigree is not correct or that Gavadappa at the top of the pedigree was not the common progenitor of the various branches who are in possession of the Vatan property. It follows therefore that the decision of the Court below was right and the appeal must be dismissed with costs.

Appeal dismissed.

(1) (1917) 41 Bom. 677-19 Bom. L. R. 730-42 I. C. 450.

1923 BOMBAY 383

MACLEOD C. J., AND CRUMP, J.

Narayan Bapulal and others-Defendants-Appellants.

v.

Sonusingh Ghanashamsingh-Plaintiff-Respondent.

F. A. No. 277 of 1921, D. 8th March 1923, against the decision of First Class Sub. J, of Jalgaon in Suit No. 483 of 1920.

Dekkan Agriculturists Relief Act S.2-Agriculturist-Joint family.

If the family is joint then the only way to ascertain whether the members of the joint family are agriculturists or not is to ascertain what is the joint income of the family provided they are living together. Where some of the defendants (members of the joint family) appeared to have been in service, and the joint income from the earnings of the father and his sons was derived from their father's pension, a certain amount of rent from the theatre which had not been very successful and the annual income derived from 14 acres of land assessed at Rs. 29-8 which was found to be about Rs. 200. *Held* that the defendants were non-agriculturists.

Y. V. Bhandarkar-for the Appellants

P. B. Shingne-for the Respondent.

Judgment :—The only question in appeal is whether the defendants have satisfied the Court that they were agriculturists. The onus lay upon them to prove that particular status, but on the evidence the learned Judge in the Court below applied, in our opinion, the right test and came to the conclusion that the defendants were not agriculturists. If the family is joint then the only way to ascertain whether the members of the joint family are agriculturists or not is to ascertain what is the joint income of the family provided they are living together. It cannot be suggested now on the evidence

that any of the members themselves engaged in agricultural labour and they can only derive their agricultural status by earning their livelihood from it. The second and the third defendant appear to have been in service, and the joint income from the earnings of the father and his sons was derived from their father's pension, a certain amount of rent from the theatre which had not been very successful and the annual income derived from 14 acres of land assessed at Rs. 29-8-0. The defendants endeavoured to prove that the income from this land was anything between Rs. 500 and Rs. 1000 but only succeeded in satisfying the Judge that the income on the evidence could not be more than Rs. 200. But as a matter of fact if it was more than that it was for the defendants to prove that. On reading the evidence, although vague allegations were made with regard to the produce of the lands, there is nothing definite from which it can be concluded that the learned Judge's finding was wrong. Therefore the plaintiff was entitled to succeed against the defendants as non-agriculturists and the decree of the lower Court was right. The appeal therefore must be dismissed with costs.

The defendants should redeem within six months from the date of this decree.

Cross-objections are dismissed. It appears they were not necessary and were filed under misapprehension, as the Pleader admits.

Appeal dismissed.

✱ 1923 BOMBAY 384

MACLEOD C. J., AND CRUMP, J.,

Sitaram Pandurang Deshmukh—Plaintiff-Appellant.

v.

Ganpat Daulatrao Deshmukh—Defendant-Respondent.

S. A. No. 384 of 1921, D. 6th Feb. 1923, against the decision of Asst. J., of Sholapur, in Appeal No. 206 of 1919.

Hindu Law—Applicability-Illegitimate sons by a Mohammadan mistress.

An illegitimate offspring of a Hindu by a Mahomedan mistress would not be a Hindu and cannot therefore inherit as heir to his father. 27 M. 13 Ref. [P. 336 C. 2]

S. Y. Abhyankar—for the Appellant.

P. B Shingne—for the Respondent.

Macleod C J.—The plaintiffs instituted this suit to recover possession of certain property on the ground that it was Deshmukhi Vatan Service Inam land, and therefore could not devolve upon the defendant, who was a daughter of one Dada, the illegitimate son of Venkatrao by a Mahomedan mistress. The pedigree appears at p. 1 of the print. Venkatrao, the last owner of the Vatan property, sold it to one Fazal Alli in 1865. After Venkatrao's death in 1871, Baburao, the illegitimate son of Venkatrao, purchased the property from Fazal Alli and enjoyed the property till he died. Then he was succeeded by his brother Dada who left a widow Pyara, and a daugther, the present defendant. Pyara died in 1906 when her daughter, the present defendant, took possession of the property. It was urged in the lower Courts on behalf of the plaintiffs that Baburao and Dada were the heirs of Venkatrao as his *dasiputras*, and hence they were in possession until their death, and that after the death of Pyara, the widow of the survivor, the Vatan would go to them. The appellants have not been able to place before us any case in which it has been laid down that an illegitimate offspring of a Hindu by a Mahomedan mistress would be a Hindu. That is contrary to one's notions of the law on the subject which is very clearly laid down in *Lingappa Goundan* v. *Esudasan*, (1) it being held that a man cannot be regarded as a Hindu by birth unless both his parents are Hindus.

The result must be that Venkatrao left no Hindu heir to succeed him, and the illegitimate sons holding adversely to Venkatrao's heirs became entitled to the property as against them. The appeal fails and must be dismissed with costs.

Appeal dismissed.

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(1) (1903) 27 Mad. 13.

✱ 1923 BOMBAY 385

MACLEOD, C. J. AND CRUMP, J.

Siddappa Bin. *Mahalingappa and another*—Defendants-Appellants.

v.

Pandurang Vasudev Chate—Plaintiff-Respondent.

S. A. No. 37 of 1922, D.25th January, 1923, against the decision of Dt. J. of Bijapur in Appeal No. 55 of 1919.

Hindu Law-Alienation by widow-Setting aside-Improvement by alienee.

In a suit by reversioner, after widow's death to recover property mortgaged by the widow without necessity, the reversioner ought, on principles of equity, to compensate the mortgagee for what he has spent on the property. But if the suecessful reversioner is not prepared to compensate either wholly or in part the mortgagee for what he has spent on the property, then the mortgagee is entitled to remove what he has placed on the property at his own expense 40 C. 555, P. C. Foll. 32 B 32 Dist.

[P. 386, C. 1]

A. G. Desai—for the Appellants.

G. N. Thakor with *R. A. Jahgirdar*—for the Respondent.

Judgment:—The only question in this appeal is whether this case is exactly similar to the case of *Vrijbhukandas* v. *Dayaram* (1) so that the plaintiff reversioner could be held entitled to recover the property in the condition in which it was when the widow died. The trial Court directed that the plaintiff should recover possession of the land, on which the shop in suit stood, with liberty to defendants forthwith to commence to remove their building, the removal to be completed within one year from the date of the order.

This decision was reversed by the appellate Judge who directed the plaintiff to recover possession of the shop as it stood. The widow when she mortgaged the property without necessity agreed that the mortgagee should practically rebuild the shop, which, at the time of the mortgage, was in a ruinous condition. It seems to us difficult to see how under the principles of Hindu law or any principles of equity, the reversioner can seek to get possession of the property, with the shop standing on it, without making any compensation to the person who built the shop or to his successor. It seems to us that the facts in *Vrijbhukandas* v. *Dayaram* (1) are entirely different, and that the question which we have to decide here is whether under general principles the mortgagee should lose the benefits of the money he spent on the building with the consent of the widow, or whether the reversioners are entitled to the whole of the benefit. Clearly if there had been a sale by the widow, which would be voidable against the reversioner, the reversioner would be bound to pay the purchaser the amount by which the value of the property had been enhanced by improvements effected by him. That was dicided in *Kidar Nath* v. *Mathu Mal* (2). There the respondent on the death of a Hindu widow brought a suit as the next heir of her husband to set aside an alienation, made by the widow in favour of the appellant. The Chief Court allowed the alienee Rs. 1,400 which represented half the expenditure by him on the property. The appellant contended that he was entitled to what he had spent. The Privy Council decided that that was not the right principle on which to assess the amount payable to the alienees as compensation, as in such cases it should always be borne in mind that the amount of the expenditure made had occasionally very little to do with the real issue, and that that issue was to what extent had enhancement of the subject matter been produced.

That is the issue and we cannot agree with the contention of Mr. Thakore that the judgment of the Privy Council does not uphold the principle that compensation to an alienee from a Hindu widow may be awarded in certain circumstances.

In the next place, we cannot see how the position of the mortgagee

(1) (1908) 32 Bom. 32—9 Bom L. R. 1181.

(2) (1913) 40 Cal 555—77 P.R. 1913—127 P.L.R. 1913—25 M. L. J. 176—(1913) M.W.N. 403—13 M.L.T. 434—17 C. W. N. 797—15 BomL.R.467—18 I.C. 946(P.C.)

who improves the property with the consent of the widow can be distinguished, except that the position of the mortgagee who improves the property mortgaged to him is not exactly the same as the position of a person who thinks he has got an absolute title to the property by sale, still there is equity in favour of the mortgagee. The only question to our mind is to what extent has that equity been established.

If the successful reversioner is not prepared to compensate either wholly or in part the mortgagee for what he has spent on the property, then we think the mortgagee is entitled to remove what he has placed on the property at his own expense. We think, therefore, that the decree of the trial Court was the proper one to make in this case, and that decree must be restored with costs in this Court and the Court below.

Appeal allowed.

1923 BOMBAY 386

MACLEOD, C. J. AND CRUMP, J.

D. B. Manke—Plaintiff -- Applicant.

v.

B. Walwekar, Secretary, Sew Sports Club, Bombay-Defendant — Opponent.

Civil Application No. 225 of 1922, D. 8th March 1923, against the order of Small Cause Court Judge, Bombay in Suit No. 283 of 1922.

Civil P.C., 0.9. R. 9—Application for restoration itself dismissed for default—Restoration—Civil P. C., S. 151.

There is no rule in the Code that enables the Court to restore an application made under Order IX Rule 9 which has been dismissed for want of prosecution. Even S. 151 does not apply in such a case. [P 386, C. 2]

V. D. Limaye--for the Applicant.

T. N. Walavalkar and K. M. Bodas--for the Opponent.

Judgment.—The plaintiff filed a suit No. 283 of 1922 in the small causes Court, Bombay to recover wages from the Opponent. The suit was decreed *ex parte* because although the opponent engaged a pleader he did not attempt to contest the suit, at the hearing. The Opponent then filed an application for setting aside of the *ex-parte* decree and notice was issued to the plaintiff and the day fixed for hearing was 10th April 1922. That notice was issued under Order IX, Rule 9. The notice was struck off for want of prosecution. Again the Opponent presented an application for setting aside the *ex-parte* decree. That was clearly time-barred, the Court considered that it was an application to restore the application previously made under O. IX R. 9. Considering the application as restored, it passed an Order against the plaintiff for a new trial. The application is made to us to revise that order as being without jurisdiction. It cannot be said that there is any rule in the Code of Civil Procedure that enables the Court to restore an application made under Order IX, Rule 9 which has been dismissed for want of prosecution. It is urged upon us that the Court has inherent powers to make orders within the provisions of section 151 and that this was an order made accordingly. There is no reference made in the decision of the Court that the order was made under Section 151. It is quite clear that if that Section had been considered, the order under revision could not possibly have been made under it. That section gives the Court power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. The plaintiff has got a decree and the defendant had every opportunity of appearing in Court at the time of hearing and also when notices were issued by him against the plaintiff for a new trial. It cannot be said therefore that in any circumstance it is necessary for the ends of justice that he should have yet another opportunity of harassing the successful party. Therefore the rule is made absolute with costs.

Rule made absolute.

1923 BOMBAY 387

PRATT, J.

Mathuradas Maganlal—Plff.—Appellant

v.

Nathubhai Vithaldas — Deft.—Respondent·

O. C. J. Suit No. 131 of 1922, D. 18th February 1923.

Bombay Rent (War restrictions) Act (II of 1918) S. 9 (1) and (2)—The increase of rent and mortgage interest-(War Restrictions Act 1915—Payment after suit.

S. 9 (1) does not mean that the conditions there laid down are conditions which apply at the date of the order, and that even if a tenant has made any default in paying the rent and is in arrears at the time that the suit is filed, yet he has under S. 9 (1), a *locus pœnitentœ* and if he brings the arrears of rent into Court, the Court cannot make an order for the recovery of possession. In both the English and the Indian sections the words "continues to pay" and the word "pays" respectively, refer to the time anterior to the filing of the suit. Section 9 (2) is in the past tense because it refers to past acts of waste or conduct in the past which has been an annoyance. Section 9 (1) is in the present tense because that section merely describes the sort of tenant who is entitled to claim protection under the Act [P 388 Cs. 1 & 2, P. 389 C. 1]

F. S. Taleyarkhan—for the Appellant.

Campbell—for the Respondent.

Judgment :-The plaintiff in this suit seeks to evict the defendant who is a monthly tenant of the plaintiff's house at Sandhurst Road and, on 18th July 1921, gave notice to quit terminating the tenancy on 1st September 1921. The defendant pleads the Bombay Rent (War Restrictions) Act No. II of 1918 and the plaintiff's reply is that the defendant is not entitled to protection under the Rent Act as he has not paid the rent. The defendant admits that his rent is in arrears from 1st July 1919, but he states that he tendered arrears of rent to the plaintiff in August 1921 and that the plaintiff refused to accept the rent.

On these pleadings the following issues were framed.

(1) Whether the defendant did not in August 1921 offer to pay all arrears of rent ?

(2) Whether plaintiff declined to recover arrears as he said he had terminated the tenancy by his letter of July 1921 ?

(3) Whether in any event the plaintiff under S. 9 of the Rent Act is entitled to an order for possession ?

Now the plaintiff had in Suit No. 941 of 1920 sued the defendant for possession and the suit had been dismissed on the ground that the plaintiff's requirements had not been proved, and that dismissal was without prejudice to the plaintiff's claim to recover the arrears of rent from the defendant. Since the dismissal of that suit the plaintiff's attorneys have been repeatedly demanding payment of rent. The first letter was Ex. A of June 23, and it was followed up by a second letter of August 9, 1920. To neither of these letters did the defendant make any reply until April 1921 when the defendant wrote demanding payment of the taxed costs in Suit No. 941 of 1920. The plaintiff in reply, on April 19, 1921, claimed to set off the amount of taxed costs against the amount of rent which was payable by the defendant, but the defendant objected to this and the plaintiff's demands of payment of the arrears of rent continued on May 5, 1921, Ex. D, and June 24, 1921, Ex. E, without eliciting any reply from the defendant. Eventually, on July 18, 1921, the plaintiff gave notice to quit.

Now, the defendant admits that he received these letters and that he made no reply to them and the only excuse that he gives is, his wife was dying and that he was absent with her at Miraj and then at Deolali. This excuse is very inadequate, for the house was in the occupation of a son and son-in-law who could have paid for him ; and after he returned from Miraj he spent some time in Bombay and could have paid then.

His unwillingness to pay the rent is manifest from his objection even to allow the amount of taxed costs to be set off against the arrears of rent.

I, therefore, disbelieve his uncorroborated statement that in August 1921 he offered to pay the plaintiff the arrears of rent and I have not called upon Mr. Taleyarkhan for evidence to contradict that statement.

That disposes of the first and second issues, but however that may be the fact remains that no rent has been paid since July 1919. That is admitted

in written statement and it is only after suit was filed that the defendant with his written statement, on February, 8, 1922, .paid into Court all the arreas of rent including rent up to the end of April 1922.

Mr. Campbell contends, and has contended very strenuously, that under S. 9 (1) on the Bombay Rent Act the effect of this payment is that the Court is unable to make an order for eviction. Section 9 (1) runs as follows :—

"No order for the recovery of possession of any premises shall be made so long as the tenant pays or is ready and willing to pay rent to the full extent allowable by this Act and performs the conditions of the tenancy."

Mr. Campbell's contention is that the conditions here laid down are conditions which apply at the date of the order, and that even if a tenant has made any default in paying the rent and is in arrears at the time that the suit is filed, yet he has under S. 9 (1) a *locus pœnitentiæ* and if he brings the arrears of rent into Court the Court cannot make an order for the recovery of possession.

The section is based on the corresponding section of the English Act, the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915, which is as follows :—

"No order for the recovery of possession of a dwelling-house to which this Act applies or for the ejectment of a tenant therefrom shall be made so long as the tenant continues to pay rent at the agreed rate as modified by this Act and performs the other conditions of the tenancy."

This section is also in the present tense but nevertheless it has been construed in England as importing a condition precedent which must be fulfilled by the tenant not at the time when the Court has to make its order, but at the time when the writ is served.

In *Beavis* v. *Carman*, (1) Lawrence J. said:—

"There was a right in the landlord to possession when the writ was served,...and there was no *locus pœnitentiæ* on the part of the tenant, nor could he (his L ordship) reinstate the tenant, a though he had continued to pay the rent and perform the terms of the tenancy."

So also in the case of *Davies* v. *Bristow* (2) the section was construed as constituting a condition precedent to the right of a tenant to claim the protection of the Act, that he should have paid the rent and performed his obligations under the tenancy agreement

I think that is the proper construction of S. 9 (1) of the Bombay Rent Act. The presnt tense is used not to describe anything that the tenant does or may do at the time when the Court's order is made, but to describe the conduct of the tenant which entitles him to plead the Rent Act, i. e., the conduct of the tenant up to or at the time when the suit was filed.

Mr. Campbell contends that there is a distinction between S. 9 (1) of the Bombay Act and the English section in that the English section uses the words "continues to pay" the rent, instead of the word "pays" which is used in the Indian section. But I do not think that the words "continues to pay" import any distinction. Whether the words are "continues to pay" or "pays", the real question is whether they refer to the time anterior to the filing of the suit or the time subsequent thereto. I think that in both the English and the Indian sections the words "continues to pay" and the word "pays" respectively, refer to the time anterior to the filing of the suit.

Then Mr. Campbell refers to the words "is ready and willing to pay the rent to the full extent allowable by this Act." These words do not appear in the English section, but here again the question is whether readiness and willingness to pay refers to the time before the suit is filed or the time subsequent to the filing of the suit. I think it refers to the time prior to the filing of the suit and it has been inserted to meet cases in which failure to pay rent bas been due to a dispute between the landlord and the tanant as to the amount of standard rent. Mr. Campbell says that this cannot be the true construction because

(1) (1920) 36 T. L. R. 396.

(2) (1920) 3 K. B. 428.

otherwise a tenant who made a wrong estimate as to what the standard rent was would find himself evicted merely because his estimate was wrong and the landlord's estimate was right. But that is a case which could easily be met by the tenant offering not to pay any fixed sum as rent, but such sum as the Rent Controller or the Court may adjudge to be the standard rent.

Mr. Campbell's third argument is that the use of the past tense in S. 9 (2) as contrasted with the present tense of S. 9 (1) shows that the acts of the tenant referred to in S. 9 (2) are past acts while the acts referred to in S. 9 (1) are present acts, i. e., acts at the date of the order. But I do not think that is so. Section 9 (2) is in the past tense because it refers to past acts of waste or conduct in the past which has been an annoyance. Section 9 (1) is in the present tense because that section merely describes the sort of tenant who is entitled to claim protection under the Act.

I think that is the only admissible construction of the section for otherwise the tenant might refuse to pay rent and the landlord will be unable to evict him. For every time that the landlord filed a suit to evict him he would bring the rent into Court and then withhold it again until such time as the landlord should file a fresh suit.

I, therefore, think that the conditions in S. 9 (1) are conditions precedent which must be fulfilled at the date of the cause of action. The defendant has contumaciously refused to pay rent and I think he was encouraged to this attitude by the dismissal of Suit 941 of 1920 in June 1920.

Mr. Campbell says that the Court has jurisdiction to relieve case for t e feiture. But this is not a a gainst forexercise by the Court of its equitable jurisdiction, for the tenancy was not determined by forfeiture but by a notice to quit. The question is one simply whetner the defendant has proved that he has fulfilled the conditions of S. 9 (1), for unless he has fulfilled those conditions, he is not entitled to protection of the Rent Act.

The Act gives the Court jurisdiction to create a statutory tenancy after the termination of previous tenancy by the notice to quit. The jurisdiction does not arise unless the terms on which the statute gives it are strictly complied with. The principle is that set forth in the judgment of the Privy Council in *Nusserwanjee Pestonjee v. Meer Mynoodeen Khan* (5). I, therefore find issue No. 3 in the affirmative and that the plaintiff is entitled to an order for possession.

Decree for the plaintiff for rent from 1st July 1919, to August 31, 1921, at the rate of Rs. 45 per mensem, less a sum of Rs. 403-0-8 and for rent and compensation at the same rate per mensem from September 1, 1921, till possession given. Liberty to plaintiff to recover this amount from the amount paid into Court by the defendant. Decree for plaintiff for possession on or before July 30, 1922. No order as to costs.

Suit decreed.

(5) [1855] 6 M.I.A. 134

✱ 1923 BOMBAY 389

MACLEOD, C.J., AND CRUMP, J.

G.I.P. Railway—Deft.—Applicant.

v.

Himatlal Jagjivandas—Plff.—Opponent.

Civil Ex. Application No. 232 of 1922, D. 19th January. 1923, against the decree of First Class Sub. J, Broach, in S. C. S. No. 810 of 1921.

Railways Act, S. 72—Loss, burden of proving—Risk note B.

If the plaintiffs have signed the Risk Note B, in order to recover, the plaintiffs have to prove that the loss was due to theft by or to the wilful neglect of the company's servants, transport agents or carriers employed by them before, during and after transit over the said railway or other railway lines working in connection therewith or by any other transport agencies employed by them respectively for the carriage of the whole or any part of the said consignment. It is prefectly true that this results in holding that the apparent protection afforded to the trader is really illusory; it practically gives him no protection at all, for it is often impossible for a trader to know what it is that has caused the loss to his goods between the time when he delivered them into the hands of the railway company's

servants and the time when they ought to have been delivered at the other end of the journey. The explanation of the loss is often within the exclusive knowledge of the railway company, and for the trader to be compelled to prove that it was due to wilful misconduct on the part of the railway company's servants is to call upon him to establish something which it may be almost impossible for him to prove. None the less, that is the burden that he has undertaken and he is bound to discharge it. (1922) 1 A. C. 178 Ref.

[P. 390, Cs. 1 & 2, P. 391, C. 1]

O' Gorman,—for the Applicant.

N. K. Mehta—for the Opponent.

Judgment ;—The plaintiffs sued the South Indian Railway Company and G. I. P. Railway Company for damages in respect of short delivery of certain tins of oil which were delivered to the South Indian Railway Company, at Erode Railway Station for carriage to Baroda. When the train arrived at Kalyan, it was found that the waggon which contained the plaintiffs' goods was open and seventeen tins were missing. The plaintiffs signed the Risk Note B, and in order to recover, the plaintiffs had to prove that the loss was due to theft by or to the wilful neglect of the company's servants, transport agents or carriers employed by them before, during and after transit over the said railway or other railway lines working in connection therewith or by any other transport agency or agencies employed by them respectively for the carriage of the whole or any part of the said consignment provided that the term "wilful neglect" could not be held to include fire, robbery from a runing train or any other unforeseen event or accident.

The learned Judge came to the conclusion that the theft was not committed in a running train, although he does not deal in detail with the evidence given by the witnesses with regard to the arrival of the train at Kalyan. The theft was discovered when the waggons were examined within a few minutes of their arrival at Kalyan, and if the theft was not committed in the running train, it would appear it must have been committed within a few minutes of the train's arrival at Kalyan. That would be a conclusion which it would be rather difficult to arrive at. However that may be, the onus lies upon the plaintiffs to prove that loss was due to theft by or to the wilful neglect of the company's servants and they called no evidence to prove that. It is true that there is the evidence of the company's servants, but in our opinion there is nothing in the evidence of the company's servants which would entitle the Court to come to the conclusion that the loss was due to theft committed by one of them or to any wilful neglect on their part.

The liability of railway companies under Risk Notes of this character, and the question what it is incumbent on the plaintiffs to prove was considered recently in *H. C. Smith, Ld.* v. *G. W. R. Co.* (1). Lord Buckmaster said, after reading out the clause in the agreement which provided that the company should not be liable for the loss of the goods except upon proof that the loss arose from the wilful misconduct of the company's servants :—

"The first question to determine is what is the true meaning of that condition ? It has been suggested on the part of the appellant that it must be read as though it contained exceptions in favour of the railway company with a proviso reserving to the consignor rights in a certain event, and that it was consequently incumbent upon them to prove that the goods had disappeared owing to the specified facts, and when that was proved it would become necessay for the consignor to establish that he had the benefit of the proviso, or, in other words, that the loss had arisen owing to the wilful misconduct of the company's servants".

"I am unable so to regard this clause ; it is in my opinion a clause which throws upon the trader, before he can recover for any of the goods, the burden of proving in the first instance that the loss sustained arose from the wilful misconduct of the company's servants. It is perfectly true that this results in holding that the apparent protection afforded to the trader is really illusory ; it

(1) (1922) 1 A. C. 178.

practically gives him no protection at all, for it is often impossible for a trader to know what it is that has caused the loss of his goods between the time when he delivered them into the hands of the railway company's servants and the time when they ought to have been delivered at the other end of the journey. The explanation of the loss is often within the exclusive knowledge of the railway company, and for the trader to be compelled to prove that it was due to wilful misconduct on the part of the railway company's servants, is to call upon him to establish something which it may be almost impossible for him to prove. None the less, that is the burden that he has undertaken, and the question is whether in this case he has afforded any evidence which calls for an answer on the part of the railway company. All he has been able to show is this: he has proved the delivery of the goods in the manner, that I have mentioned, to the railway company's servants, and he has put in evidence a correspondence between himself and the railway company, and their answers to certain interrogatories. I am bound to say that the correspondence does not reflect very creditably upon the attitude which the railway company adopted, and certainly does not show any anxiety on their part to satisfy one of their customers as to such of their circumstances as were within their knowledge, associated with the loss of these goods".

It appears, therefore, that although it may be said that in equity the railway company ought to give such information to their customers as is in their possession with regard to the loss of goods delivered to them, it is not incumbent under the law upon them to do, and they are not obliged to go out of their way to assist a plaintiff in proving wilful neglect. But as there are no rules of procedure enabling a party to administer interrogatories in a Small Cause Court suit we still think that in this country a railway company should produce before the Court for examination those of their servants who were in a position to be acquainted with the facts relating to the disappearance of their customer's goods. The G. I. P. Railway Company have done so in this case, and in our opinion very rightly, but the learned Judge considered that their long continued failure to give any explanation as to what had happened to the seventeen tins short delivered, coupled with the want of explanation to account for the delay, afforded evidence upon which it could be found that the short delivery was due to wilful misconduct of the company's servants. That is a conclusion which can no longer be warranted under the decision to which we have just referred. Therefore the rule must be made absolute and the suit dismissed with costs.

Rule made absolute.

✱ 1923 BOMBAY 391

MACLEOD, C. J. AND CRUMP, J.

Hari Shridhar Prabhu Desai—Plff.—Appellant.

v.

Sakharam Padmanna Magdum—Deft.—Respondent.

S. A. No. 259 of 1922, D. 20th February 1923, from the decision of Dt. J., Ratnagiri, in Appeal No. 235 of 1921.

Civil P. C., S. 47—Decree for possession—Waste by judgment-debtor after decree.

The question with regard to the waste committed by the judgment-debtor in possession, after decree, is a question arising between the parties relating to the execution, discharge or satisfaction of the decree. If the property has depreciated in value or been damaged since the decree, owing to the wilful action of the defendants, it is a question in execution whether defendants are liable to make good the loss. [P. 392 C. 1

G. B. Chitale—for the Appellant.

D.R. Manerikar and *G. S. Mulgaonkar*—for the Respondent.

Judgment.—The appellant in this case obtained a decree for possession of the suit property. An appeal was filed, and pending the hearing of the appeal the defendants remained in possession. The appeal was dismissed and then the appellant discovered that the present respondents, while in possession of the

property pending the appeal, appeared to have committed waste by cutting down trees. Consequently the appellant took out a Darkhast to ascertain the damages alleged to have been committed by the respondents.

It was contended that this was not a question in execution, and that the appellant would have to file a separate suit. Both the lower Courts have dismissed the Darkhast on this ground. But we think that the question with regard to the waste committed by the judgment-debtor after decree, was a question arising between the parties relating to the execution, discharge or satisfaction of the decree, and must be determined by the Court executing the decree, and not by a separate suit. The appellant is entitled under the decree to the property of which possession was directed to be given to him. If the property has depreciated in value or been damaged since the decree, owing to the wilful action of the defendants, it is a question in execution whether defendants are liable to make good the loss. Therefore we remand the Darkhast to be decided on its merits. The appellant is entitled to his costs in this Court and in the Court below. Costs in the trial Court to be costs in the cause.

Appeal allowed.

1923 BOMBAY 392

MACLEOD, C. J. AND CRUMP, J.

Damodar Jagjiwan— Plaintiff—Appellant.

v.

Govindji Jivabhai—Defendant—Respondent.

S. A. No. 285 1922, D. 1st February 1923, against the decision of Dt. J., Thana in Appeal No. 142 of 1921.

(a) Civil P. C , Appendix A. form (1)—Title of insolvent defendant, in plaint.

Obiter:—Where the plaintift desired to sue the defendant as well as his official assignee. *Held* 'the title of the suit as "Govindji Jivabhai insolvent and on behalf of him official Assignee" is absolutely wrong. The official Assignee ought to have been sued personally, so that if the plaintift wished to sue him, Govindji would have been the 1st defendant, and the Official Assignee, 'as assignee of the estate and effects of the insolvent Govindji,' the 2nd defendant. [P. 392 C. 2]

(b) Civil P. C. S. 80—Official Assignee—Suit for declaration.

Where the plaintiff sues the official assignee for declaration and possession of insolvent's land, he can do so without having to give notice under section 80, the suit not being based on tort. [P. 393 C. 1]

R. W. Desai—for the Appellant.

P. B. Shingne—for the Respondent.

Macleod, C.J.—The plaintiff sued to recover possession of the land and Tram Cars which he alleged he purchased from the 1st defendant on the 7th January 1908. He lost possession owing to Govindji Jivabhai acting in collusion with the 2nd defendant Balkrishna Jagannath Patil. Govindji had been adjudicated an insolvent, and the Official Assignee could have been made a party. It appears that Plaintiff intended to make him a party, but in the title of the suit "Govindji Jivabhai insolvent and on behalf of him Official Assignee" is absolutely wrong. The Official Assignee ought to have been sued personally, so that if the plaintiff wished to sue him, Govindji would have been the 1st defendant, the Official Assignee as assignee of the estate and effects of the insolvent Govindji, the 2nd Defendant, and Balkrishna Jagannath, the 3rd defendant. The suit was decreed in the lower Court. In appeal the Judge on the merits was in favour of that decision, but considered that the plaintiff's suit was bad for want of notice under Section 80, C. P. C. That provides that where a suit is instituted against a public officer in respect of any act purporting to be done by such public officer in his official capacity, notice should be given. It is not clear in respect of what act of the Official Assignee the suit was brought. It appears to me that the plaintiff suing on title was justified in filing the suit without giving notice. In the note to S. 80 of Mr. Mulla's Civ. Pro. Code it is said "The only class of suits in which it is necessary to give notice to a public officer is where the suit is founded upon tort, in other words, where the suit is

for damages for some wrong inadvertently committed by him in the discharge of his official duties, and that no notice is necessary if the suit is founded upon contract or any other cause of action."

What the plaintiff stated in his plaint was "defendant Govindji has applied in the High Court of Bombay for being adjudged insolvent and all his property is vested in the Official Assignee, who has objected to the entry of the land in the name of the plaintiff in the Record of Rights". That is the act of which really the plaintiff is complaining. He is suing for a declaration of his title to get possession. In my opinion he can do so without having to give notice under section 80. The appeal is allowed, the decree of the lower appellate Court set aside and the decree of the trial Court restored with costs throughout.

Crump J.— I agree. I can find no act on the part of the Official Assignee in this case which comes within the scope of section 80 of the Code of Civil Procedure. All that is alleged in the plaint is that the Official Assignee objected to the entry of the land in the name of the plaintiff in the Record of Rights. The real cause of action is that the plaintiff being dispossessed is suing to recover possession, with which suit the Official Assignee had nothing whatever to do. If the Official Assignee has taken up a certain attitude with regard to the 1st defendant's property, it is not such an act as is contemplated by section 80 of the Code, and beyond this attitude on the part of the Official Assignee there is nothing to show that the Official Assignee has any connection with the present suit. It, therefore, appears idle to contend that any notice is required to be given before the suit is instituted.

Appeal allowed

1923 BOMBAY 393

MACLEOD, C. J., AND CRUMP, J.

Madhavrao Vishvanath Nimbalkar—Plaintiff—Applicant.

v.

Shrikrishna Govindrao Kirtikar—Defendant—Opponent.

Civil Application No. 143 of 1922, D. 19th January 1923, against the decree passed by the Court of the Small Causes at Bombay in Civil Suit No. 24370 of 1921.

Presidency Small Cause Courts Act, S. 19 (q) Suit to recover ornaments.

A suit for the return of ornaments and cloth presented by custom by the prospective bridegroom at the time of betrothal is not a suit for compensation for breach of promise of marriage, and therefore the Small Cause Court has jurisdiction to try it. [P. 393 C. 2]

A. A. Adarkar—for the Applicant.

Judgment.—The plaintiff filed a suit in the Small Cause Court, Bomday, alleging that he had been betrothed to the defendant's daughter; that according to the custom he gave at the time of betrothal two *Lugadas* one *polka* and a gold ring of the aggregate value of Rs. 54, and spent Rs. 30 over and above the value of these articles. Eventually the defendant said he would not celebrate the marriage of his daughter with the plaintiff, hence the suit.

The trial Court held that the suit was excluded from the jurisdiction of the Small Cause Court under section 19 (q) of the Pres. S. C. Courts Act, treating it as a suit for compensaction for breach of promise of marriage. Such a suit in England is brought against a party who has failed to perform a promise to marry. A suit for the return of ornaments presented by custom by the prospective bridegroom at the time of betrothal is a suit of an entirely different nature. We see no reason why we should hold that it is a suit for compensation for breach of promise of marriage we think, therefore, that with regard to the claim for the return of the two *Lugadas*, the *polka* and the gold ring, or the value thereof, the Small Cause Court has jurisdiction. The rule will be made absolute and the suit remanded to that Court for disposal on the merits, with costs here and in the full Court on the opponent.

Application allowed.

1923 BOMBAY 394

MULLA, J.

Sukhanand Gurumukhrai — Plff.-Appellant.

v.

Bhimraj R. Potdar—Deft.-Respondent.

O. C. J. Suit No. 248 of 1923, D. 20th February 1923.

Bombay High Court Rules Original side (amended) R 215—Existence of partnership in dispute.

Although the words "when the existence of the partnership or the right to, or the fact of the dissolution thereof, is not in dispute" which occurred in the old rule 213, are ommitted, and the words "and for the determination of any question arising in such partnership whether to be dissolved or wound up or not" are added in the corresponding new rule 215, rule 215 does not apply where the existence of a partnership is in dispute. In omitting these words from rule 215, the rule has been brought into line with rules 212, and 214.

[P. 394 C. 2 & P. .1]

Strangman—for the Appellant.

Setalvad—for the Respondent.

Judgment:—This is an originating summons for reliefs usual in a partnership action. The defendant denies the partnership, and it is contended on his behalf that the question as to the existence of the partnership is not one that can be disposed of on an originating summons. The correspondence annexed to the written statement shows that the plaintiff was aware at date of the institution of the suit that the defendant had denied the partnership. For the plaintiff it is contended that the amendment of the rule as to originating summons in partnership cases indicates an intention that such a question can now be determined by originating summons.

The old rule 213 was as follows:—

"When the existence of the partnership or the right to or the fact of the dissolution thereof, is not in dispute, any partner in a firm or his representatives may take out an originating summons returnable before the Judge sitting in Chambers against his partners, or former partners, or their representatives (if any) for the purpose of having the partnership dissolved (if it be still subsisting) and for the purpose of taking the accounts of, and winding up, such partnership."

The rule was amended in January 1919, and it now appears among the High Court Rules as Rule 215. It is as follows:—

"Any partner in a firm or his representatives may take out an originating summons returnable before the Judge sitting in Chambers against his partners or former partners, or their representatives (if any) for the purpose of having the partnership dissolved (if it be still subsisting) and for the purpose of taking the accounts of and winding up, such partnership and the determination of any question arising in such partnership whether to be dissolved or wound up or not."

On comparing the two rules it will be observed that the words "when the existence of the partnership or the right to, or the fact of the dissolution thereof, is not in dispute", which occurred in the old rule, are omitted, and the words "and for the determination of any question arising in such partnership whether to be dissolved or wound up or not" are added.

It is argued for the plaintiff that the omission of the words "when the existence of a partnership is not in dispute" has the effect of bringing within the scope of the rule questions as to the existence of a partnership. I am unable to accede to this contention. Rule 212 begins with the words "A vendor or purchaser"; rule 214 begins with the words "Any mortgagee or mortgagor"; the presnt rule begins with the words "Any partner." As to rule 212 it was held by Pratt J. in an unreported case (*Ebrahim Haji Mahomed* v, *Haji Tar Mahomed Abba Shariff* (1) that it did not apply where either party denied the agreement for sale. That rule does not contain the words "where the fact of the agreement for sale is not in dispute." As to rule 214 it has never been suggested that it applies where the factum of a mortgage is in dispute. Rule 209, clause (*g*), provides for the determination by originating summons of "any question arising in the administration of the estate or trust." As to this rule it has never been held that it applies where a trust is denied. On the other hand, it was held under the corresponding English rule [Order 45, rule 3 (*g*)];

(1) O. C. J. Suit No. 221 of 1921.

where an action was brought by writ to determine whether the defendant was a trustee of a settlement and for his discharge and for the appointment of a new trustee, that the action was rightly brought by writ, and not by originating summons: *Elworthy* v. *Harvey* (2).

I think that rule 215 deos not apply where the existence of a partnership is in dispute. Almost all the rules as to originating summons are a reproduction of the corresponding English rules. There is no rule corresponding with the old rule 213 or the new rule 215 among the rules of the Supreme Court. The words "when the existence of the partnership is not in dispute" seem to have been used in the old rule *ex majore cautela*. In omitting these words from rule 215, the rule has been brought into line with rule 212 as to vendor and purchaser and rule 214 as to mortgagor and mortgagee. The summons is therefore, discharged with costs. Counsel certified.

Summons discharged.

(2) (1888) 60 L. T. 30.

1923 BOMBAY 395

MACLEOD, C. J, AND CRUMP, J.

Pandurang Veduram—Plaintiff—Applicant.

v.

Mohan Chhatrabhuj—Defendant—Opponent.

Civil Application No. 154 of 1922, D. 8th March 1923, against the decree passed by Second Class Sub. J. of Yaval in Small Cause Suit No. 210. of 1921.

Civil P. C., O. 9 R. 8—Plaintiff absent—Dismissal—Remedy.

Where the Court, on the day of the hearing when an application was made for adjournment as the plaintiff was ill, rejected the application and dismissed the suit, *Held* the proper course was to apply for a review of the order or apply for an order to set aside the order or dismissal and not to apply in revision. [P. 395 C. 2]

V. D. Limaye—for the Applicant.

Judgment:—The plaintiff has filed this suit to recover Rs. 112-8-0 from the defendant with costs and interest representing the estate of the deceased Chhatrabhuj. The defendant denies the claim. On the record it appears that issues were raised, the Judge found on the issues and rejected the claim with costs. An application was made to this Court in revision on the ground that the Court, on the day of the hearing when an application was made for adjournment as the plaintiff was ill, rejected the application and dismissed the suit wrongly. If the plaintiff was absent and the pleader had no instructions to conduct the suit, then there was no reason for the Court to raise issues or if issues were raised to find on them. If the plaintiff does not appear either in person or by a pleader who has instructions to go on with the suit, then the suit must be dismissed under Order 9 Rule 8. In such a case the party aggrieved by the order can apply for a review of the order or apply for an order to set aside the order of dismissal. The plaintiff applied neither for review nor for a rule. Owing to the Judge having found on the issues he thought that the order passed was a decree. That was most unfortunate and it may very well be that the plaintiff was misled in making this application owing to the way in which the case was dealt with by the Subordinate Judge. It is still open to the plaintiff to apply to the Subordinate Judge to restore the suit to the board if he can induce the Judge to excuse the delay. We cannot direct that the delay shall be excused but no doubt when the application is made everything that has been urged before us as regards the misunderstanding, which was the reason why the plaintiff did not make the application sooner, will be heard and considered by the Judge. The rule must be discharged.

Rule discharged.

1923 BOMBAY 396

MACLEOD, C. J., AND CRUMP, J.

Vithu Daulaga Patil—Deft.—Appellant.

v:

Ganesh Ramchandra—Plff. – Respondent.

S. A. No. 131 of 1920, D. 7th March, 1923, from the decision of First Class Sub. J. of Satara, in Appeal No. 437 of 1917.

Civil P. C. S. 41 -- Certificate by the executing Court— Failure — Meaning.

The Court to which a decree is sent for execution retains its jurisdiction to execute the decree until the execution has been withdrawn from it, or until it has fully executed the decree and has certified that fact to the Court which sent the decree, or until it has failed to execute the decree and certified that fact to the Court which forwarded the decree. There should be complete failure such as would result in no benefit to the judgment-creditor for one reason or another, and not merely a partial failure. [P. 396 C. 1 & 2]

K. N. Koyajee—for the Appellant.

R. A. Jahagirdar–for the Respondent.

Judgment — This is an attempt by the judgment-debtors to evade execution of the decree passed by the Satara Court in Suit No. 162 of 1901, which was transferred by the Satara Court to the Islampur Court for execution. It is contended that the jurisdiction of the Islampur Court under the certificate which had been issued by the Satara Court had exhausted itself. Section 41, Civil Procedure Code, is relied upon. It was urged that because the certificate was not sent by the Islampur Court, as ought to have been done, therefore its jurisdiction is gone. But the jurisdiction of the Islampur Court would continue until it had sent a certificate under S. 41, Civil Procedure Code. In *Abda Begam* v. *Muzaffar Husen Khan* (1), which was a case under the corresponding S 223 of the Code of Civil Procedure of 1882, it was held that the Court to which a decree was sent for execution retained its jurisdiction to execute the decree until the execution had been withdrawn from it, or until it had fully executed the decree and had certified that fact to the Court which sent the decree, or had executed it so far as that Court had been able to execute it within its jurisdiction and had certified that fact to the Court which sent the decree, or until it had failed to execute the decree and certified that fact to the Court which forwarded the decree. It does not follow that because one application for execution fails in a Court to which the decree has been sent, that Court is bound to send a certificate to the Court in which the decree was passed. The judgment-creditor might still be anxious to execute his decree in the former Court, and if that interpretation which is now sought to be placed on S. 41 is correct, it would result in the decree being transferred from one Court to another without any corresponding advantage to the judgment-creditor It is only when the Court to which decree is sent has executed it, or has failed to execute it that Court is the bound to send a certificate under S.41. It sems it was intended that there should be complete failure such as would result in no benefit to the judgment-creditor for one reason or another, and not merely a partial failure.

It is also urged that the Darkhast of 1912 was illegal, and therefore would not save time. Gopal one of the judgment-creditors, having died in 1912, the Darkhast proceeded against his sons as his legal representatives. The Islampur Court, it is urged, would have no power to put the representatives of Gopal on the record, and we are asked to assume that such an application was made to the Islampur Court, which was not competent, instead of to the Satara Court, which was the proper Court. But it was for the appellants to prove the fact they contended for. An issue on that point was never raised in the trial Court It was never suggested that all the proper steps were not taken to place the legal representatives of Gopal on the record, and whatever the actual facts may be, the appellants cannot ask us to assume that proper steps were taken to put Gopal's representatives on the record. The appeal is dismissed with costs.

Appeal dismissed.

(1) [1897] 20 All. 129—(1897) A. W. N. 218.

1923 BOMBAY 397

MACLEOD, C. J. AND CRUMP, J.

Vijbhukandas Kashidas and others—Defendants—Appellants.

v.

Sardar Ishwardas Jagjivandas and another—Plaintiffs—Respondents.

S. A. No. 354 of 1920 D. 6th February 1923 from the Sm. C. C. J. in App. No. 112 of 1918.

Bombay Land Revenue Code, S. 83—Long occupancy—Agreement to give up possession—Presumption.

No doubt when it has been proved that a tenant has been in occupation of certain land so long that one cannot ascertain the commencement of the tenancy, the mere fact, that during the currency of his holding he has signed a kabuliyat which purports to be in terms an agreement for an annual tenancy, may not be sufficient to displace the advantage he has obtained from his long holding, if he continues in possession for many years after he had signed the kabuliyat on the same rent. But each case of this class must stand entirely on its facts. At first, the tenant claiming to hold as a permanent tenant must establish the facts which would entitle him to the presumption of section 83. But that can be rebutted by the landlord by the production of acknowledgment. Again the effect of the kabuliyat can be destroyed by further evidence on the part of the tenant. The fact of the signing of the kabuliat as, merely an isolated instance in the midst of a long holding at the same rent, will not necessarily prevent the tenant from succeeding. Where the purpose of the plaintiff in taking kabuliyats was perfectly clear, and the tenants must have known that the plaintiffs were asking for kabuliyats because plaintiff was asserting his rights against any claims of the tenants to hold as permanent tenants and that many of the tenants were singing these kabuliyats. *Held* the singing of the kabuliyat at once destroyed any presumption that might have arisen from the previous holding of the defendants of the suit lands. [P. 397, C. 2, P 398, C. 1]

G N. Thakore with *R. J. Thakore*—for Appellants.

H. C. Coyajee with *G. S. Rao* and *Ratan Lal*—for Respondents.

Judgment.—The plaintiff brought this action to receive possession of the plaint lands, mesne profits and certain damages. The trial Court dismissed the suit on the ground that the insertion in the Kabuliyat of 1902 signed by the defendants, about giving up possession of the land was made fraudulently and without the knowledge of the defendants, and that apart from the Kabuliyat, the defendants were entitled to the presumption on the facts found under section 83 of the Land Revenue Code that they were permanent tenants.

This decision was reversed in appeal the learned Judge being of opinion that the defendants' contention that the Kabulayat of 1902 was taken by the plaintiffs fraudulently was not established by the evidence. He was also of opinion that the defendants could not prove their possession of the suit land further back than 1862, and there was nothing on the record from which the Court could presume that they had been in possession prior to 1862. In any event the Court was satisfied that the fact that defendants were in possession in 1854 had not been established. It would follow then that even without the Kabulayat, it would be rather difficult for the defendants to ask the Court to give them the benefit of section 83, and hold that they were permanent tenants. The execution of the Kabulayat of 1902, in our opinion, must be taken as an admission by the defendants that they were not permanent tenants but tenants bound to give up possession according to the terms of the documents.

No doubt when it has been proved that a tenant has been in occupation of certain land for so long that one cannot ascertain the commencement of the tenancy, the mere fact that during the currency of his holding he has signed a Kabulayat which purports to be in terms an agreement for an annual tenancy, may not be sufficient to displace the advantage he has obtained from his long holding, if he continues in possession for many years after he had signed the Kabuliat on the same rent. But each case of this class must stand entirely on its own facts. At first, the tenants claiming to hold as a permanent tenant must establish the fact which would entitle him to the presumption of section 83. But that can be rebutted by the landlord by the production of a Kabulayat. Again the effect of the Kabulayat can be destroyed by further evidence on the part of the tenant. The fact of the signing of the Kabulayat as merely

an isolated instance in the midst of a long holding at the same rent will not necessarily prevent the tenant from succeeding.

There cannot be a clearer case than the one before us in which it has been proved that the Kabulayat was taken for a definite purpose. The plaintiffs were put in possession in 1892 as Court purchasers. Prior to that time the land had been managed by the Collector and as soon as the plaintiffs got into possession, they determined to establish their rights to the village lands. They began by filing suits against defendants occupants for possession. These suits were taken up to the High Court and ended in decrees for the plaintiffs. Thereafter plaintiffs began taking Kabulayats from the tenants, of which a very large number have been recorded in the case, covering a period from 1902 to 1909. The purpose the plaintiff had in taking these Kabulayats is perfectly clear. It is also clear that the tenants in occupation of the village lands must have known what the plaintiffs had in their minds. The tenants must have known that the plaintiffs were asking for kabulayats that they were asserting their rights against any claims of the tenants to hold as permanent tenants and that many of the tenants were signing those kabulayats.

In these circumstances, the plaintiffs obtained the kabulayat in suit from the defendants. Therefore the signing of the Kabulayat at once destroyed any presumption that might have arisen from the previous holding of the defendants of the suit lands and there is nothing that has occurred since, which would lead one to suppose that the signing of a Kabulayat was a mere accident which on the continuance of the holding on the old terms could be treated as a nullity in consequence of the latter possession.

We think, then; the judgment of the First Class Subordinate Judge was correct, and that, therefore, this appeal must be dismissed with costs.

Appeal dismissed.

1923 BOMBAY 398

MACLEOD, C. J. AND CRUMP, J.

Gulam Mohiuddin Narmavala—Plff.—Appellant.

v.

Dayabhai Chimanlal—Deft.—Respondent.

S. A. No 30 of 1922, D. 16th February, 1923, from the decision of Small Cause Court Judge at Ahmedabad in Appeal No. 73 of 1920.

(a) Civil P. C. S. 2 (12)—Premium received from a sub-tenant.

Premium received from a sub-tenant by a tenant who was holding over after notice by plaintiff landlord, is included in the term 'mesne profits.'

(b) Practice--Pleader's fees-Ejectment suit.

In an ejectment suit, the relief was held as rightly valued at Rs. 301 for jurisdiction and Rs. 5000 for pleader's fees.

G. N. Thakor with *R. J. Thakor*—for the Appellant.

J. G. Rele—for the Respondent.

Judgment—The first defendant held over after notice was given to vacate the suit property which was let out to him by the plaintiff. He sub-let the premises and in addition to the rent received a premium of Rs. 1,250. Under S. 2 (12) of the Code "mesne profits" of property means those profits which the person in wrongful possession of such property actually has received or might with ordinary diligence have received therefrom, and clearly Rs. 1,351 was profit received by the first defendant, so the plaintiff was entitled to a decree for that amount together with rent at the annual rate of Rs. 271 for the period for which he sued, less the amount which had been paid by defendant No. 1, namely, Rs 542.

The plaintiff claims that pleader's fees are payable on Rs. 5,000 the value of the subject-matter of the suit. We think that contention is sound under the law regulating the charge for pleadsr's fees when the suit was filed. The appeal, therefore succeeds and there must be a decree in terms of the judgment with costs throughout.

Appeal allowed.

✱ 1923 BOMBAY 399

MACLEOD, C J., AND CRUMP, J.

Ratanchand Dayachand—Appellant.

vs.

Damji Dharsey—Respondent.

O. C. J. A. No. 22 of 1921, D. 29th March 1923.

Civil P. C. O. 41 R 10–Applicability to Letters Patent Appeals-High Court Rules. Original side R. 736—Ground for demanding security.

High Court Rule 736 is not inconsistent with Order 41, rule 10, as it merely prescribes the amount of security which an appellant shall deposit as a condition on which the appeal will be admitted, although, undoubtedly, many of the rules in Order 41 cannot apply to appeals under the Letters Patent, it would be going too far to say that none of them are applicable. The mere fact that the appellant may lose and may not pay the costs of the appeal is not a sufficient ground for demanding security. There must be some evidence at least of facts which cast doubts on the honesty and *bona fides* of the appellant, such as obstruction to the execution of the decree in the lower Court, or the fact that the appellant is not the real litigant or, if in any way it can be shown, that the appeal is vexatious. [P. 399, C. 2]

Lalkaka for *Jinnah*—for the Appellant.

Bahadurji—for the Respondent.

Macleod, C. J.—This is an application by the respondents for an oder directing the appellants to deposit such further security for the costs of the appeal as the Court may think fit, on the ground that the costs of the appeal will run into thousands of rupees beyond the 500 rupees deposited by the appellants under High Court Rule 736 when the appeal was filed.

A stay of execution of the decree of the lower Court was obtained on the appellants giving security to the extent of Rs. 35,000.

This is an appeal under clause 15 of Letters Patent, and it has been contentended that Order XLI, rule 10, does not apply to such appeals, and even if it did, that High Court Rule 736 is inconsistent with it and governs the case. The authority relied upon is *Behram Jung* v. *Sultan Ali* (1). It does not seem to me o matter much whether we hold that Order XLI, rule 10, is not applicable, as the learned Chief Justice in the case just cited remarked that the appellate Court had the power to demand security if it thought fit to do so in the interests of justice. I also think that High Court Rule 736 is not inconsistent with Order XLI, rule 10, as it merely prescribes the amount of security which an appellant shall deposit as a condition on which the appeal will be admitted. Although undoubtedly many of the rules in Order XLI cannot apply to appeals under the Letters Patent, I think it would be going too far to say that none of them are applicable. Certainly in *Kessowji Issur* v. *Great Indian Peninsula Railway* (2) it appears to have been considered in what circumstances the Appeal Court in a Letters Patent appeal may allow further evidence to be produced under S. 368 of the Code of 1882 corresponding to Order XLI, rule 27.

But the powers to demand security for the costs of an appeal must in any event be exercised according to well-known principles. The mere fact that the appellant may lose and may not pay the costs of the appeal is not a sufficient ground for demanding security. There must be some evidence at least of facts which cast doubts on the honesty and *bona fides* of the appellant such as obstruction to the execution of the decree in the lower Court, or the fact that the appellant is not the real litigant, or if in any way it can be shown that the appeal is vexatious. This application, I think, should be dismissed with costs.

Crump, J.—I agree.

Application dismissed.

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(1) (1912) 37 Bom. 572—14 Bom. L.R. 1106—17 I. C. 739.

(2) (1907) 34 I. A. 115—31 Bom. 381—11 C. W. N. 721—6 C. L. J. 5—4 A. L. J. 461—17 M. L. J. 347—9 Bom. L. R. 671 (P. C.)

✱ 1923 BOMBAY 400

MACLEOD, C. J., AND CRUMP, J.

Kalyanchand Lalachand Patni—Appellant.

v.

Bhogilal Jayachand—Respondent.

F. A. No. 103 of 1921, D. 29th January, 1923, from the decision of First Class Sub. J., at Jalgaon.

Civil P. C. S. 48—Appeal against some defendants—Starting point as against others.

The plaintiff filed a suit in 1905 against five defendants. A decree was passed in March 1907 against defendants Nos. 1 to 4 but the suit was dismissed as against defendant No. 5. Against that order of dismissal the plaintiffs appealed but without success; *Held* that a Darkhast filed after 12 years of March 1907 but within 12 years of the appellate Court's decree was time-barred as against Defendant Nos. 1 to 4.

S. S. Patkar—for the Appellant.

P. B. Shingne—for the Respondent.

Judgment.—The plaintiffs filed a suit in 1905 against the four sons of one Jayachand deceased. They added as a defendant one Bhaichand who they alleged stood surety for the amount due by Jayachand. A decree was passed in March 1907 against defendants Nos. 1 to 4 as representatives of the deceased Jayachand. The plaintiffs' suit againt defendant No. 5 was dismissed. Against that order of dismissal the plaintiffs appealed but without suceess. The plaintiffs made various applications for execution against defendants Nos. 1 to 4, including Darkhast No. 745 of 1917 filed in the First Class Subordinate Judge's Court at Dhulia, which was tranferred to Jalgaon owing to the transfer of the territorial jurisdiction from Dhulia to Jalgaon. By that Darkhast the applicant sought to attach the particular house to which a claim was made by a third party which was successful. Thereafter the applicant asked the Court to amend that particular Darkhast by substituting other property therein mentioned which had already been declared to be not liable to be attached. We think that the amendment ought not to have been allowed and that the application must be considered as a fresh application. Otherwise clearly the provisions of S. 48 of the Civil Procedure Code could easily be evaded, and a Darkhast could be kept alive for an indefinite time.

It is necessary, therefore, to consider whether Exs., 35 and 71, which admittedly are applications for execution made more than twelve years after the date when the decree was passed against defendants Nos. 1 to 4, were in time; and it is contended that limitation runs from the date the plaintiff's appeal in the High Court against defendant No. 5 was dismissed. That contention could only prevail if the High Court, in dismissing the appeal, could be said to have passed a decree against defendants Nos. 1 to 4 which could be executed. It is not suggested that the High Court confirmed the decree against defendants Nos. 1 to 4 which had already been passed by the lower Court. It merely dismissed the plaintff's appeal as against defendant No 5. It seems to me therefore, that decree which is sought to be executed is the decree of the trial Court and no other, and that limitation must run from the date that decree was passed.

Various cases have been cited but I doubt that any of them are really in point. In *Mashiat-un-nissa* v. *Rani* (1) a decree for possession of immoveable property was passed not jointly, but severally as against all the defendants individually and specifically stated the proportions of which they were severally in possession. Two of the defendants appealed, and it was held that the first application for execution of the original decree against those defendants whe had not appealed from it, and which was made five years after the date of the decree was barred by limitation. On the other hand, when a decree is passed in favour of the plaintiff aginst a particular defendant, and part of the decree is appealed against, then no doubt the whole case is before the appellate Court and the decree of the appellate Court will be the decree to be executed.

It seems to me this case stands entirely on its own facts, and the plaintiffs, as soon as the decree was passed against defendants Nos. 1 to 4, could have executed it. An application by

(1) 1889) 13 All. 1—(1890) A.W.N. 207 (F. B.)

defendants Nos. 1 to 4 to the appellate Court for stay of execution, because the plaintiffs were appealing against defendant No. 5, certainly would not have been competent. There was nothing, therefore to prevent the Court executing the decree passed against defendants Nos. 1 to 4 and the date of that decree must be the date from which limitation must run for the purposes of execution. we think the appeal must be dismissed with costs.

Appeal dismissed.

✱ 1923 BOMBAY 401

MACLEOD, C. J. AND CRUMP, J.

Thakoredas Tribuvandas and another—Plaintiffs—Petitioners.

v.

Lallubhai Tribhovandas—Defendant—Opponent.

Civil Ex. Application No. 297 of 1922, D - 3rd March 1923, from the decision of Dt. J. of Surat, in Mis. A. No. 12 of 1921.

(a) *Civil P. C., O. 23 R. 3—Arbitrators' misconduct—Validity of the award.*

It is impossible to conceive that it was intended, when an application is made to the Court under Order XXIII, R. 3, that all that the Court has to do is to satisfy itself that there has been an agreement to refer and an award, and that it is bound to pass a decree in terms of the award, without considering any objection raised by one party or the other that there has been misconduct on the part of the arbitrators, such, as in any other case, would vitiate an award. [P. 401 C. 2]

(b) *Civil P. C., S. 115—Decided.*

No revision lies from an order of remand by lower appellate Court, as there is no case decided.

G. N. Thakor, with M. K. Thakore—for the Petitioners.

G. S. Rao—for the Opponent.

Judgment.—In this case, there being an agreement to refer to arbitration the disputes between the parties without the intervention of the Court, the arbitrators made an award, and thereupon the defendants applied for a decree in terms of the award. That would be an application under Order XXIII, r. 3, the defendants seeking to prove to the satisfaction of the Court that the suit had been adjusted by a lawful agreement or compromise. The plaintiffs impugned the award on the ground that the arbitrators were guilty of misconduct. The trial Court passed a decree in terms of the award. An appeal was filed to the District Judge who held that the award was vitiated and could not be given effect to in accordance with law on various grounds, and accordingly the Judge directed that the decree on the award should be set aside and the suit remanded for trial.

An application has now been made under S. 115 of the Code to revise the order of the District Judge. The first ground relied upon was that the Judge acted without jurisdiction in going into the misconduct of the arbitrators under Order XXIII. r. 3. It cannot be that the Judge had no jurisdiction to entertain the question, as he is bound to decide whether there was a lawful agreement or compromise, and an agreement to refer coupled with an award in which it has been proved that the arbitrators are guilty of misconduct, will not be a lawful agreement or compromise. It is impossible to conceive that it was intended, when an application was made to the Court under Order XXIII, r. 3, that all that the Court had to do was to satisfy itself that there had been an agreement to refer and an award, and that it was bound to pass a decree in terms of the award, without considering any objection raised by one party or the other that there had been misconduct on the part of the arbitrators, such as in any other case would vitiate an award.

But there is another ground on which we refuse to entertain the application and that is that the case has not been decided. All that the Court has found is that there had been no lawful agreement or compromise of the suit, and therefore it directed a trial of the suit. The rule will, therefore, be discharged with costs.

Rule discharged.

✱ 1923 BOMBAY 402

MACLEOD, C. J, AND CRUMP, J.

Chimanbhai Kalyanabhai and another—Plaintiffs—Applicants.

v.

Keshavlal Bulakhidas and others—Defendants—Respondents.

Civil Ex. Application No. 210 of 1921, D/-21st February. 1923, against an order passed by Addl. First Class Sub-J. of Surat in Suit No. 236 of 1917.

Civil P. C., S. 115—Case decided—Refusal to pass decree in terms of an award.

Where an application was made to the Court to pass a decree in terms of the award and the Court decided not to pass a decree in terms of the award but to continue the hearing of the suit by the Court, *Held* that it was clearly an interlocutory order and an application to revise it was not competent. [P.402 C.2]

(b) *Civil P. C., O. 32 R. 7—Permission to refer.*

An agreement to refer in a suit is an agreement coming within order XXXII, rule 7 and therefore the sanction of the Court is necessary in the case of a minor party. [P. 403 C. 1]

H. C. Coyajee with M. B. Dave—for the Applicants.

G. N. Thakor with N. K. Mehta and R. J. Thakor—for the Respondents.

Judgment.—In this case there was a reference to arbitration in which an award was made. When an application was made to the Court to pass a decree in terms of the award, objections were taken to it on various grounds. The Judge framed three issues for preliminary trial:—

(1) Was the permission of the Court taken to refer this dispute to the arbitrator in this case so as to make the reference binding on the minor defendants on the record ?

(2) If not, is the award Exhibit 191 binding on the said minor defendants ? Is the reference itself not bad if the first issue is held in the negative ?

(3) Is defendant Dhansukhlal not a major now ? Did he attain his majority pending the suit ; if so, on what date?

It was found that defendant Dhansukhlal became a major on July 19, 1920, pending the suit. The first two issues were found against the plaintiffs seeking for a decree on the award. The consequence was that the Court refused to pass a decree in terms of the award. The arbitration proceedings became a nullity and the suit had to proceed in the ordinary course.

From that order of the Judge an application has been made to us under S. 115 of the Code. A preliminary objection has been raised by the opponents that it is not competent to this Court in such a case to consider an application in revision. In *Damodar* v. *Raghunath* (1) it was held that an order under S. 521 of the Code of 1882, setting aside an award made under Chapter XXXVII of the Code on a reference to arbitration in the course of a suit, on the ground of the arbitrator's misconduct, was not subject to revision under S. 622. The order complained of was interlocutory and, if erroneous, might form a ground of appeal against any decree that might be passed in the suit.

Under S 115 of the present Code, the High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto. It cannot be said in this case that there has been a decision of the suit by the Subordinate Judge. He decided not to pass a decree in terms of the award but to continue the hearing of the suit by the Court. There is no appeal from that decision and as it is clearly an interlocutory order, an application to revise it is not competent. It is unnecessary therefore to discuss the grounds on which the Judge decided that he should not pass a decree in terms of the award. When the suit is finally decided it may be open to the parties supporting the award to appeal on the ground that a decree ought to have been passed in terms of the award. But we may refer perhaps at the present moment to the decision in *Atmaram* v. *Bhila* (2) in which this

(1) (1902) 26 Bom. 551—4 Bom L.R. 267.

(2) (1912) 15 Bom. L.R. 223—19 I. C. 424.

Court decided that an agreement to refer in a suit was an agreement coming within the provisions of Order XXXII, rule 7. Therefore the sanction of the Court was necessary in the case of a minor party. The rule is discharged with costs. It is desirable that the hearing of this suit should be expedited as much possible.

Rule discharged

1923 BOMBAY 403

MACLEOD, C. J. AND CRUMP, J.

Hirachand Amichand Gujar—Plaintiff—Appellant.

v.

Nemchand Fulchand Marwadi—Defendant—Respondent.

F. A. No. 224 of 1921, D/-14th February 1923, from the decision of First Class Sub. J. at Sholapur, in suit No. 361 of 1923.

T. P. Act, Ss. 6 (e) and 3—Right to sue for damages for breach of contract.

The right to claim damages for breach of contract cannot be transferred under S. 6 (e), it being merely a right to sue, and not an actionable claim as defined in S. 3 of the Act. 36 C. 345, Foll. [P. 403 C. 2]

H. C. Coyajee, with N. V. Gokhale—for the Appellant.

G. N. Thakor with R. A. Jahagirdar—for the Respondent.

Judgment.—The firm of Jivraj Amichand entered into contracts for the purchase of specified goods at various rates as evidenced by the sale-notes from the Laxmi Mills Then the same firm contracted to sell the goods bought under the aforesaid agreements to the defendant firm, Nemchand Gulabchand at a profit. Jivraj Amichand complained that the defendant would not take delivery and purported to sell the goods against the defendant. The result was that owing to the refusal of the defendant to take delivery there appeared to be a loss of Rs. 13,000 and cdd to Jivraj Amichand. It was open then to Jivraj Amichand to file a suit against the defendant for damages for breach of the contract. Instead of so doing, Hemchand, one of the partners of the said firm, purported to transfer to the Plaintiff the right to recover damages.

The suit was dismissed in the trial Court on the ground that the defendant did not break the contract. When it came before us in appeal it seems to us obvious that the right to claim damages against the defendant's firm could not be transferred under S. 6 (*e*) of the Transfer of Property Act. It was merely a right to sue, and it was not a transfer of an 'actionable claim' as defined in S. 3 of the Act, being neither a debt nor a beneficial interest in moveable property.

The same point had to be decided by the High Court of Calcutta in *Abu Mahomed* v. *S. C. Chunder* (1). Maclean, C. J. said [p. 351 of 36 Cal]:—

"I do not think that we can properly bring a mere claim for damages for breach of contract within those words (actionable claim). Now, if it does not fall within the definition of 'actionable claim', what is it except a mere right to sue; a mere right to sue for damages resulting from an alleged breach of contract. It seems to me that it is not anything more or less than that; and if so, that cannot be transferred."

With due respect that reasoning seems obviously right. Therefore this appeal must be dismissed. The appellant's counsel urges upon us that he ought not to be made to pay respondents' costs, as this point was not taken in the Court below. But it was open to the respondents' counsel to dispute the plaintiff's case in this Court on any point which was open to him, and as the plaintiff was not satisfied with the decision of the trial Court, but wished to take his chance of obtaining a decision in his favour in this Court, he must pay the costs of the appeal.

Appeal dismissed.

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(1) (1909) 36 Cal 345—13 C.W.N.384—1 I.C. 827.

✱ 1923 BOMBAY 404

MACLEOD, C. J. AND CRUMP, J.

Raghunath Govind Mayekar — Applicant.

v.

Gangaram Yesu Mayekar—Opponent.

Civil Ex. Application No. 310 of 1921 D/- 9th January 1923, against the Order passed by Sub. J. at Malvan, in Civil Suit No. 84 of 1918.

Civil P. C., O 21 Rr. 2 & 16—Uncertified payment—Objection to assignment.

When an application is made to the Court which passed the decree by a transferee or assignee of the decree from the original decree-holder under Order XXI, rule 16, the application is made to the Court as a Court which passed the decree, and not as a Court which is executing the decree; and it is open to the judgment-debtor to plead that the claim has already been satisfied even though the formalities prescribed by Order XXI, rule 2 sub-rules (1) and (2) have not been followed. It is true that the decree-holder may be allowed, under Order XXI, rule 2, sub-rule (3) to take advantage of the fact that the payment was not certified, to contend that it cannot be recognised by the Court executing the decree, but the fact remains, assuming that the payment has been made, that the decree has been satisfied and there is nothing to transfer; so that when a transferee comes to the Court which passed the decree and asks the Court to recognise him as a decree-holder, it is open to the judgment-debtor to say. "I have satisfied the debt which was merged in the decree". 35 M. 659, 40 M. 296 Ref. [P, 405 Cs. 1 & 2]

K. N. Koyajee—for the Applicant.

A. G. Desai—for the Opponent.

Macleod, C. J. — One Vithal Hari Kochrekar obtained a money-decree against the present petitioner in Suit No. 84 of 1918, in the Court of the Subordinate Judge at Malvan on March 22, 1918. The petitioner alleges that he paid the whole amount of the decree to the plaintiff on October 28, 1918, in full satisfaction; that the decree-holder recorded the payment on his copy of the decree, but the satisfaction of the decree was not certified to the Court, as it should have been, under Order XXI, r. 2, of the Civil Procedure Code. It would appear that thereafter the decree-holder made an application for execution. Before the application was dealt with by the Court, the decree-holder transferred the decree to the present opponent on May 18, 1921. The opponent then applied for execution of the decree.

The Court on the hearing of the application raised three issues. (1) Can the alleged satisfaction which was not certified to the Court be recognized in execution? (2) If so, is the said satisfaction proved? (3) Is the assigment relied on by Gangaram proved?

The findings of the Court on these issues were: (1) in the negative; (2) unnecessary; and (3) in the affirmative. Accordingly the Court directed a warrant to issue against the judgment-debtor under Order XXI, rules 30 and 43, of the Code.

The petitioner has applied to this Court under S. 115 of the Code to revise that order. It seems to me quite clear that the lower Court has failed entirely to recognise what is the proper procedure to be followed in the case of an application being made to the Court by the transferee of a decree. Whether attachment proceedings are already commenced at the instance of the decree-holder or not, the assignee or transferee of the decree cannot continue any proceedings previously commenced, nor can he institute any fresh proceedings for the execution of the decree, unless he makes an application under Order XXI, rule 16, to the Court which passed the decree. That application will be heard by the Court, not as a Court executing the decree, but as a Court which passed the decree, and it seems clear to me that until an order is made by the Court which passed the decree that execution may proceed at the instance of the transferee, it is not open to the transferee to execute the decree, nor is there any Court which is executing the decree. That this must be the right view can be shown by the instance of a Court having passed a decree transferring it to another Court for execution. In such a case the application under Order XXI, rule 16, must be made to the Court which passed the decree, and the Court then is certainly not the Court executing the decree The provisions then of order XXI, rule 2, sub-rule (3), would not be applicable as that only enacts that a payment of adjustment, which has not been certified or recorded as aforesaid, should not be recognised by any Court

executing the decree. That sub-rule lays down an exception to the ordinary law that a party against whom a claim is made, may plead as a defence that the claim has been satisfied.

In my opinion, therefore when an application is made to the Court which passed the decree by a transferee or assignee of the decree from the original decree-holder under Order XXI, rule 16, the application is made to the Court as a Court which passed the decree, and not as a Court which is executing the decree ; and it is open to the judgment-debtor to plead that the claim has already been satisfied even although the formalities prescribed by Order XXI, rule 2, sub-rules (1) and (2), have not been followed.

There is authority for this opinion in the decisions of the Madras High Court in *Ponnusami Nadar* v. *Letchmanan Chettiar* (1) and in *Ramayya* v, *Krishnamurti* (2).

In the first case A held a decree against C. It was arranged between C and B that B should advance the decretal amount to C as a loan and that an assignment of the decree should be obtained in the name of B for the benefit of C. The decree was accordingly assigned to B who applied for execution. C set up the above arrangement as a bar to execution. B contended that such arrangement amounted to an adjustment of the decree and not being certified to the Court it could not be given effect to under Order XXI, rule 2, of the Civil Procedure Code. There was a difference of opinion, Mr. Justice Abdur Rahim holding that the arrangement amounted to an adjustment of the decree, and not being certified, could not be pleaded as a bar to execution, Mr. Justice Sundara Ayyar holding that Order XXI, rule 2, did not make an uncertified adjustment invalid but merely forbade effect being given to such an adjustment when it was set up as a defence to the execution of a decree by one entitled to do so. The section did not disentitle the judgment-debtor to prove facts which would show that the applicant was not the real transferee, even if the facts he relied upon showed that the decree had been adjusted.

The facts in the second case were very similar. The learned Judges following the opinion of Mr. Justice Sundara Ayyar in the previous case held that Order XXI, rule 2, sub-rule (3), of the Civil Procedure Code, did not debar the judgment-debtor from proving facts which showed that the transferee of the decree applying for execution was merely a Benamidar of another judgment-debtor, even if the facts on which he relied showed that there had been a payment which had not been certified, and that when the transferee was found to be such a Benamidar, the Court was bound by Order XXI, rule 16, to refuse execution in his favour.

It seems to me, therefore, that the ordinary law applies when an application is made under Order XXI, rule 16. The judgment-debtor asserting that he has paid the decretal amount, even although it has not been certified, is entitled to prove it. It cannot be suggested that the judgment-debtor is not entitled to pay the decretal amount to the creditor, nor can such a payment be treated as a nullity because it is not certified. Therefore if the decretal amount is as a matter of fact paid, then the decree in the eye of law becomes satisfied, and any attempt to execute it on a demand for payment made is unconscionable conduct on the part of the decree-holder. It is true that the decree-holder may be allowed, under Order XXI, rule 2, sub-rule (3), to take advantage of the fact that the payment was not certified, to contend that it cannot be recognised by the Court executing the decree. But the fact remains, assuming that the payment has been made, that the decree has been satisfied and there is nothing to transfer, so that when a transferee comes to the Court which passed the decree and asks the Court to recognise him as a decree-holder, it is

(1) (1911) 35 Mad. 659—10 M. L. T. 442—(1911) 2 M.W.N.568—22 M. L. J. 170—12 Cr. L. J. 567—12 I. C. 657.

(2) (1916) 40 Mad. 296—19 M. L. T. 124—(1916) 1 M. W. N. 133—3 L. W. 186—32 I.C. 952.

open to the judgment-debtor to say "I have satisfied the debt which was merged in the l ecree." In my opinion, therefore, the rule must be made absolute, the order made by the lower Court set aside and the case remanded to that Court to be tried on the footing that notice under Order XXI, rule 16, had been issued and is being heard, and that on the hearing of that notice, it will be open to the judgment-debtor to prove that he satisfied the decree. All costs will be costs in the notice under Order XXI, rule 16. Both parties to be allowed to adduce evidence.

Crump, J.—The question which arises in the present matter is whether, where the assignee of a decree applies to execute the decree, the Court which has to consider such application is precluded from considering any objection to the validity of the assignment, if such objection involves proof of facts showing that there had been a payment or adjustment of the decree.

Now, under Order XXI, rule 16, where the transferee of a decree applies for execution, it is necessary that notice of such application shall be given to the transferor and the judgment-debtor, and the decree shall not be executed until the Court has heard their objections (if any) to its execution. The first paragraph of that rule clearly lays down that the application for execution must be made to the Court which passed the decree, and it is plain enough that the Court which passed the decree is not necessarily the Court executing the decree. The Court which passed the decree may have transferred it for execution to another Court, and had the Legislature intended to indicate the Court which executed the decree for the purposes of Order XXI, rule 16, no doubt it would have used apt words for that purpose.

Therefore, so far as the wording of the section goes, there seems no reason for extending to the consideration of an application under Order XXI, rule 16, the bar introduced by the third paragraph of Order XXI, rule 2. In that paragraph the words used are "the Court executing the decree", and in my opinion, that restriction should be confined strictly to those cases where it really applies. It seems to me that where a Court has to deal with an application on the notice under Order XXI, rule 16, the question which arises as a preliminary question, that is to say, whether the person who comes forward as assignee is or is not entitled to execute the decree, and until that question has been disposed of, no question of execution can arise, and, therefore, there is no Court at that stage which can be termed "the Court executing the decree." If that is the correct view, and it finds support from the decisions which my Lord the Chief Justice has discussed, it follows that the Court which has to deal with objections to the validity of an assignment is not precluded from considering those objections which are only excluded from the consideration of the Court executing the decree. It follows, therefore, that if satisfaction anterior to the date of the assignment is made out, the Court could consider that matter before allowing the assignee or so-called assignee to proceed with execution, and it seems to me abundantly clear that if the decree has, as a matter of fact, been satisfied before the date of the assignment, there is nothing which can compel the Court which passed the decree, to allow the alleged assignee to proceed with execution. Indeed it would be wrong to allow anything of the kind to be done. Therefore, in the present case the point which has not been etemined, must, in my opinion, be determined, that is to say, whether the decree was as a matter of fact discharged before the date of the assignment on which the opponent applying for leave to execute bases his title. I agree, therefore, with the order proposed.

Rule made absolute.

1923 BOMBAY 407

MACLEOD, C. J. AND CRUMP, J.

The Bandra City Municipality—Defendant—Appellant.

v.

Dr. D. A. D'Monte—Plaintiff—Respondent.

S. A. No. 703 of 1921, D/- 19th January, 1923, against the decision of the Joint J., Thana in Appl. No. 123 of 1920.

Bombay Dt. Municipal Act, Ss. 96 and 3 (7)—Erection of wall on old foundation—Permission necessary.

Rebuilding of a wall from its foundation is equivalent to "Building" under the Act and Committee's permission is necessary.

The Govt. Pleader—for Appellant.

R. W. Desai—for Respondent.

Judgment.—The plaintiff sued to restrain the defendant by a permanent injunction from pulling down any walls or other parts of the house No. 167 mentioned in para 1 of the plaint. The defendant Municipality had given notice to the plaintiff that the house was in a dilapidated condition, and after certain correspondence the Municipality agreed to the proposal of the plaintiff that the wall of the house on the west and east should be reconstructed and the damaged-wood work renewed, and permission to carry out the proposed alteration was given. The defendant contested the fact that permission had been given to the plaintiff to erect the eastern and western walls from the foundation; and that was one of the issues upon which the parties went to trial. It was found that permission had been granted. So far the plaintiff succeeded. But with regard to the southern wall, it was never suggested that permission had been given, or even been asked for, to erect a wall from its foundation, and it was contended for the plaintiff that it was not necessary to ask for permission, so that the 3rd issue raised was whether it was necessary for the plaintiff to have the permission of the Municipality to rebuild the southern wall of the house. That issue was found in the affirmative by the trial Court. The learned Judge said at p. 8 "To erect a building in Section 96 of the District Municipal Act, includes any material alteration, enlargement or reconstruction of any building, and under Section 3 (7) of the District Municipal Act 'Building' includes walls, verandahs etc. I think that constructing the southern wall from the foundation is a material alteration or reconstruction of the building."

In appeal the learned Appellate Judge said "But in my opinion in the circumstances the mere rebuilding of the southern wall from its foundation would not be 'erection of a building' within the meaning of section 96 of the District Municipal Act, and consequently no permission was necessary. It has been suggested that any change was effected in the dimension of the old wall. It has been urged that probably the Municipality might have insisted on a larger space being left between the present building of the plaintiff and his other building to the south if the plaintiff had gone to the Municipality for permission to build the southern wall. That may be, but there is nothing on the record to justify the inference that there was a deliberate attempt to offend against the Municipal Laws in this respect."

Now it is difficult, so far as we can see, to realise on what grounds the learned Judge could say that the mere rebuilding of the southern wall from its foundation would not be "the erection of a building". When the old wall was pulled down, then there was nothing left until rebuilding operations began. The mere fact that an exact replica of the old wall was built cannot prevent the new building from being a 'building' within the meaning of the Act. The point seems to us to be too clear to require elaboration. Really all that the plaintiff can urge is that it is a hard case that the defendant Municipality should object to this wall now that it has been built, although no permission was asked for. But we have nothing to do with questions of that sort in Second Appeal. We are merely to decide the question of law whether it was necessary under the Act for the plaintiff to obtain permission of the Municipality before he rebuilt this southern wall. That was necessary,

and therefore, the plaintiff was not entitled to the injunction he asked for.

The result will be that the appeal is allowed, and the decree of the trial Court will be restored with costs in this Court and the Court below.

It will now be a matter for adjustment between the parties whether the Municipality should take full advantage of the southern wall having been built without permission. No doubt the Municipality will consider our judgment and the finding of the lower appellate Court, with which we do not intend to quarrel that there was nothing on the record to justify the inference that there was a deliberate attempt to offend against the Municipal Laws in this respect.

Appeal allowed.

1923 BOMBAY 408

MACLEOD, C. J. AND CRUMP, J.

Motilal Satyanarayan and another — Appellants.

v.

Harnarayan Premsukh and another— Respondents.

F. A. No. 119 of 1922, D/- 7th February 1923, against the decision of First Class Sub. Judge at Dhulia in Suit No. 417 of 1920.

Probate and Administration Act, S. 89—Suit for malicious prosecution—C. P. Code, O. 22 R. 1.

The intention of the section is to express in a statutory form the maxim *actio personalis moritur cum persona.* Accordingly an action for malicious prosecution does not survive beyond the life-time of the plaintiff, even so far as it relates to the expenses incurred by the deceased plaintiff in defending himself against a prosecution. 44 M. 357 (F.B.) Foll.

[P. 408 C. 2 ; P. 409 C, 1]

B. G. Rao—for the Appellants.

B. J. Desai with H. B. Gumaste—for the Respondents.

Judgment.—The plaintiff Satyanarayan Dhanjishet brought a suit against the defendants to recover damages for malicious prosecution. Before the suit came on for hearing the plaintiff died and heirs sought to continue the action. Their application to be placed on the record as heirs of the original plaintiff was dismissed by the Subordinate Judge ; and the appellants in their arguments before us rely mainly on the decision in *Krishna Behari Sen* v. *The Corporation of Calcutta* (1) where it was held by a Full Bench that a suit for malicious prosecution falls within the general words of section 89 of the Probate and Administration Act, and not within any of the exceptions.

In *Rustomji Dorabji* v. *W. H. Nurse* (2) the learned Judges dissented from the decision in 31 Cal. 993 (1) holding that the expression " personal injuries not causing the death of the party " in section 89 of the Probate and Administration Act, does not mean injuries to the body merely, but all injuries which do not necessarily cause damage to the state of the person wronged."

We prefer to agree with that decision as otherwise we would have to read into the section the words "physical " or " to the body". It has been argued that the expression " other personal injuries' must refer to injuries *ejusdem generis* as the injuries referred to in the preceding sentence, namely " assault" as defined in the Indian Penal Code. When we refer to Section 351 for the definition of the word " assault" in the Indian Penal Code, we find that the offence of assault does not involve physical injury, but merely a threat to cause physical injury. Therefore the exception includes causes of action for defamation and assault neither of which cause physical injury ; and then includes " all other personal iniuries" except those which cause the death of the party. We think the intention of the section was to express in a statutory form the maxim *actio personalis moritur cum persona.* Accordingly an action for malicious prosecution does not survive beyond the life-time of the plaintiff.

But it was argued on the strength of the decision in *Twycross* v. *Grant* (3)

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(1) (1904) 31 Cal. 993—8 C.W.N. 745. (F. B.)

(2) (1921) 44 Mad. 357—40 M. L. J. 173—(1921) M.W.N. 121—29 M. L. T. 121—14 L.W. 200—62 I.C. 260 (F. B.)

(3) (1878) 4 C. P. D. 40—48 L. J., C. P. 1—39 L.T. 616—27 W.R. 87.

that the action, so far as it related to expenses incurred by the deceased plaintiff in defending himself against a prosecution, could be transmitted to the personal representatives. That case was considered in *London* v. *The London Road Car Company* (4) which was a case against a defendant for damages for personal injuries caused by an accident. The plaintiff had claimed as consequential damages £. 75 for loss of earnings, and various sums for medical expenses. The plaintiff died before the action was heard. An application had been made on the part of the administratrix, asking to be allowed to continue the action for these parts of the claim, which was refused by the Judge at Chambers. In appeal from that Order Lord Coleridge said:—"The action was for personal injuries, i.e., for injuries to the person and the heads of damage relied upon (except as to the damage to the coat) resulted directly from these personal injuries. As to *Twycross* v. *Grant* (3) it was not an action for injuries to the person, but for pecuniary damage arising from wrongful acts of another nature. No case showed that an action for personal injuries causing pecuniary loss could be continued after the death of the party injured; and the case of *Pulling* v. *North Eastern Railway Company* (5) showed just the contrary."

In this case the injury caused to the plaintiff by wrongful prosecution was personal just as much as if he had been injured in a railway accident. Consequently his representatives cannot continue the action to recover tho pecuniary loss which he suffered owing to his having had to defend himself against the prosecution. We think, therefore, the decision of the Court below was right and the appeal must be dismissed with costs.

Appeal dismissed.

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(4) (1888) 4 T L. R. 448.
(5) L. R. 9 Q. B. D. 110.

1923 BOMBAY 409

MACLEOD, C.J. AND CRUMP, J.

Kashinath Hari Bondale—Defendant—Appellant.

v.

Vishwanath Bhiko Padhye Bondale and others—Plaintiffs—Respondents.

S. A. No. 117 of 1922, D. 19th December 1922, against the decision from the Dt. J., Ratnagiri in Appl. No. 147 of 1920.

Injunctions - General injunction - Mention of particular acts unnecssary.

It is always undesirable that an order should be made forbidding a party enjoined generally from doing particular acts. If once the Court enjoins the defendant against particular acts there is no limit to the number of acts which might have to be mentioned. The general injunction is sufficient. [P 410 C 1]

A. G. Desai—for Appellant.

P. B. Shingne—for Respondents.

Judgment.—The trial Court passed an order in favour of the plaintiffs who asked to have it declared that the temple of Shri Vithoba situate at Devgad being a public temple they had a right to worship the said deity. They also asked for a permanent injunction restraining the defendant from obstructing the plaintiff in the enjoyment of their said rights. They also prayed for the removal of a certain lock put up by the defendant on the door of the inner room of the temple. After granting the perpetual injunction asked for, and directing the defendant not to obstruct the plaintiffs in doing the acts referred to in para 4, clause 1 of the plaint the order then proceeded as follows:—As the lock has been clearly removed by the order of the Court I order that the defendant shall not lock the door again." That order was confirmed in appeal. The defendant in second appeal asked us to delete from the order those words with regard to the locking of the door, on the ground that they are unnecessary as they may led to undue interference with his powers of management. It appears to us that there was no necessity whatever to pass a mandatory order against the defendant forbidding him from locking the door again. The perpetual injunction granted is quite sufficient. If the plaintiffs are in any way

instructed in the future, then they have their remedy by executing the decree. It is always undesirable that an order of this kind should be made forbidding a party enjoined generally, from doing particular acts. If once the Court enjoins the defendant against particular acts, there is no limit to the number of acts which might have to be mentioned. The general injunction is sufficient. Decree to be amended to that extent. No order as to costs.

Decree amended.

1923 BOMBAY 410

MACLEOD, C. J. AND CRUMP, J.

Peerkha Lalka—Defendant — Appellant.

v.

Bapu Kashiba Mali—Pliantiff—Respondent.

S. A. No. 149 of 1922, D/- 31st January 1923, from the decision of Joint J, of Poona, in Appeal No. 298 of 1920.

T. P. Act, S. 3—Notice—Registration.

Registration by itself is no notice. There must be other circumstances in the case from which the Court could come to the conclusion that the subsequent purchaser had notice of the prior registered agreement and the burden of proof lies on the person setting up notice. 36 B. 446 Dist.

S. R. Parulekar—for the Appellant.
B. G. Rao—for the Respondent.

Judgment.—One Nazukbi, the owner of the suit property, passed an agreement in plaintiff's favour on April 2,1907, to sell the land to the plaintiff. On September 4, 1907, Nazukbi agreed to sell the land to one Chimaji. Chimaji obtained a sale-deed on October 18, 1907. The plaintiff obtained his sale-deed on November 29, 1907. All those documents were registered. The defendants purchased the land from Chimaji on July 28, 1914. On August 2, 1919, the plaintiff filed this suit to recover from the defendants the suit property alleging that the defendants dispossessed him on July 28, 1914. That is the date of the defendant's sale-deed from Chimaji. The plaintiff failed to prove that he had been in possession in 1914 and had deen dispossessed.

The question is whether Chimaji took his sale-deed in October 1907 with notice of the previous agreement by Nazukbi to sell the same property to the plaintiff. It has been urged that registration of the agreement of April 2, 1907, was notice to Chimaji. But it has now been settled by a decision of the Privy Council that registration by itself is no notice. There must be other circumstances in the case from which the Court could come to the conclusion that Chimaji had notice of that agreement. It has been urged that the onus lay upon Chimaji, or the defendants claiming through him, to prove that they had no notice of the prior agreement, and the case of *Himatlal Motilal* v. *Vasudev Ganesh* (1) was relied upon. That case must depend upon its own facts, and from the judgment it appears that the lower Court had come to the conclusion that the appellants-defendants had knowledge of the plaintiff's contract prior to the date of the conveyance ; but if that case is to be considered as an authority for the proposition that a person in the position of the defendants in this case has to prove the negative, that he took without notice of the prior agreement to sell, then with the greatest respect I cannot agree. The defendants had a title, and anybody seeking to dispossess them must prove his prior right to possession. If the plaintiff had simply proved his prior agreement and nothing more, it cannot possibly be said that he would be entitled to a decree. But if that proposition were correct it would follow that the plaintiff would be entitled to a decree merely on proving his prior agreement of sale, unless the defendants proved that although they had title and possession, they had no notice of the agreement. In my opinion the decision of the Court below was correct and the appeal must be dismissod with costs.

Appeal dismissed

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(1) (1912) 36 Bom. 446—14 Bom. L.R 634—16 I. C. 680.

1923 BOMBAY 411

MACLEOD, C. J. AND CRUMP, J.

Lala Miya Shiak Abbas Potrik and others—Defendants—Appellants.

v.

Manubibi and others—Plaintiffs—Respondents.

S. A. No. 158 of 1922, D/- 30th January 1923, from the decision of Dt. J., of Ratnagiri, in Appeal No. 248 of 1919.

Mahomedan Law—Co-heirs—Decree against one—Effect on the others.

The plaintiffs sued for redemption of the property described in clause (*e*) of para 2 of the plaint. The properties originally belonged to B., one who left a widow H., a son D., and two daughters, plaintiffs Nos. 2 and 3. After B's death, a suit was filed by a creditor of his, and only D. as represented by H., his mother, was impleaded. In execution of the decree which was passed in favour of that creditor, certain property belonging to the estate of B. was put up for sale. That property had already been mortgaged to one A. in 1878, so that the heirs of B. had only the equity of redemption, which was purchased by A's father. The present defendants Nos. 1 and 2 were the sons of A.

Held: that plaintiffs Nos. 2 and 3 were not bound by the decree in a suit to which they were not parties, nor would their interests in their father's estate pass by the sale in execution of that decree and therefore they were entitled to redeem to the extent of their shares. 43 B. 412, Foll.

G. N. Thakor with G. B. Chitale—for Appellants.

H. C. Coyajee with A. G. Desai—for Respondents.

Judgment.—The plaintiffs sued to recover possession by redemption of the property described in clause (*e*) of para 2 of the plaint. The properties originally belonged to Bhaudin who left a widow Hamidabibi, a son Daud, and two daughters who are plaintiffs Nos. 2 and 3. After Bhaudin's death, a suit was filed by a creditor of his, and only Daud was made a party, but as he was a minor, Hamidabibi, his mother, was impleaded as his guardian and filed a written statement on his behalf. In execution of the decree which was passed in favour of that creditor, certain property belonging to the estate of Bhaudin was put up for sale. That property had already been mortgaged to one Abbas in 1878, so that the heirs of Bhaudin were only entitled to the equity of redemption, which was purchased by Ali, father of Abbas. The present defendants Nos. 1 and 2 are the sons of Abbas. A decree for redemption was passed in favour of plaintiffs Nos. 2 and 3 by the trial Court, and that has been confirmed in appeal.

The main question is whether the daughters of Bhaudin were deprived of their rights to the property by the decree passed against Daud and the subsequent sale. Ordinarily speaking they would not be bound by the decree in a suit to which they were not parties, nor would their interests in their father's estate pass by the sale in execution of that decree. That was decided by a Bench of this Court in *Bhagirthibai* v. *Roshanbi* (1).

The learned Judges in that case considered the decisions in *Khurshetbibi* v. *Keso Vinayak* (2) and *Davalava* v. *Bhimaji Dhondo* (3). Mr. Justice Heaton said [on page 426 of 43 Bom.] :—

"My learned brother and myself have considered the matter most carefully and have come to the conclusion that it would not be incumbent on us to follow the case of *Khurshetbibi* v. *Keso Vinayak* (2) if that case be held to affirm that the theory of substantial representation derived from the Hindu law applies to Mahomedans. For, to follow that case, if it so decides, would be to accept, without any stated reason for doing so, the application to Mahomedans of a rule evolved out of Hindu law; and to do this would, we think, be to set aside the principles underlying the decision of the Full Bench of this Court in *Isap Ahmed* v. *Abhramji Ahmadji* (4)."

We think it is advisable to follow the latest decision on the point, which is also supported by the opinion of Sir Roland Wilson in his Digest of

(1) (1918) 43 Bom. 412—21 Bom. L. R. 329—51 I. C. 18.
(2) (1887) 12 Bom. 101.
(3) (1895) 20 Bom. 338.
(4) (1917) 41 Bom. 588—19 Bom. L. R. 579—41 I. C. 761 (F.B.)

Anglo-Mahomedan Law, 3rd Edition. See also paragraphs 566, 567 of F. B., Tyabji's Principles of Mahomedan Law. The plaintiffs Nos. 2 and 3 will, therefore, be entitled to redeem, but the decree as drawn up by the trial Court is too wide, as these plaintiffs would only be entitled to redeem to the extent of their shares in the estate of Bhaudin, which would be 7/32 each. The case must go back to the trial Court to ascertain the exact amount which they must pay, and what properties should be redeemed by such payments, as there are five properties in suit, and we are told that only four of these properties were purchased by the defendants at the sale in execution of the decree in Suit No. 691 of 1880. If that is the case, the fifth property is only subject to the mortgage, Exhibit 84. We do not know whether it really makes very much difference, because plaintiffs Nos. 2 and 3 are entitled to consider that the sale does not in any way affect their interests. Therefore all the five properties may be taken as subject to the mortgage and liable to be redeemed. On the plaintiffs Nos. 2 and 3 paying the redemption money they will be entitled to be placed in joint possession with the defendants. The plaintiffs Nos. 2 and 3 will be entitled to their costs in this Court and in the Court below. Liberty to plaintiffs Nos. 2 and 3 to apply when they pay the money in execution for partition.

1923 BOMBAY 412 (1)

MACLEOD, C. J. AND C[illegible], J.

Dagdu Rajarum Marwadi—Applicant.

v.

Laxman Pandushet Thakur—Opposite Party.

Civil Ex. Application No 231 of 1922, D/- 22nd March 1923, against an order passed by Joint Sub. J. at Thana.

Practice—Pleader — Vakalatnama in claim proceedings.

No fresh Vakalatnama is required in claim proceedings.

D. C. Virkar—for the Applicant.

Judgment.—We think that the rule must be made absolute. The decree-holder's pleader put in his Vakalatnama in the proceeding for execution. It cannot be contended that because a claim petition was put in against the execution, it was necessary for the decree-holder to file another Vakalatnama.

Rule made absolute.

1923 BOMBAY 412 (2)

MACLEOD, C.J. AND CRUMP J.

Bala Raghu Dhanwade — Plaintiff — Appellant.

v.

Bhiku Genu Jambhale—Defendant.—Respondent.

S.A. No. 5 of 1922, D. 23rd February 1923, from the decision of Dt. J. of Satara, in Appeal No. 283 of 1920.

Stamp Act, S. 36—Document once admitted —Objectian as to deficient stamp not allowed.

When a document has been admitted in evidence in the trial Court, it cannot be called in question in the same suit or in appeal from the same suit, on the ground that the document was not duly stamped. 13 B. 449 F.B. and 18 B 737 Foll.

W. B. Pradhan — for the Appellant.

Judgment.—The learned Judge varied the decree of the trial Court on account of the promissory note sued not being sufficiently stamped. There is no reference in the judgment to the Full Bench decision in *Devachand* v. *Hirachana Kamaraj* (1) and the decision in *Shiddapa* v. *Irava* (2) which decided that when a document has been admitted in evidence in the trial Court, it cannot be called in question in the same suit on the ground that the document was not duly stamped. This is now provided by S. 36 of the Indian Stamp Act of 1899 which corresponds with S. 34, proviso iii of the Act of 1879, on which those decisions were based. We, therefore, allow the appeal and restore the decree of the trial Court with costs throughout.

Appeal allowed.

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(1) [1889] 13 Bom. 449. (F.B.)
(2) [1893] 18 Bom. 737.

1923 BOMBAY 413

MACLEOD, C. J. AND CRUMP, J.

Laxmichand Javermal — Plaintiff—Appellant.

v.

The Municipal Committee of Nandurbar—Defendant—Respondent.

Civ. App. No. 174 of 1922, D/- 23rd January 1923, from the 2nd Class Sub. J. Nandurbar in S. C. S. No. 142 of 1921.

Bombay District Municipal Act. — Octroi Schedule—Construction—Ad valorem *duty*.

The Municipality claimed to charge on the plaintiff's goods, which were bales of cloth, an *ad valorem* rate on the value of the maunds according to their present value and not according to the value, appearing in the schedule of rates. The octroi Schedule was divided into three columns: in the 1st column were the names of various articles; in the 2nd column was the rate per cent load; in the 3rd column was the weight in maunds or price. For cloth the rate per cent load was 12 annas per every Rs. 100 or part of it. In the 3rd column the price was to be taken at Rs. 500 per cent load of 16 maunds.

Held: it is clear that Rs. 500 was the limit value of a full cart load of cloth of all sorts and articles made of cotton, silk, etc., upon which the rate of 12 annas per cent was to e levied; otherwise the amount of Rs. 500 in the third column has no meaning. If it is considered desirable in the interest of the Municipality that certain articles should be charged on their actual value *ad valorem*, it would certainly be necessary to add to the schedule, rules prescribing how the real value of these goods was to be ascertained. It would also be necessary to set up the proper machinary for arriving at such valuation.[P. 414,C. 1]

R. J. Thakur—for the Applicant.

P. V. Kane—for the Opponent.

Macleod, C. J. — The plaintiff filed this suit against the defendant Municipality claiming Rs. 60-4-6 being the amount charged by the Municipality by way of octroi duty on cloth over and above what it was under the law entitled to levy. It is admitted that section 167 of the District Municipal Act applied, and therefore the first 5 items sued for are beyond time. Shortly put, the Municipality claimed to charge on the plaintiff's goods, which were bales of cloth, an *ad valorem* rate on the value of the goods according to their present value, and not according to the value appearing in the Schedule of rules. The Octori Schedule is divided into 3 Columns. In the 1st Column are the names of various articles; in the 2nd Column is the rate per cart-load; in the 3rd Column is the weight in maunds or price. The cart-load is to be reckoned at 16 maunds of 40 paka sheers. Cloth comes under class VII as cloth of all sorts and articles made of cotton, silk, and wool; the rate per cart-load is 12 annas per every Rs. 100 or part of it. In the 3rd Column the price is to be taken at Rs. 500 per cart-load of 16 maunds.

It seems to me clear that Rs. 500, was the limit value of a full cart-load of cloth of all sorts and articles made of cotton, silk &c., upon which the rate of 12 annas per cent was to be levied. Otherwise the amount of Rs. 500 in the third Column, has no meaning. But if no amount was mentioned, as the rate was 12 annas per cent., it would be necessary to have some method for appraising the value of such goods by means of an appraiser at the Octroi Station. But to obviate all difficulties of that kind, the framers of the Schedule fixed the price per cart-load on which the *ad valorem* duty was to be paid.

If we turn to Class VIII which includes iron and articles of iron, the rate per cart-load is 12 annas, the price of a cart-load of 16 maunds being taken at Rs. 150.

Again copper, brass, tin, lead, zinc and articles made therefrom are all charged at 8 annas per cart-load, the value of a cart load of 16 maunds being taken at Rs. 400.

In those cases as there was no rate per cent, it really was not necessary to place any value on the cart-load, for according as the cart appeared to the clerk to have a less or a greater load than the average load, he would be entitled to charge more or less than 12 annas.

That appears to me to be the obvious construction which the Court should put on this Schedule. Unfortunately in 1919, the examiner of Local Fund Accounts found fault with the method upon which the octroi duty had been charged.

He said. "As it appears to be the intention to charge these articles, against which value is stated, *ad valorem* the present practice should either be stopped, and cloth, iron, and

other metals etc, against which value is stated, should be charged *ad valorem* after seeing the original invoices showing the purchase prices received by the importers from the exporting merchants, or the Schedule amended with the sanction of the Commissioner C. D. so as to legalize the present practice. It appears advisable in the interest of the Municipality to charge cloth and iron etc. or articles made thereof *ad valorem* as is done by most Municipalities."

It seems to me that the proper procedure was exactly the opposite. If it was considered desirable in the interest of the Municipality that cloth and iron etc. or articles made thereof should be charged on their actual value, *ad valorem* it would certainly be necessary to add to the Schedule, rules prescribing how the real value of these goods was to be ascertained. It would also be necessary to set up the proper machinery for arriving at such valuation. It seems to me probable that when the Schedule was framed it was considered advisable that there should be as little delay as possible at the Octori Station, and that the methods of arriving at the Octroi duty to be charged should be of the simplest possible description. If it was intended that the contents of cart-loads of goods such as these of various descriptions and quality had to be valued at the Octroi Station, and if the rate was to be charged on such value, then it was necessary to have expert appraisers to estimate that value. Moreover it would not be possible in many cases to obtain without much delay the invoices showing purchase prices received by the importers from the exporting merchants. However, if the Municipality wish to charge Octori duty *ad vaolrem* on the value of the goods imported within their limits, then they must set up a proper machinery for that purpose. The rules will be made absolute and there will be a decree for the plaintiff for Rs. 8-4-0. No order as to costs.

Crump, J.—I agree.

Rule made absolute.

✱ 1923 BOMBAY 414

MACLEOD, C. J. AND CRUMP, J.

Jayavant Rao Narayan Deshmukh—Applicant.

v.

Narsing Sakharam Deshmukh — Opponent.

Civil Appl. No. 213 of 1922, D/- 25th January 1923 from the Dt. J. Nasik in Mis. Appl. No. 32 of 1921.

Civil P. C., S. 152—Decree passed against legal representative personally — Application to amend decree at a late stage entertainable.

To pass a decree against the legal representative of the deceased defendant so as to make him personally liable is not competent to a Court to direct. When the attention of the Court is drawn to the error, even although it might be at a rather late stage of the proceedings, there is no reason why on that account the mistake should not be remedied. [P. 415, C. 1]

D. R. Patwardhan — for the Applicant.

D. A. Tuljapurkar—for the Opponent.

Judgment.—A suit was brought against one Narayanrao in the Court of the Joint Subordinate Judge at Nasik, being Civil Suit No. 225 of 1917. Narayanrao died pending the proceedings, and his son was brought on the record as his legal representative on the 16th June 1918. The suit was dismissed on the 20th June 1918. But in appeal the decree of the trial Court was reversed and a decree was passed against the son on the 16th June 1919 The proper decree of the Court would have been against the son as the legal representative of his father to the extent of any assets which might come into his hands from the estate of his father. No one however, seems to have taken any notice of the error which had been made and even in 1920, when the Darkhast was filed Narayanrao's son paid Rs. 10. A fresh Darkhast was taken out in 1921 asking for the personal arrest of the present petitioner who then applied for a review of the decree of the appellate Court for the purpose of amending the decree in conformity with section 52 of the Civil Procedure Code. The District Judge considered that there was no error apparent on the

face of the decree ; that it would have been an error of this description if the petitioner when brought on the record had asked the trial Court not to pass a decree against him, and if a decree had been made, it should be made against the estate of the deceased which might come into his hands ; and that no such prayer was made. It seems to me it is not an excuse for an error of this description that the party affected by the error made no application at the time. To pass a decree against the legal representative of the deceased defendant so as to make him personally liable is not, in my opinion, competent to a Court to direct. When the attention of the Court was drawn to the error, even, although it might be at a rather late stage of the proceedings, there was no reason why on that account the mistake should not be remedied. I think the Rule must be made absolute and the decree must be amended so as to direct the payment by the defendant out of the assets which may have come into his hands from the estate belonging to his deceased father. No order as to costs.

Rule made Absolute. Decree amended.

✱ 1923 BOMBAY 415

MACLEOD, C. J. AND CRUMP, J.

Raghunath Vithal Bhat—Plaintiff—Appellant.

v.

Madhav Raval Kamat — Defendant—Respondent.

S. A. No. 247 of 1922, D/- 7th March 1923, from the decision of Dt. J. of Kanara, in Appeal No. 33 of 1921

Hindu Law—Partition—Portion reserved for the parents—Rights of sons in the portion.

Where at a partition between sons, a portion is left for the parents, to be divided among sons after parents' death, the sons get a vested remainder and not a contingent interest in the land. If a son mortgages his interest in that portion during the life-time of the parents the right of the auction purchaser under the mortgage decree to sue for possession accrues on the death of the parents. [P. 415 C. 2]

G. S. Rao—for the Appellant.

Judgment.—This appeal is confined to one piece of land 25 gunthas of Survey No. 71, Pot No. 1, the plaintiffs having succeeded with regard to the other lands in the suit. The plaintiffs have lost in both the lower Courts and they now appeal on the grounds mentioned in the memorandum of appeal. The respondents do not appear. The land originally belonged to one Biranna and his three sons, Hanmanna, Timmanna and Narayan, as joint family property. In 1898 the family separated, and in the partition deed various lands were allotted to the three sons. Survey No. 71, Pot No. 1, was allotted to Biranna without power of alienation, it being provided that on the death of Biranna and his wife, the land was to be divided between the three sons in certain proportions. Both the Courts seem to have held that the three sons took a contingent interest but they took under that deed a vested remainder in the land, which they could have disposed of even before they were entitled to possession. Narayan, who was entitled to twenty-five gunthas, mortgaged his share by a simple mortgage to the plaintiffs. A decree was passed on the mortgage in 1907 and eventually the property was brought to sale and purchased by the plaintiffs in 1916. Before Biranna died a suit was brought against him in which a decree was passed by which he lost possession of the suit land. The learned Judge has held that that decree was binding on the sons as the heirs of their father. It would not bind them as they were nct the heirs of their father. They had a vested interest in the remainder, subject to the lives of their father and mother. They would uot be entitled to possession until the death of their mother, and it is difficult to see why neither of the lower Courts was satisfied with the death certificate produced by the plaintiffs. We think the death certificate ought to have been treated as proof of Davamma's death, and therefore limitation could only run against the remainder man from 1908. But plaintiffs as mortgagees would not be bound by possession being taken from Biranna, the mortgage being a simple mortgage. That was decided by a Full Bench of

the Madras High Court in *Vyapuri* v. *Sonamma Boi Ammani* (1), where all the authorities on the subject are very fully discussed. In any event as Narayan was only entitled to possession in 1908, even he would not be barred from filing a suit at the time the plaintiffs filed their suit.

We think, therefore, first, on the ground that there was a vested remainder in the sons and not a contingent remainder; and, secondly, on the ground that the suit was not barred, that the plaintiffs are entitled to succeed to the twenty-five gunthas of Survey Number 71, Pot No. 1 which are in dispute. There will be a decree in their favour for that Survey Number. There will be an inquiry as to mesne profits from the date of suit till possession is given or three years from this date. The plaintiffs will be entitled to their costs against respondents Nos. 3 to 5.

Appeal allowed.

(1) (1915) 39 Mad. 811—2 L. W. 1080—29 M.L.J. 645—18 M.L.T. 436—(1915) M. W. N. 927—31 I. C. 412 (F. B.)

1923 BOMBAY 416

MACLEOD, C. J. AND CRUMP, J.

(*Patel*) *Ambaram Kuberdas*—Plaintiff-Appellant.

v.

The Secretary of State for India — Defendant—Respondent.

Appeal No. 189 of 1921 D/- 29th January, 1923 from the Dt. J., Ahmedabad, in Suit No. 19 of 1916.

Bombay Revenue Jurisdiction Act, S. 11—Collector's refusal to grant sanad—Suit.

Section 11 clearly prevents High Court from entertaining any suit on account of the Collector's refusal to grant the plaintiff a sanad, as the plaintiff has to prove, previously to filing the suit, that he had presented all such appeals allowed by the law for the time being in force, as within the period of limitation allowed for bringing such suit it was possible to present.

[P. 416, C. 2]

H. V. Divatia—for the Appellant.

The Government Pleader—for the Respondent.

Judgment.—We think the District Judge was right in holding that the suit was barred under section 11 of the Bombay Revenue Jurisdiction Act X of 1876. The plaintiff having purchased certain property from one Kasam Punja made an application to the Collector, which must have been due to the fact that he could not get possession of the property which he thought he had purchased. The Collector replied that as Kasan Punja, the Plaintiff's vender, had not formed his ownership at the line of the Suburban Survey enquiry, it was held to be Government lands. Therefore the application in which the applicant had held a right to the said land and asked for a sanad in respect of the same could not hold good, because the land was Government land. That refusal to grant a Sanad was the cause of action on which the Plaintiff relied when he filed this suit.

It is also clear from the notice he gave to the Secretary of State under section 80 of the C. P. Code, that the notice was given because his application to the Collector had been rejected. The plaintiff could have appealed under Section 203 of the Land Revenue Code, but he omitted to do so. Section 11 of the Revenue Jurisdiction Act clearly prevents us from entertaining any suit on account of the Collector's refusal to grant the plaintiff a sanad, as the plaintiff had to prove previously to filing the suit, he had presented all such appeals allowed by the law for the time being in force, as within the period of limitation allowed for bringing such suit, it was possible to present. He presented no such appeals. This appeal is, therefore, dismissed with costs.

Appeal dismissed.

1923 BOMBAY 417

MACLEOD, C. J. AND CRUMP, J.

The Government of Bombay— Original Acquirer—Appellant.

v.

Khanderao Ramchandra Talpade — Original Claimant—Respondent.

F. A. No. 274 of 1922, D/- 21st February, 1923 against the decision of the President of the Tribunal of Appeal, Bombay in Ref. No. 29 of 1920.

Toka lands–Apportionment of value between Government and Toka tenants–Principles.

Considering the varying nature of the Toka lands,it is out of question to attempt to rule that in every case where Toka land is acquired by Government, the rate of assessment which it is expected Government would levy in 1929 when the 50 years' period expires, is a certain percentage of the present value of the land, because the rate to be now fixed on the present value of the land must be determined in such case according to the prospects which the land has of improving or decreasing in value, and other varying circumstances. In respect of land held under the Toka tenure the right of Government to increase the Toka rent is not subject to any specific limitation. A declaration by Government of its present policy cannot affect the apportionment to be made by the Court as of the date when the land was notified. Also it is useless to inquire into what a purchaser of Government rights in Toka land would give for such rights, or what a present owner of Toka land would put by at the present moment in order to secure his position in 1919 when the previous settlement came to an end. All such calculations are themselves purely fanciful, and do not in any way assist the Court in arriving at a conclusion which itself can only be based on pure speculation. They merely delude the Court into thinking that it has arrived at a conclusion, not on speculation but on sound reasoning. The Court has to decide the views of Government, and no doubt has to consider that Govt. are entitled at the end of the period to re-assess the land at a rate entirely at the end within their discretion, and the views of the claimants, the present owners, who may consider that they have rights in the nature of occupancy rights which would entitle them to pay something less than a rack rent, which otherwise Government would charge on the basis that the lands were liable to be resumed at the end of the period. It is certainly desirable in all these cases that Court should avoid as far as possible fanciful, speculation which can be of no assistance towards fixing a figure which is itself a matter of speculation. [P. 417 C. 2 P. 418 C. 2]

The Advocate General with Government Solicitor — for Appellant.

Desai Campbell with K. N. Koyajee — for Respondent.

Judgment.—These are 5 appeals from the decisions of the Tribunal of Appeal in references 29, 31 and 32 of 1920 and 78 and 79 of 1920, in which certificates have been given that they are fit cases for appeal to the High Court. Those certificates appear to have been granted on the ground that an important question of principle was involved, although as a matter of fact, if there a question of principle was involved, it had already been before the High Court on two different occasions, and the High Court, as far as it could, laid down what method should be followed with regard to the apportionment of the present value of Toka lands between Government and the Toka tenants. But it seems that each party wants this Court not only to lay down some uniform method of apportionment, but to go still further and fix the rate of assessment for arriving at the apportionment in all cases. No doubt that would be very desirable, but considering the varying nature of these Toka lands, it appears to us to be out of question to attempt to rule that in every case where Toka land is acquired by Government, the rate of assessment which it is expected Government would levy in 1929 when the 50 years period expires, is a certain percentage of the present value of the land, because the rate to be now fixed on the present value of the land must be determined in each case according to the prospects which the land has of of improving or decreasing in value, and other varying circumstances.

On that question it may be said that the lands in all these References were of very much the same nature, and their value was fixed at a time when the value of the land had arisen by speculation considerably beyond the usual rate, while there does not seem to be much prospect of those values increasing by the year 1929. It may even be that these lands by 1929 might decrease in value However that may be, we have to fix a rate for the assessment and another rate for interest at which the assessment should be capitalized. As was stated in F. A. No. 147 of 1911, which is known as Pasta's case :—

"In respect of lands held under the Toka tenure the right of Government

to increase the Toka rent is not subject to any specific limitation. The present Toka rent for the land in question is Rs. 13-11-7. By a resolution of the 14th August 1879 this rent was declared for a period of 50 years. The next revision will therefore take place in 1929. It is agreed that the amount of rent receivable up to that time is of a present value of Rs. 213; the contest is as to the value of the subsequent interest of Government in Toka rents payable after that date. The question is one which cannot be settled with anything approaching to certainty but the claim formulated by Government and accepted by the Tribunal of Appeal is based unon two probabilities, first that Government will in 1929 adhere to their declared policy of demanding 4 per cent of the estimated value of building land as the rent or assessment payable to them and secondly, that the value of the land in question will certainly not be less than that fixed as its present value under the proceedings which have resulted in its acquisition by the Improvement Trust. Taking then Rs. 2-5-0 per square yard as the present value making a total value of Rs. 18, 278, a 4 per cent rent. in 1929 would produce Rs. 731 per annum. Although Rs. 731 is two-thirds of a 6 per cent. return on the capital value and would at present only leave 2 per cent. for the tenant the question to be determined is whether Rs. 731 is a rent charge greater than the property can reasonably be expected to bear in 1929 having regard to the prospective development of building land in the North of the Island Upon this point the expert Tribunal entertain no doubt. They say 'we have arrived at the view that it will be land ripe for building when that assessment comes to be levied and land of this area and ripe for building in that locality and position will carry the assessment referred to.' ".

There is no doubt the land in that case was valued as not ripe for building at a very low rate of Rs. 2-5-0 per square yard. Assuming that the land would be ripe for building in 1929 and would fetch anything between Rs. 5 to 15 per square yard, 4 per cent on Rs. 2-5-0 would be a very much smaller rate on a value between Rs. 5 and 15. But it must also be remembered that the rate of Government Paper was 3·2 per cent. at that time.

It seems to us that it is hopeless at the present moment to speculate on what the Government policy will be in 1929. An attempt was made to place before the Tribunal evidence that the present policy of Government was, in the case of Toka land which came into the possession of Government, to demand a 6 per cent. rate on the present value. But the letter of the Collector which was put in with the reply of Government was dated sometime in 1921, and such a declaration of policy could not affect the apportionment to be made by the Court as of the date when the land was notified. It also appears to us useless to inquire into what a purchaser of Government rights in Toka land would give for such rights, or what a present owner of Toka land would put by at the present moment in order to secure his position in 1929 when the previous settlement came to an end. All such calculations are themselves purely fanciful, and do not in any way assist the Court in arriving at a conclusion which itself can only be based on pure speculation. They merely delude the Court into thinking that it has arrived at a conclusion, not on speculation, but on sound reasoning. We have to decide between the views of Government and no doubt we have to consider that they are entitled at the end of the pariod to re-assess the land at a rate entirely within their discretion. and the views of the claimants, the present owners, who may consider that they have rights in the nature of occupancy rights, which would entitle them to pay something less than a rack rent, which otherwise Government would charge on the basis that the lands were liable to be resumed at the end of the period.

Whether in 1929 there will be any Toka tenants still left in Bombay is also problematical. But if there are any, it is quite possible that they may attempt to urge their claims in this Court, and naturally it is quite impos-

sible for any one to place any value on such claims at the present moment. Still our own view is that Toka tenants are entitled to some consideration, and they are not to be treated at the present day as if in 1929 they would be rack-rented off their lands. In these cases we have to fix the rate of assessment on the present value and the rate at which it should be capitalized; and on a consideration of all the arguments which have been placed before us by the Advocate General for the Government and Mr. Dasai, we think we should fix 4 per cent. as the rate of assessment on the present value of the land and 6 per cent. as the rate for capitalization. The rate of capitalization can, we think, be laid down with absolute certainty. We have to take the present value of an annual payment to commence in 1929, 6 per cent is the usual rate of interest, and has always been considered the usual rate of interest in this Court, so we see no reason why it should not be adopted in these cases, without considering whether the assessment of these lands in 1929 will be well secured or unsecured. It is certainly desirable in all these cases that we should avoid as far as possible fanciful speculation which can be of no assistance towards fixing a figure which is itself a matter of speculation. For the purpose of apportionment between the rival claims of Government and the tenants we may say that it would not be fair in 1919 to fix the prospective rate of assessment higher than 4 per cent, while there may be cases in which it may be equitable to allow a lower rate. Therefore calculations will be made in each of the References according to the rates which we have laid down, and the orders of the Tribunal of Appeal will be amended in accordance with our decision.

One cross-objection was urged on the part of the respondents in References 29, 31 and 32 of 1920 against the direction that they were to get only half their costs from Government. But Reference 26 was tried together with these References, and the claimant in Reference 26 got all his costs. We presume that the Tribunal considered that on a consideration of the facts in these References 29, 31 and 32 the fair order was to make costs payable only to the extent of half. That is entirely a matter within the discretion of the Tribunal and we connot possibly interfere with it.

Reference answered

1923 BOMBAY 419

MACLEOD C. J. AND CRUMP, J.

Nilawa Iraya Mathapati and another— Defendants—Appellants.

v,

Revanshidaya Shidlingaya— Plaintiff-Respondent.

S. A. No. 505 of 1922, D/-9th March 1923, against the decision of the Dt. J. of Bijapur in Appeal No. 52 of 1920.

Practice--Relief--Suit for maintenance—Quantity.

In all cases where a right to maintenance has been allowed the quantum of maintenance should be decided in the suit itself even though the parties may not have in the first instance provided the Court with the materials. The parties entitled to maintenance who are generally females should not be left to separate proceedings. [P. 419 C. 2]

A. G. Desai—for Appellants.

H. B. Gumaste—for Respondent.

Judgment .—The District Judge was wrong in not remanding the case to trial Court to ascertain what maintenance should be payable to defendants Nos, 1 and 11. We have repeatedly laid down the general principle that in all cases of this class where a right to maintenance has been allowed the quantum of maintenance should be decided in the suit itself, even though the parties may not have in the first instance provided the Court with the materials. Once that right is decided it is eminently desirable that the quantum should be ascertained in the suit itself, and that the parties entitled to maintenance who are generally females should not be left to separate proceedings. The appeal will be allowed to that extent.

There will be no order as to costs.

Appeal allowed.

✱ 1923 BOMBAY 420

MACLEOD, C. J. AND CRUMP, J.

Harjivan Devraj and others—Plaintiffs—Appellants.

v.

Gajanan Kashinath Naik and others—Defendants—Respondents.

S.A.No. 461 of 1922, D/- 15th March, 1923, from the decision of Dt. J., of Thana, in Appeal No. 14 of 1921.

(a) *Limitation Act Art. 181—Decree not made final—Previous applications for execution dismissed for default—Limitation.*

The plaintiff, on December 7, 1913, took out a Darkhast to make the decree, passed on 29-6-11, final which was not prosecuted. Although it was called Darkhast it was really an application to make the decree final. A similar Darkhast was issued on April 24, 1915, which was also dismissed for want of prosecution.

Held that all the previous applications were futile to prevent the present application being time-barred, as they were not applications in execution. [P 420 C 2]

(b) *Civil P.C., O. 34, Rr. 2, 4 & 7—Preliminary decree.*

It might be desirable, until the rules in Order 34 and the corresponding forms are recast, that the Courts, when drawing up preliminary decrees under rules 2, 4 and 7, should add the following heading. "Preliminary decree, which requires to be made final within the prescribed period of limitation before it can be executed." [P 421 C 1]

P. B. Shingne--for the Appellants.

Judgment.—On 29th, June 1911, the plaintiffs obtained a decree in the Court of the First Class Subordinate Judge at Thana on a simple mortgage. The decree directed as follows:—

"The defendant do pay to the plaintiffs Rs. 598 and costs within six months from this date or do pay the same into Court. In default, the plaintiffs do get the mortgaged property or a sufficient portion thereof sold and do recover their amount."

That was a decree under Order 34, rule 4, Civil Procedure Code, which corresponded to S. 88 of the Transfer of Property Act as it stood prior to the passing of the Civil Procedure Code. Sections 85 to 90, 92 to 94, 96, 97, 99 and part of 100 of the Transfer of Property Act, IV of 1882 were repealed, and re-enacted in the Civil Procedure Code in Order 34, with certain variations. Decrees passed in accordance with the provisions of Ss. 86 and 88 of Act IV of 1882 had been regarded by some Courts as final decrees and by some Courts as preliminary decrees, with the result that there was a conflict of decisions on the question whether any further proceedings should be treated as in execution or as applications to make the decree final. That conflict was set at rest by the alteration made in S. 89 when it became Order 34, rule 5, whereby it was directed that the Courts should pass a final decree, the terms of which would depend upon whether the mortgage amount had been paid or whether there had been dafault. Unfortunately Ss. 86, 88 and 92 were not consequently amended when inserted in the Civil Procedure Code as Order 34, rules 2, 4 and 7, with the result that not only those rules but also the forms 3, 4 and 5 of preliminary decrees appearing in Appendix D are misleading. An ordinary layman and even a lawyer might well think that all that is necessary after a decree has been obtained under one of those rules, and drawn up in accordance with the relative form, is to apply to the Court in execution to get the mortgaged property sold, purchased or redeemed. In this case the plaintiff, on December 7, 1913 took out a Darkhast to make the decree final which was not prosecuted. We do not think, although it was called Darkhast, that the Court would be entitled to look upon it on that account as a proceeding in execution, considering that the application really was to make the decree final. A similar Darkhast was issued on April 24, 1915, which was also dismissed for want of prosecution.

Now the time allowed for applying to the Court for making a decree final is three years from the time when the right to apply accrues under Article 181, First Schedule, of the Indian Limitation Act. So that after three years and six months from June 29, 1911, the plaintiffs were time-barred from asking the Court to make the decree final.

On 25th, April 1918, an application was made to make the decree final and that was rejected as being out of time. The plaintiffs have appealed from the rejection of their application. Since

it is clear under the provisions of the Code that there has been only a preliminary decree, which must be made final before it can be executed all the previous applications were futile to prevent the present application being time-barred. The decision of the learned Judge in the Court below dismissing the application was right, and the appeal, therefore, must be dismissed

It might be desirable, until the rules in Order XXXIV and the corresponding forms are re-cast, that the Courts, when drawing up preliminary decrees under rules 2, 4 and 7, should add the following heading. "Preliminary decree, which requires to be made final within the prescribed period of limitation before it can be executed."

Appeal dismissed.

1923 BOMBAY 421

MACLEOD, C. J AND CRUMP, J.

R. S. Navalkar—Petitioner.

v.

Mrs. Sarojini Naidu and *The Municipal Commissioner, Bombay*—Opponents.

Civ. Extra. Appl. No. 70 of 1923, D/- 28th March, 1923 against the order of the election Court in the Court of Small Causes Court in Municipal App. No. M. 4 of 1923.

Bombay City Municipal Act (III of 1918), S. 33—Decision under—Revision—Civil P. C. S. 115.

A judge acting under section 33 is not a Court within the meaning of the C. P. Code and hence no revision lies from his decision under S. 115, C. P. C.

R. S. Navalkar, in person.

Bahadurji and Patel with S. Y. Abhyankar—for Opponent No. 1.

Campbell —for Opponent No. 2.

Judgment.—This application is purported to be made under Sections 115 and 151 of the Civil Procedure Code in the following circumstances :—

The petitioner and Opponent No. 1 were candidates in the Bhuleshwar (C) Ward Municipal General Election held on the 29th January 1923 with 15 others for 16 seats. The petitioner as a result of the poll was not elected, and then filed an Election Petition under Section 33 of the Bombay City Municipal Act (III of 1888).

Under Section 33 (1) if the qualifications of any person declared to be elected for being a councillor is disputed, or if the validity of any election is questioned whether by reason of the improper rejection by the Commissioner of a nomination or of the improper reception or refusal of a vote, or for any other cause, any person enrolled in the Municipal Election roll may, at any time, within 15 days after the result of the election has been declared, apply to the Chief Judge of the Small Causes Court. Sub-Section 2 Section 33 directs what the Chief Judge, after making such inquiry as he deems necessary may decide. Under Sub-Section 3 the said Chief Judge's order shall be conclusive.

On the 7th March the Chief Judge delivered judgment in the matter of the petitioner's application and dismissed it with costs.

The petitioner applies to this Court on the grounds viz : (1) that the Election Court acted with material irregularity in various ways (2) that the Court declined to exercise the jurisdiction vested in it under Section 33 of the Bombay City Municipal Act, and (3) that it erred in trying the petition summarily without framing any issues as requested in order to prevent any miscarriage of justice.

We admitted the petition in order that this matter might be argued as there is no direct authority on the question.

Section 151 C. P. C. may be easily ruled out as it is clear that the relief which is asked for by the petitioner cannot be granted under that Section.

Then under Section 115 the High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto. The real question is whether the Chief Judge in the Small Cause Court acting under the powers granted to him by Section 33 of the Bombay City Municipal Act III of 1888 is a Court subordinate to this Court, so that if a case is made out for our interference within the

powers granted to us by Section 115 C. P. Code, we may make such order as we may think fit.

A similar question arose in *Balaji Sakharam* v. *Merwanji Nowroji* (1) where it was held that a District Judge acting under Section 23 of the Bombay District Municipal Act, Amendment Act (II of 1884) was not a Court within the meaning of the word in Section 622 of the Civil Procedure Code (Act XIV of 1882), and that the High Court had no jurisdiction to revise his order refusing to set aside an election, nor could it interfere with an order made by him that the applicant should pay the costs incurred by the opponent. Section 23 of the District Municipal Act is practically identical in terms, apart from certain immaterial differences with Section 33 of the Bombay City Municipal Act. It runs as follows :—"If the validity of any election of a Municipal Commissioner is brought in question by any person qualified either to be elected or to vote at the election to which such question refers, such person may, at any time within 10 days after the date of the declaration of the result of the election, apply to the District Judge of the District within which the election has been or should have been held. The District Judge may, after such inquiry as he deems necessary, pass an order for confirming or amending the declared result of the election, or for setting the election aside. For the purposes of the said inquiry the District Judge may exercise any of the powers of a Civil Court, and his decision shall be conclusive." The Chief Justice in delivering the judgment said :—

"We are of opinion that a District Judge acting under Section 23 of the Bombay District Municipal Act Amendment Act 1884, is not a Court within the meaning of the word in Section 622 C P. C. (Act XIV of 1882) and that this Court has no jurisdiction to revise his order refusing to set aside an election. For the same reason we cannot interfere with the order he has made that the applicant shall pay the actual costs incurred by the opponent. The circular order referred to deals only with District Courts, Courts of Small Causes, Subordinate Courts, and Mamlatdar's Courts. The District Judge in the present case is neither of these, and the order can have no application to him. He is merely a *persona designata*, and if he has jurisdiction at all to award costs, there is nothing to prevent him from awarding them on the scale he has adopted-

We may refer to another decision in *Bhaishankar* v. *The Municipal Corporation of Bombay* (2). That was a suit filed by the plaintiff under S. 33 of the City of Bombay Municipal Act against the Municipal Commissioner of Bombay to have it declared that the general election of Councillors by the Justices on the 21st February 1907 was invalid and to set aside the said election altogether. It was held that the High Court had no jurisdiction to entertain such a suit. The Chief Justice said :—

"But under Section 33 the Chief Judge has jurisdiction to determine the validity of a contested election, and so he is the tribunal appointed by the Act for the purpose. But where a special tribunal, out of the ordinary course, is appointed by an Act to determine questions as to rights which are the creation of that Act, then, except so far as otherwise expressly provided or necessarily implied, that tribunal's jurisdiction to determine those questions is exclusive..... Here not only is the Chief Judge appointed the tribunal, but it also is expressly provided that his order shall be conclusive, and that every election not called in question in accordance with the provisions of Section 33 shall be deemed to have been, to all intents and purposes, a good and valid election."

The point now in issue did not therefore arise in that case, but the decision cannot be said in any way to assist the petitioner in showing that it was considered by the Chief Justice that the Chief Judge of the Small Cause Court acting as a special tribunal under the City of Bombay Municipal Act was a Court subordinate to the

(1) [1897] 21 Bom. 279.

(2) [1907] 31 Bom. 604—9 Bom. L.R. 417.

High Court. It seems to us that there is no reason whatever for differing from the decision in 31 Bom. 604 as we think there is no distinction between the provisions of Section 23 of the District Municipal Act and Section 33 of the Bombay City Municipal Act with regard to this particular point, whether or not, the Chief Judge acting under Section 33 is a *persona designata* or a Court subordinate to the High Court. In our opinion therefore we have no power to interfere with the decision of the Chief Judge in this case, and the rule should be discharged with costs.

Rule discharged.

1923 BOMBAY 423

MACLEOD C. J., AND CRUMP, J.

Secretary of State for India—Plaintiff-Appellant.

v.

Great Indian Peninsula Railway Co.,—Defendant-Respondent.

O. C. J. Suit No. 875 of 1923, D/-5th April, 1923.

Sea Customs Act (1873)—Goods imported by G. I. P. Ry., whether chargeable.

Stores purchased and imported by the G. I. P. Rly., Company into India for the use of the undertaking are at the time of importation goods belonging to Government and therefore not chargeable with customs duty. [P. 424 C. 2]

Kanga—for the Appellant.

Strangman and Campbell—for the Respondent Company.

Macleod, C. J.—This is a case stated by the agreement of the parties for the opinion of the Court under Order 36, rule 1. The question is whether stores purchased and imported by the defendant company into India for the use of the under-taking are at the time of importation goods belonging to Government. If the answer is in the affirmative it has been agreed that the plaintiff shall refrain from levying or seeking customs duty upon such stores. The defendant company was incorporated by statute 11 & 12 Vic. c. 83 intituled an Act for incorporating the Great Indian Peninsula Railway Company and for other purposes contained therein.

Statute 63 and 64 Vic. c. 38 was passed to provide for the vesting of the railways and other property of the Great Indian Peninsula Railway Company in the Secretary of State for India in Council and by S. 4 it was provided that at and from June 30, 1900, the Railways, works and diverse other property of the company should be transferred to and be vested in the Secretary of State.

Section 72 enabled the defendant company to enter into and conclude with the Secretary of State any contract or contracts for the maintenance, management and working of the Great Indian Peninsula Railway Company. Accordingly, on December 21,1900, the defendant company entered into an agreement with the plaintiff a copy of which is annexed to the case stated. I will refer to the pertinent clauses, omitting any mention of the Indian Midland Railway system as unnecessary.

Under clause 5 the plaintiff was to hand over to the defendant company for the purposes of the contract the Great Indian Peninsula Railway system together with the rolling stock, plant and machinery belonging thereto

Under clause 6 the plaintiff was to deliver to the defendant company for the purposes of the undertaking all stores belonging to the Great Indian Peninsula Railway system excepting such as on the representation of the company the plaintiff might adjudge to be unserviceable and surplus stores.

Under clause 10 the company was to keep the undertaking in good repair, in good working condition and fully supplied with rolling stock, plant and machinery to the satisfaction of the plaintiff, and on their failure to comply with any requirements of the plaintiff, the plaintiff might enter on the undertaking to execute such requirements.

Under clause 22 all stores required by the undertaking were to be conveyed by the company at rates to be approved by the plaintiff, not being less than the actual cost of conveyance.

Under clause 22 A all capital monies reguired for the undertaking

were at the option of the plaintiff to be provided by him or were to be raised by the company by the issue of debentures or debenture stock in such manner and on such terms as to interest or otherwise as the plaintiff might determine.

Under clause 23 all monies received by the company in India in respect of the undertaking were to be paid without deduction into the Treasury and all monies received elsewhere than in India were to be paid into the Bank of England to the plaintiff's account.

Under clause 24 all monies required by the company for the undertaking were to be supplied by the plaintiff.

Under clause 25 all monies expended by the company on account of the undertaking were from time to time to be stated and submitted to the plaintiff for his sanction.

Clause 33 provided for accounts to be delivered of all stores in hand or in the course of delivery on July 1,1900, and for the valuation thereof. Thereafter half yearly accounts were to be furnished of all stores in hand and of all stores used since the last accounts were made, the value of store used to be charged to the general working expenses or to the capital account as the case might require in accordance with the provisions of the agreement in that behalf.

Clause 34 provided for the re-valuation from time to time of stores in hand.

By clause 37 the company was prohibited during the continuance of the contract from acquiring any property in India without the sanction of the plaintiff.

Clause 39 provided for the application of the nett receipts of the undertaking.

By clause 60 the company was to give possession to the plaintiff on June 30,1925, of the undertaking, together with the rolling stock, plant and machinery belonging thereto, and all stores in hand or in course of delivery on that day. The plaintiff was to pay to the company the amounts paid up or credited as paid up on all shares or stocks or stock then in existence in the company's new capital which the company might have issued for the purposes of the contract with the sanction of the plaintiff.

It is sufficient for this case to say that the surplus arising from the excess of receipts over payments in any year commencing on July 1 and ending on June 30 were to belong as to 19/20 to the plaintiff and as to 1/20 the company.

Now it will be seen that the whole of the undertaking became the property of the plaintiff on July 1,1900, and was handed back to the defendant company only for the management and working thereof according to the terms of the contract. On the termination of the contract everything had to be returned to the plaintiff. All receipts had to be paid into the treasury in India, or into the plaintiff's account with the Bank of England. The company, therefore possessed no property of its own. All the monies required for the purpose of the undertaking had to be supplied by the plaintiff and no expenditure could be made without the plaintiff's sanction. It is difficult then to see how stores purchased in England or abroad became the property of the company. There can be no distinction between stores, the cost of which could be debited to working expenses, and stores, the cost of which would be debited to capital account. If the plaintiff's contention were correct, new rolling stock imported is for the moment the property of the company, but it belongs to the plaintiff as soon as it is taken into use, or even as soon as the customs duty has been paid. In other words, stores imported are to be considered as belonging to the company for the purpose of paying customs duty and for that alone.

In my opinion such a contention cannot be sustained.

I would answer the question propounded in the concise statement in the affirmative.

Crump, J.—I agree.

✱ 1923 BOMBAY 425

MACLEOD, C. J, AND CRUMP, J.

Bapuji Narso Kulkarni—Plaintiff—Appellant.

v.

Dattu Antaji Kulkarni—Defendant—Respondent.

F. A. No. 41 of 1921, D/- 29th January, 1923, from the decision of the Sub. J. at Belgaum, in Civil Suit No. 154 of 1918.

Hindu Law—Succession—Exclusion from—Insanity.

Insanity, as a ground of exclusion from inheritance under Hindu law, need not be congenital. 43 Mad. 464 Foll. [P 426 C 2]

Nandkarni, and K. H. Kelkar—for the Appellant.

H. C. Coyajee and D. R. Manerikar—for the Respondent.

Macleod, C. J.—The plaintiff sued to recover possession as owner of the suit lands from the defendants. The lands originally belonged to one Bhimaji, who was the only brother of the first defendant Dattu. He was adopted into the other branch of the family, whose pedigree appears at page 4 of the print, by Appaji. He died in 1905 leaving a son Baburao, who admittedly at that time was a lunatic. Bhimaji, before his death, executed a *malkipatra* in favour of the first defendant, and I gather from the record that Bhimaji, who must have been aware of his son's lunacy, executed the document in favour of the first defendant on the understanding that he should undertake to look after Baburao.

In 1906, plaintiff filed a suit in the Athni Court against Dattu, claiming as the person entitled to succeed to the property of Bhimaji after the death of Baburao, who, he alleged, had recently become a lunatic, to obtain a declaration that the *malkipatra* alleged to have heen executed by Bhimaji in favour of defendant No. 1 on July 10, 1905 was a forgery. The defendant contended that the plaintiff could not maintain the suit as he was not the heir of Bhimaji. The first issue was—Is the plaintiff entitled to maintain the suit? Now, as in the plaint it was alleged that Baburao was the son of Bhimaji, he would be the only heir under Hindu law, and it was not alleged by the plaintiff that Baburao was incapable of succeeding on account of insanity. It is obvious, therefore, on the face of the plaint, that the plaintiff could not possibly succeed, as he had no interest whatever in the property, except as a possible reversioner after Baburao dying without leaving an heir. The defendant in his written statement pleaded that according to law the plainttff could never become the nearest heir of the deceased Bhimaji under Hindu religion and Shastras. He could not become the nearer heir than the defendant himself. In paragraph 7 he pleaded that the plaintiff's suit could not go on unless plaintiff's brother Ramkrishna Narso, and deceased Bhimaji's son Baburao and daughter's sons Bhimaji *alias* Sarjerao and Balaji Datto Kulkarni were made parties. That was perfectly correct as an answer to the plaintiff's suit, because, according to the plaintiff himself, Baburao would certainly be concerned in disputing the document set up by the defendant.

Baburao died in 1917, and plaintiff brought this suit on April 10, 1918. His main point was that Baburao, unless he was a congenital idiot, was not debarred from succession on the death of Bhimaji, and, therefore, Baburao succeeded to Bhimaji's property, and succession opened only on Baburao's death.

On the question whether insanity to be a cause for exclusion from inheritance must be congential, in the 9th Edition of Mayne's Hindu Law, page 872, it is statad :—

"There is a difference of opinion as to whether insanity also need be congenital. The texts and cases are all collected and discussed in a judgment of the High Court of Bombay. The question for decision was only as to blindness, but the Court expressed a strong opinion that madness, as well as blindness, must be shown to have existed from birth. It may, however, be doubted whether the texts which go to this extent do not refer to the case of idiocy, which is always congenital, while madness, as distinguished from idiocy, is rather a disease than an incapacity of the

mind. Cases of disability from lunacy have come at least twice before the Privy Council. In one, *Baboo Bodhnarain Singh* v. *Baboo Omrao Singh* (1), it was admitted that the lunacy was not congenital, and it was assumed that the only question was whether the insanity had existed at the time the succession opened. In the second, *Kooer Goolab Singh* v. *Rao Kurun Singh* (2), no question was raised as to the date of the lunacy. From the fact that the lunatic was a married man and a father, it is most probable that he had not been born so. On the other hand, in Bengal, Allahabad and Madras, it has been expressly held that insanity at the time the inheritance falls in is sufficient to exclude; and, in the second of the cases cited below, it was further held that the insanity itself need not be incurable. If it was sufficient to prevent the claimant from offering the proper funeral oblations he was an unfit person to succeed."

The question was first considered in *Braja Bhukan Lal Ahusti* v. *Bichan Debi* (3) reported in a note to the case of *Dwarkanath Bysak* v. *Mahendranath Bysak* (4). It was decided in those cases that in order to exclude a person on the ground of insanity, it was sufficient to show that when the succession opened he was mad and not in a position to perform funeral oblations.

In *Deo Kishen* v. *Budh Prakash* (5) and in *Ram Singh* v. *Mt. Bhani* (6) the same view was taken.

The latest decision is in *Mothusami Gurukkal* v. *Meenammal* (7). Mr. Justice Seshagiri Ayyar considered all the texts on the subject and the authorities, and came to the conclusion that insanity, as a ground of exclusion from inheritance under Hindu law, need not be congenital. One apparent error appears in the judgment at page 467, where the case of *Murarji Gokuldas* v. *Parvatibai* (8) is cited as an authority for the same conclusion. But it would appear from the judgment of Sir Michael Westropp in that case, that although the learned Judge was only considering the question whether blindness to cause exclusion from inheritance must be congenital, after examination of the text he expressed the opinion that madness, as well as blindness, to disqualify a person from inheritance, must be congenital. That opinion, although entitled to the very greatest respect, still cannot be regarded as anything else but obiter. When we find that from 1870 up to the present time the High Courts of Bengal, Allahabad and Madras have consistently been of opinion that insanity to cause exclusion from inheritance need not be congenital, I am not prepared to express a contrary opinion. I think, therefore, that the Judge of the Court below was right in holding that Baburao was incapable of inheriting to Bhimaji.

The only other question is whether the defendant is estopped from pleading that Baburao was incapable of inheriting to Bhimaji by virtue of the decision in Suit No. 8 of 1906. If it could be shown that he represented to the plaintiff at that time that Baburao was the heir, and that there was no ground for his exclusion from the inheritance, that on account of that representation the plaintiff refrained from filing the suit until the death of Baburao, then possibly it might be said that the defendant is now estopped from raising his present contention. But all the proceedings in Suit No. 8 of 1906 clearly show that the plaintiff was out of Court on the representation made by him in his plaint, therefore the plaintiff cannot be said to have

(1) [1870] 13 M.I.A. 519—15 W.R. 1—6 B.L.R. 509 (P.C.)
(2) [1871] 14 M.I.A. 176—10 B.L.R. 1—2 Suther 474—2 Sar. 722 (P.C.)
(3) [1872] 9 B.L.R. 204. (Notes.)
(4) [1872] 9 B.L.R. 198—18 W.R. 305.
(5) [1883] 5 All. 509—(1883) A.W.N. 105 (F. B.)
(6) [1915] 38 All. 117—14 A.L.J. 11—32 I.C. 1-7.
(7) [1918] 43 Mad. 464—38 M.L.J. 291—(1920) M.W.N. 253—55 I.C. 576.
(8) [1878] 1 Bom. 177.

refrained from taking proceedings to establish his right to succeed after Baburao on account of any representation made by the defendant. The appeal, in my opinion, fails and must be dismissed with costs.

Crump, J—I agree.

Appeal dismissed.

1923 BOMBAY 427

MACLEOD, C. J. AND CRUMP, J.

Kahandas Naran and others—Plaintiffs-Appellant.

v.

Jivan Parag and others—Defendants-Respondents.

F. A. No. 125 of 1921, D/- 11th April, 1923 from the decision of the First Class Sub. J., Broach, in C. S. No. 129 of 1919.

Hindu Law—Adoption—Sister's son—Lewa patidars in Gujarat.

Among Lewa Patidars of Gujarat, adoption of sister's son is valid. The Patidars are sudras and not Vaishyas. 21 Bom. L. R. 1172, Ref.

[P. 428 C. 1]

R. W. Desai, and *I. K. Vakil*—for Appellants.

M. B. Dave and *R. J. Thakor*—for Respondents.

Judgment.—The plaintiffs sued for a declaration that the adoption of the first defendant was invalid and accordingly to recover possession of the property specified in the plaint. The relationship of the parties is shown in the pedigree at p. 2. The original holder of the suit property was one Parag Ranchhod who died leaving a widow Parwati and a sister Lakhi. Parwati adopted the first defendant Jivan, son of Lakhi. Plaintiffs, sons of Naran, who was the first cousin of Ranchhod, claimed that to the property in suit which was Bhagdari property, paternal kinsmen succeeded in preference to female heirs, so that if the adoption of the first defendant was declared to be invalid, they would be entitled to succeed. The learned Judge held that as the property was Bhagdari, the plaintiffs would succeed in preference to Lakhi, the sixth defendant. But he held also that the adoption of the first defendant was valid and accordingly dismissed the plaintiffs' suit.

The learned Judge discussed the evidence on the question whether the plaintiffs had established that they being Leva Patidars of Gujarat could be considered to be Vaishyas and not Sudras, and he came to the conclusion (1) that the weight of the evidence was against the plaintiff's plea that they were Vaishyas: (2) that there prevailed a custom in the caste to take a sister's son or daughter's son in adoption. As pointed out by Mr. Justice Shah in *Manchharam* v. *Dattu* (1), if the parties are Sudras, there is no necessity to prove a custom permitting the adoption of a sister's son or daughter's son. But it seems to me to be perfectly clear on the evidence that such an adoption was recognised in this community and that would therefore go some distance towards showing that the parties were Sudras and not Vaishyas. Now the evidence, although it may be said to be somewhat indeterminate as well as conflicting, is of very much the same character as in *Mancharam* v. *Dattu*, (1) in which the appeal was heard by Mr. Justice Shah and myself. Mr. Justice Shah said :—

" The second question is whether the lower Court is right in its conclusion that the parties are Sudras. The evidence on this point has been fully discussed on behalf of the appellants, and in view of the facts found by the lower Court as to the customs obtaining in the community to which the parties belong, it is not necessary to examine the oral evidence in detail. It is found by the lower Court that the members of the community to which the parties belong ' have no Vedic rights and Samskaras prescribed for the twice-born classes among them; that they have not the chief Samskara, Munj, which makes a man Dwija; that they wear the sacred thread only occasionally; that this occasional wearing also is probably of a recent growth; that they have all the customs which one should expect among the Sudras, viz., adoption of a daughter's son, and of sister's son , divorce, Pat marriage, widow remarriage and non-tonsure of the widows which are all badges of an inferior or unregenerate caste as

(1) [1919] 21 Bom. L. R. 1172—54 I. C. 110.

observed by the High Court in *Gopa Narhar* v. *Hanmant Ganesh* (2) "

Compare that with what was said by the First Class Subordinate Judge at page 6 :—

" In brief, it is an established fact that Lewa Kunbis have no Vedic rights and Samskaras prescribed for the Dwij; that they do not perform chief Upanayan Samskara which makes a man Dwij; that they do not wear sacred thread; that they have all the customs which one should expect among the Sudras, viz., divorce and Natra marriage by widows, and also adoption of a daughter's or sister's son. "

We think that on the evidence there is sufficient justification for the conclusion at which the learned Judge arrived. Again, in *Mancharam* v. *Dattu* (1) Shah J. said :—

" it is to be noted that the caste to which the parties belong, and which used to be described originally as Kunbi caste has recently been described according to the evidence as Lewa Kunbis; and it seems to me that an attempt has been made on behalf of the defendants to show, if possible, a higher status with a view to escape the liability in the present suit. The description of the caste ' Pajne Kunbis ', which was originally given to this caste, has apparently been changed to ' Lewa Kunbis ' during the last twenty years. "

In the same way in this case, it is apparent from the evidence that there have been endeavours in the community to establish their status as Vaishyas. Some of the witnesses for the plaintsffs even admitted that they were not Vaishyas by birth, but only by deeds. Considering, therefore, the whole of the record and the opinion which was formed on that record by the First Class Subordinate Judge, a Hindu of considerable experience in Gujarat, we think that his decision was right and that therefore the appeal must be dismissed with costs. Defendant No. 1 is entitled to his costs in both the Courts. Cross objections allowed as to costs, Other cross-objections are dismissed.

Appeal dismissed.

(2) [1879] 3 Bom. 273.

✱ 1923 BOMBAY 428

MACLEOD, C. J. AND CRUMP, J.

Sakharam Balwant Peshwe and another—Plaintiffs—Appellants.

v.

Laxman Trimbak Purandare and others—Defendants—Respondents.

F. A. No. 246 of 1921, D/- 9th February, 1923 against the decision of District Judge, Poona, in Suit No. 4 of 1921.

Civil P. C., S. 92—Sanction obtained for some reliefs—Other reliefs joined.

Where plaintiff's suit asks for some reliefs sanctioned by Collector and others not so sanctioned, the whole suit should not be dismissed. It maybe tried so far as the relief sanctioned by the Collector is concerned. [P. 428 C. 2]

H. C. Coyajee, and D. A. Tuljapurkar—for Appellant.

G. S. Rao—for Respondents.

Judgment.—The plaintiffs filed this suit praying for various reliefs with regard to an ancient temple of Shri Martand Dev which had been managed by a Committee of five trustees since the year 1841. They asked the sanction of the Collector under S. 92 of the Civil Procedure Code for the institution of the suit for the purpose of obtaining the five reliefs set out in the application. The Collector replied that sanction was only given to the institution of a suit for the specific purpose of settling a Scheme. Inspite of that order the plaint was filed on the 12th February 1921 asking in addition to the prayer for a settlement of the Scheme for the other reliefs for which sanction had been refused by the Collector. That no doubt was very improper. It did not follow on that account that the plaintiffs' suit so far as it was covered by the Collector's sanction was not entitled to be heard on its merits. Therefore the appeal must be allowed and the case must be remanded to the District Judge to be heard on the merits with regard to the plaintiffs' prayer that a Scheme should be settled to secure the good management of the Sansthan in future.

Defendants are entitled to their costs in this Court. Costs of the lower Court to be costs in the cause.

Appeal allowed.

1923 BOMBAY 429

MACLEOD, C. J. AND CRUMP, J.

Hiraji walad *Guna Gujar and another*—Plaintiffs—Appellants.

v.

Vishnu walad *Chandra and others*—Defendants—Respondents.

F. A. No. 287 of 1921, D/- 15th February, 1923, against the decision of the First Class Sub. J., Jalgaon in Suit No. 402 of 1920

(a) *Evidence Act, S. 92—Sale or mortgage—Deed apparently a sale deed—Evidence to show that it was a mortgage admissible.*

Evidence is admissible to show that a sale-deed is not in fact a sale-deed but only a mortgage deed. S. 92 prohibits only parties. 44 I. A. 236, Foll. [P. 429 C. 2 ; P. 430 C. 2]

(b) *Evidence Act, S. 114—Deed in possession of mortgagor—Presumption.*

The mere fact that the deeds are in the possession of the mortgagor does not itself prove that the mortgagee was a mere benamidar for the mortgagor. [431 C. 1]

P. B. Shingne—for Appellants.

S. C. Joshi and S. R. Gokhale—for Respondents.

Macleod, C. J.—The plaintiffs sued to recover possession of the suit lands alleging they belonged to their great grandfather Kondu. Kondu left two sons Moru and Chandra. There was a separation whereby plaintiffs' father Guna Moru got a half share, the other half going to the descendants of Chandra now represented by the defendants.

The plaint states that in 1885 plaintiffs' father gave his share to Haridas Ramdas by passing a mortgage-deed in the form of a sale for Rs. 1,000. Possession remained with plaintiff's father. Defendant's father also gave his share to Haridas on the same condition, retaining possession. In 1886 plaintiff's father having died, their mother, defendant and Haridas came to an arrangement by which it was found that the amount due by both branches was Rs. 5,000 and the defendants passed an instalment bond for that amount for the plaintiffs and themselves, keeping all the land in their possession and giving a portion of O. S. No. 24 and the whole of O. S No. 17 to the plaintiffs' mother for the maintenance. In 1908-09 the defendants had liquidated the debt. The plaintiffs therefore claimed back from the defendants the properties originally mortgaged by their father to Haridas.

The defendants pleaded that the family properties were partitioned between Moru and Chandra. Guna sold his lands to Haridas by a sale-deed of the 12th September 1885. The lands except O. S. No. 17 were purchased orally by defendant 1 and the father of defendants 2 to 5 in 1886 from Haridas. An instalment bond in respect of the properties so purchased was given to Haridas and the amount due under the bond had been paid. Survey No. 17 was not purchased from Haridas by the defendants. A portion of S. No. 24 was sold by Krishna Chandra and was recently purchased by the plaintiffs. The plaintiffs having recently got possession of the deed of 1885 had brought a false suit against the defendants.

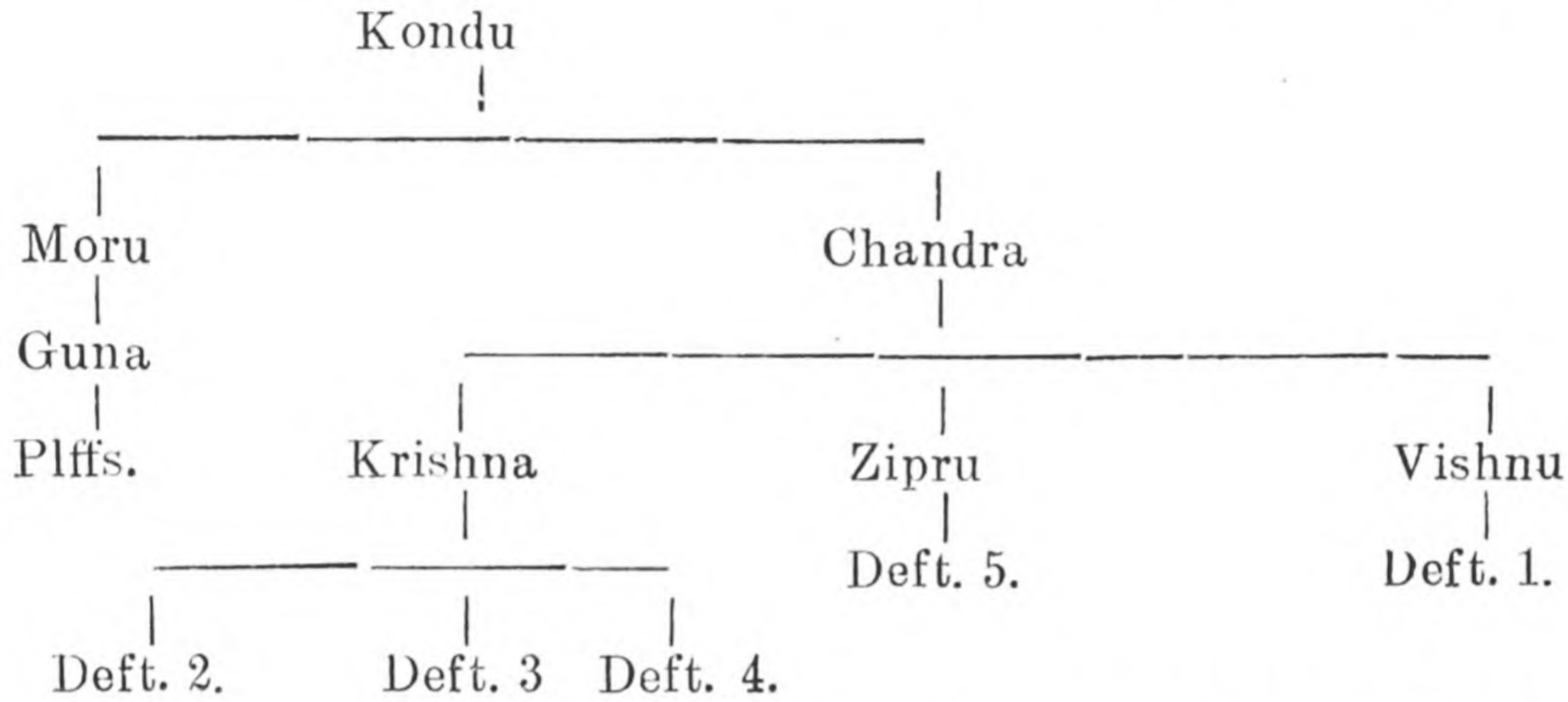
The plaintiffs filed a reply to the effect that an arrangement had been arrived at between their mother and the defendants whereby defendants mortgaged the whole property to Haridas, so that when the debt was paid off, defendants being in possession all along, the plaintiffs were entitled to get back their property.

The trial Judge held that the plaintiffs were not entitled to prove that the document of the 12th September 1885 was a mortgage and not a sale-deed. But under the decision of the Privy Council in *Maung Kyin v. Ma Shwe La* (1) the plaintiffs would be entitled to prove that the defendants purchased from Haridas knowing that he was not the owner. The question then is whether plaintiffs have succeeded in proving the arrangement they alleged was made between their mother and the defendants in 1886 They rely on the evidence of Jaysing (Exhibit 101) and Haridas (Exhibit 103) The trial Judge has discussed that

(1) [1917] 45 Cal. 320—44 I.A. 236—15 A.L.J. 825—33 M.L.J. 648—3 P.L.W. 185—6 L.W. 777—22 C.W.N. 257—23 M.L.T. 36—27 C.L.J. 175—20 Bom. L.R. 278—(1918) M.W.N. 300—9 L.B.R. 114—11 Bur. L.T. 21—42 I.C. 642 (P.C.)

evidence in very great detail and has come to the conclusion that the agreement alleged was never made. I can find no reason for differing from him. The appeal must be dismissed with costs.

Crump, J.—The parties to this suit are related as shown in the following pedigree :—



The properties in suit originally belonged to Kondu. Plaintiff's father Guna separated from his cousin Krishna, Zipru and Vishnu and took half the property. In February 1885 he mortgaged his half share to Haridas. In September 1885 he executed a sale deed of the same property to Haridas. He died in February 1886. After his death in June 1886 defendant 1 and his brothers Krishna and Zirpu mortgaged the whole property to Haridas.

The plaintiffs are suing for possession and they must show title and possession within twelve years of the date of suit. The suit was filed on October 29th 1920. On the face of the documents it appears that the title of plaintiffs' father passed to Haridas by the sale of September 1885 and the natural inference from the mortgage by defendant 1 and his brothers to Haridas in June 1886 is that the vendee between those dates transferred the property to his mortgagors. The mortgage-deed contains a recital to that effect, and defendant pleads that there was an oral sale by Haridas to them. Haridas who was plaintiffs' witness, says that this was so. There are thus several difficulties in the way of plaintiffs' success. Their case as placed before us is that the sale deed by their father to Haridas was intended to operate as a mortgage, and further that the oral sale by Haridas was intended to be for their benefit, defendant 1 and his brothers being benamidars only. There is some inconsistency here but generally what they allege is that the equity of redemption remained with them, and that defendant 1 and his brothers agreed to hold the property on their behalf and to pay off Haridas who continued to be the mortgagee in fifteen years, and then to restore the property to plaintiffs, or at least their share of it. In order to establish this case plaintiffs must prove at the outset that the sale by their father in September 1885 was in fact intended to be a mortgage. Defendants were not parties to that document, and in view of the decision of the Privy Council in *Maung Kyin v. Ma Shwe La* (1) it may be open to them to do so despite section 92 of the Indian Evidence Act, but it would require to be established by satisfactory evidence. It will be observed that the fifteen years of the original agreement expired in 1901 and on this point plaintiffs' explanation is that it was found impossible to pay off the debts until 1908, and that the property therefore remained with defendants until that date.

Now at the outset it is clear that plaintiffs have been guilty of most inexplicable delay even on their own case. They knew in 1908 that they were entitled to the property in suit, but for nearly full twelve years they took no action. It would be difficult to hold their case proved on the evidence of their two witnesses Jaysing and Haridas, for apart from the delay the transaction alleged is of a most

unusual and indeed improbable description. There is no obvious reason why defendant 1 and his brothers should have undertaken the payment of what Guna owed to Haridas unless the property was sold to them. They benefited in no way by doing so. There is little affirmative evidence in favour of the theory put forward by plaintiffs, and it is impossible to say that the lower Court was wrong in refusing to believe it. Some stress is laid on the fact that the documents evidencing the mortgage and sale by Guna to Haridas were produced by plaintiff but that alone is not a very convincing circumstance. It would require a far more convincing case than has been made out to justify a Court in overriding defendants' possession from 1886 down to the date of the suit.

Appeal dismissed.

✱ 1923 BOMBAY 431

MACLEOD, C. J AND CRUMP, J.

Govinddas Rajaramdas Devi — Plaintiff—Appellant.

v.

Ganpatdas Narrottamdas—Defendant-Respondent.

F. A. No. 282 of 1921, D/- 20th March, 1923 from the decision of First Class Sub. J., Satara, in Darkhast No. 671 of 1920.

Limitation Act, Art. 182—Prosecution of appeal from order in execution—No step-in-aid.

The prosecution of an appeal from an order made in the course of a proceeding in execution of a decree cannot be looked upon as an application in accordance with law to the proper Court for execution or to take some step-in-aid of execution. 26 All. 608 Foll.

[P. 431 C. 2]

M. V. Bhat—for Appellant.

K. N. Koyajee—for Respondent.

Judgment.—This is an appeal from the order of the Subordinate Judge dismissing the plaintiff's Darkhast as time-barred. The decree was a partition decree passed on 30th, June 1906. Some of the suit properties were partitioned by the Commissioner, but it seems that with regard to the house, the subject-matter of the present Darkhast, the parties thought that they might arrive at a settlement, with the result that it remained unpartitioned. The last Darkhast No. 193 of 1915 taken out by one of the parties was dismissed on 12th September 1917. That was a Darkhast by defendant No. 1, and it had nothing to do with the partition of the suit properties. The defendants' appeals to the High Court against the orders passed in that Darkhast and on plaintiff's Darkhast No 428 of 1913 were decided on 1st March 1920. The present Darkhast was presented on 4th October 1920, and unless time can be computed from 1st March 1920, the present Darkhast is clearly time-barred.

In *Nand Kishore* v. *Sipahi Singh* (1) it was decided that the prosecution of an appeal from an order made in the course of a proceeding in execution of a decree could not be looked upon as an application in accordance with law to the proper Court for execution or to take some steps-in-aid of execution within the meaning of Article 179 of the Second Schedule to the Indian Limitation Act of 1877. The decision in *Kristo Coomar Nag* v *Mahabat Khan* (2) was followed. We agree with these decisions.

It certainly cannot be said that an appeal to the High Court against an order in a Darkhast is an application in accordance with law to the proper Court for execution. The High Court is not a Court whose duty it is to execute decrees passed by the lower Courts. So the Darkhast in this case was time-barred. The plaintiff has only himself to blame that the house has not been partitioned, since the decree was passed in 1906. Now he can either come to an arrangement with the defendant for partition of the house or he can file another suit.

The appeal must be dismissed with costs.

Appeal dismissed.

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(1) [1904] 26 All. 608—(1904) A.W. N. 139—1 A.L.J. 336.

(2) [1880] 5 Cal. 595.

✱✱ 1923 BOMBAY 432

MACLEOD, C. J. AND CRUMP, J.

Rama Nana Babar—Appellant.

v.

Dhondi Murari Tarade—Respondent.

S. A. No. 623 of 1921, D/- 23rd January 1923, from the decision of Dt. J. of Satara in Appeal No. 139 of 1920.

Hindu Law—Widow—Surrender in favour of daughter—Surrender in exchange for maintenance—Adoption after surrender-Rights of adopted son.

One M died leaving a widow D and three daughters, D executed a gift deed in favour of R her youngest daughter. In the operative part of the deed it was stated that the donee should go on looking after the arrangements of the donor's feeding, etc., and should render service to her by way of looking after her comforts as she had been doing all along to the end of the donor's life and should perform the last religious rites in accordance with their religion. R died first and thereafter, D having fallen out with R's husband defendant No. 1 adopted the plaintiff, nearly twelve years after her husband's death. In a suit by the adopted son to set aside the gift deed in favour of R.

Held that an adopted son cannot impeach prior alienations by widow which she is legally entitled to make. The ruling of the Privy Council in 47 I.A. 233 which would appear to be inconsistent with the decision in 44 B. 255 has afforded a very wide scope for future litigation. It offers a temptation to next reversioners to induce young widows to surrender their life estate in return for maintenance, and it will be difficult to draw the line between a promise to pay maintenance, and an arrangement which is a devise to divide the estate between the reversioner and the widow. The alienation by a widow of her life-estate to any one other than the next reversioner can be set aside by her adopted son as the adoption puts an end to the life estate and so divests the estate of any one claiming under a title derived from her, (Mayne, 9th Edn. p. 271) but the surrender of the life-estate to the next reversioner gives a title to him which is not dependent on the continuance of the life-estate but results from its extinction, and cannot be questioned by the subsequently adopted son. The title of one claiming either by purchase or by inheritence from the next reversioner is equally indefeasible. [P. 433 C. 1,2 ; P. 436 C. 1]

Rangnekar and D. R. Patwardhan,—for the Appellant.

H. C. Coyajee and S. Y. Abhyankar—for the Respondent.

Macleod, C. J.—The plaintiff filed this suit as the adopted son of one Murari Tarade to recover possession of the suit properties, which had been gifted by his adoptive mother to her daughter Rakhma who died prior to the suit. Murari died leaving a widow Dhondai and three daughters. The date of his death does not appear on the record but it was prior to 23rd November 1910, when Dhondai executed a gift deed (Exhibit 52) in favor of Rakhma, her youngest daughter. The document recites that the other two daughters were married and had ample means while Rakhma and her husband had been residing with Dhondai, serving her and looking after her comforts and the arrangement of her maintenance, and as she hoped that both of them would continue to do the same to the last she gave to Rakhma in gift the property described below. Then in the operative part it was stated that the donee should go on looking after the arrangements of the donor's feeding, etc. and should render service to her by way of looking after her comforts as she had been doing all along to the end of the donor's life and should perform the last religious rites in accordance with their religion. Rakhma died first and thereafter Dhondai, having fallen out with Rakhma's husband defendant No. 1, adopted the plaintiff, nearly twelve years after her husband's death.

It has been found as a fact that plaintiff was adopted by Dhondai and that Rakhma's sisters consented to the alienation by Dhondai to Rakhma who was the sole next reversioner as being the poorest of the three married daughters.

The trial Judge said: "A son by adoption stands in very much the same position as a natural born son and traces his rights to the property of his adoptive father as they existed at the time of his death though he might be adopted by the widow long after and would divest all estates created by the widow during the interval between the time of the death of the last male owner and of his adoption

by the widow of such owner". He then dealt with the argument that the consent of the next reversioners was presumptive proof of necessity and therefore made the alienation good against the plaintiff, coming to the conclusion that in the case of a gift without consideration no question of necessity could arise.

Accordingly he passed a decree in favour of the plaintiff. The learned Judge, though he referred to the fact that on the same day that the deed of gift was executed defendant No. 1 passed a *potgi-patra* (maintenance deed) agreeing to provide Dhondai with maintenance, did not consider that that amounted to consideration for the gift.

The learned District Judge, however, was of opinion that there was consideration for the gift and following the decision of this Court in *Adiveppa Nagappa* v. *Tontappa* (1) held that there was no acceleration of the reversion and so the adopted son was entitled to have it set aside.

The appeal accordingly was dismissed and the plaintiff succeeded on the ground that there was no acceleration.

Now the agreement by Rakhma's husband could not be treated as consideration passing from Rakhma, and the provisions in the deed of gift that Rakhma should go on looking after the arrangements for Dhondai's feeding would not be considered objectionable according to the ruling of the Privy Council in *Sureshwar Misser* v. *Mt. Maheshrani Misrain* (2) which would appear to be inconsistent with the decision in *Adiveppa* v. *Tontappa*.(1) With the very greatest respect it would appear as if this decision has afforded a very wide scope for future litigation. It offers a temptation to next reversioners to induce young widows to surrender their life estate in return for maintenance, and it will be difficult to draw the line between a promise to pay maintenance, and an arrangement which is a device to divide the estate between the reversioner and the widow. If the real test is the complete surrender by the widow of the right to hold the property, the loss of the right acting as a deterrent against a too frequent use by widows of the power of surrender so as to favour the next reversioner to the detriment of the more remote who still have a chance of being the nearest when the reversion falls in, it seems to me that if the widow is able to secure her maintenance, the forces operating on her mind to prevent her exercising her power of surrender have been rendered extremely small. Provided the surrender is total and not a device to divide the estate with the reversioner, it is effective. The question then arises whether the title of Rakhma was absolute or was liable to be divested in the event of Dhondai adopting. The learned counsel who appeared for the parties could find no direct authority on the point, though it is certainly strange that it has not hitherto come before the Courts for decision.

The rights of a Hindu widow in her late husband's estate, as pointed out by their Lordships of the Privy Council in *Rangasami Gounden* v. *Nachiappa Gounden* (3), are not aptly represented by any of the terms of English law applicable to what might seem analogous circumstances. Her estate is neither a fee nor an estate tail. At p. 84 their Lordships, summarised the result of the considerations of the decided cases on the question of a widow's powers of alienation distinguishing between the alienation, which could be shown to be a surrender of her whole interest in the whole estate in favour of the nearest reversioner or reversioners at the time of alienation, where no question of necessity would fall to be considered, and the alienation of a whole or

(1) [1919] 44 Bom. 255—22 Bom. L. R. 94—55 I.C. 369.

(2) [1920] 47 I.A. 233—39 M.L.J. 161—(1920) M.W.N. 472—18 A. L.J. 1069—12 L.W. 461—28 M.L.T. 154—57 I.C. 325 (P.C.)

(3) [1918] 42 Mad. 523—46 I.A. 72—36 M.L.J. 493—17 A.L.J. 536—29 C.L.J. 539—21 Bom L. R. 640—23 C.W.N 777—(1919) M. W. N. 262—26 M.L.T 5—10 L.W. 105—50 I.C. 498 (P.C.)

part of the estate on the ground of necessity, when the consent of such reversioner as might be fairly expected to be interested to dispute the transaction would be held to afford presumptive proof which, if not rebutted by contrary proof, would validate the transaction as a right and proper one.

With regard to the power of surrender their Lordships said at page 79 [46 I. A.]

"The foundation of the doctrine has been sought in certain texts of the Smritis. It is unnecessary to quote them...But in any case it is settled by long practice and confirmed by decisions that a Hindu widow can renounce in favour of the nearest reversioner if there be only one or of all the reversioners nearest in degree if more than one at the moment. That is to say, she can so to speak by voluntary act operate her own death."

The questions which might arise when a woman after such a voluntary act bore a son to her husband or adopted to him were not considered. But the real issues are liable to be confused as they were in the trial Court by the widow purporting to convey not her whole interest in the whole estate, but the whole estate itself as if she were full owner, and this is what Dhondai purported to do by Ex. 52. There was therefore an alienation which *prima facie* the widow was incompetent to make. But it is curious that no distinction appears to have been drawn between the transfer by a widow of her life estate which she is competent to make in favour of any one, and a transfer of what I may call the fee which she cannot do without some justification. If a widow by deed conveys her life estate to the next reversioner, is there any necessity of making use of a legal fiction in order to make the next reversioner the full owner?

As pointed out by Beaman J. in *Moti Raiji* v. *Laldas Jebhai* (4) the true doctrine of acceleration is no more than the English doctrine of merger subjected to the peculiar conditions and requirements of the law of the joint Hindu family. If then the widow does not convey her life estate to the next reversioner for which she is competent, but purports to convey the fee for which she is not competent, the real result of the authorities is that the conveyance is split up into its component parts and effect is given to that part which is valid. When treated in this way it may be said that no question arises with regard to the attempted alienation of the fee, which would be as a matter of fact unnecessary for bringing about the merger.

In the above mentioned case it was held that there was in effect a reservation at the time of the intended acceleration by the life tenant of a substantial interest in the estate so accelerated, in other words, there was a division of the estate between the widow and the reversioner and therefore the transaction violated the fundamental basis of the doctrine of acceleration. If she had not done so the Court would have had to consider the question whether an after-made adoption could divest an estate which had vested in the meantime. Beaman J., however, as the question had been discussed in the arguments, made certain observations upon it and those though obiter may usefully be referred to. The learned Judge said:—

"The point of difficulty is to find any single, clear and uniform principle upon which (*a*) to rest the law commonly favoured in the Courts where it is a case of after-adoption, and (*b*) to distinguish such a case from that of a posthumous natural son. In the latter case, it could only be on the assumption that his rights arise upon his conception, that he could be put upon a different footing from an after-adopted son. But I doubt whether that ground can be justified in the Hindu law proper. Reasoning to be found in some of the reported cases against allowing an after-adopted son to divest estates vested in the meantime, will not do. There we find it said that the true reason is, that until a widow does adopt no one can say whether she will or not. But it is as true to say that a widow left pregnant

(4) [1916] 41 Bom 93—18 Bom. L R. 954—37 I.C. 945.

cannot say, nor can any one say, whether she will give birth to a child at all, or if she does whether that child will be a son. A son adopted fifteen years after his adoptive father's death would certainly not be allowed to divest estates which during that period might have vested more than once in others. But a posthumous son born a week after his father's death almost certainly would. Yet a very little reflection will show that the element of time has really nothing to do with the operation of any uniform principle rightly applicable to all cases of the kind. Nor upon a rigorous analysis is it easy to discover any ground upon which to distinguish the case of an after-adopted from that of an after born son."

It may be gathered from the above remarks that the learned Judge, if it had been necessary, would have decided in favour of the after-adopted son.

The question whether a widow who had been given authority by her husband to adopt but had not exercised that power could file a suit in her character as a widow claiming his succession in the family estates was considered in *Bamundoss Mookerjee* v. *Mt. Tarinee* (5). Their Lordships of the Privy Council concurred in its entirety with the judgment of the Full Bench of the Suddar Dewany Court deciding that the authority to adopt did not, before an adoption had actually taken place, supersede and destroy her personal right to sue as widow. It was argued that a widow who had permission to adopt was to be regarded as *enciente*, but the Court was of opinion that if no text could be shown for the suspension of the rights of a widow actually pregnant it was still more certain that there was no similar provision for divesture of the right in the case of a widow held only to be constructively pregnant of a son through the effect of a permission to adopt. After considering the authorities the judgment proceeds at page 183 : (7 M. I. A.)

"So that the after-born son's right is to his share of the estate as it stands at the time of his birth, and not retrospectively with reference to its state at any supposed period of his conception...The clear inference is, that could a widow have been heir, as she can incontestably be in *Bengal*, she might have been admitted on her own right during pregnancy, the share devolving to her son only on his brith."

Reference was made to the opinion of Mr. Colebrooke in Strange's Hindu Law, Vol. II, p. 127, 1st Ed :—

" Presuming the property here spoken of as a woman's to have been what devolved upon her by the death of her husband, it ceased to be hers at the moment of a valid adoption made by her of a son to her husband and herself; in the same manner as property, coming into the hands of a pregnant widow, by the same means, cannot be used by her as her own, after the birth of a son. An adopted son is in most respects precisely similar to a posthumous son. From the moment of the adoption taking effect, the child became heir of the widow's husband ; and the widow could have no other authority but that of mother and guardian."

And the Court after considering whether it made any difference that that opinion was given in regard to a Madras case governed by the Mitakshara concluded :

"There is nothing in that difference which affects the applicability of Mr. *Colebrooke's* opinion to the case of sons in *Bengal*, as well as elsewhere, antecedent to birth. See the *dictum* of the Privy Council in *Dhurm Das Pandey* v. *Mt. Shama Soondri Debiah* (6). Now, upon the authorities, there can be no doubt that that is the result of an act of adoption, because the property is in the widow from the death of the husband till the power of adoption is exercised. Then that adoption divests it from the widow and vests it in the adopted son."

Again at p. 189 the Court said :

"The truth is, that the supposition of a positive and actual right vested in an embryo which may never come

(5) [1858] 7 M.I.A. 169—1 Sar. 616 (P.C.)

(6) [1843] 3 M.I.A. 229—6 W.R. 43—1 Sar. 271—1. Suth. 147 (P.C.)

into full existence, is one which must almost be rejected on the mere statement of it. It is particularly repugnant to common reason in the case of a possible adoption, which may be made after the lapse of many years, or may or may never be made at all"

As soon as we get rid of the notion of constructive pregnancy in the case of a widow with power to adopt, the result of an adoption upon prior alienations by the widow can be determined without any difficulty. As stated in Mayne's Hindu Law, 9th Edn., at page 270 :—

"These restrictions which fetter a widow's estate exist quite independently of the adoption. The only effect of the adoption is that the person who can question them springs into existence at once, whereas, in the absence of an adoption, he would not be ascertained till the death of the woman. If she has created any encumbrances or made any alienations which go beyond her legal powers, the son can set them aside at once. If they are within her powers, he is as much bound by them as any other reversioner would be."

The alienation by a widow of her life-estate to any one other than the next reversioner can be set aside by her adopted son as the adoption puts an end to the life-estate and so divests the estate of any one claiming under a title derived from her, (Mayne, 9th Edn., p. 271) but the surrender of the life-estate to the next reversioner gives a title to him which is not dependent on the continuance of the life-estate but results from its extinction, and cannot, in my opinion, be questioned by the subsequently adopted son. It follows that the title of one claiming either by purchase or by inheritance from the next reversioner is equally indefeasible. The appeal must succeed and the suit must be dismissed with costs throughout.

Crump J.-The facts found in this case by the lower Courts are as follows :—

The property in suit belonged to one Murari. He died leaving him surviving a widow Dhondai and three daughters, Abai, Kondai and Rakhma. Defendant No. 1 is the husband of Rakhma. After Murari's death his widow Dhondai gifted the whole estate to Rakhma. Rakhma was to a marked degree the poorest of the three and therefore the nearest reversioner : *Totawa* v. *Basawa* (7). The other daughters gave their consent to the gift which was made in 1910. After Rakhma's death and some eight or ten years after the gift Dhondai adopted the plaintiff.

Plaintiff sues to recover possession of the property alleging that the gift is null and void and the questions which arise for decision are whether the gift was effectual at the time when it was made, and whether it is binding on a son subsequently adopted.

The alienation by a Hindu widow of her deceased husband's estate may be validated on two grounds: (*a*) on the ground of necessity and (*b*) as a surrender of her whole interest in favour of the nearest reversioner : see *Rangasami Gounden* v. *Nachiappa Gounden* (3). In the case of a gift no question of necessity can arise and therefore the second ground alone need be considered in this case. The lower appellate Court has held on the authority of *Adiveppa* v. *Tontappa* (1) that there was no complete surrender here because there was a provision for the widow's maintenance. But in view of the decisions of the Privy Council it is difficult to accept that conclusion. In *Sureshwar Misser* v. *Maheshrani Misrain* (2) their Lordships of the Privy Council lay down that there must be total, not a partial, surrender, that is a *bona fide* surrender, not a device to divide the estate with the reversioner. In that case there was a provision in the deed which was there under consideration that the widow should retain one-hundred bighas of land for her maintenance, but the surrender was none the less held to be effective. Upon this point their Lordships say :

"The conveyance of small portions of land to the widowed mother was unobjectionable, as it was only for maintenance. Their Lordships are therefore of opinion that the arrangements of the compromise cannot be stigmatized as a device to divide the

(7) [1898] 23 Bom. 229.

estate between the surrendering lady and the nearest reversioner, and cannot now be taken exception to."

The same conclusion appears to follow from the judgment of the Privy Council in *Bhagwat Koer* v. *Dhanukhdhari Prasad* (8). In that case also the two Ekrarnamas, which were held to amount to a complete surrender, contained a provision for the maintenance of the widow. There is nothing in the facts of the present case to remove it from the ambit of these decisions, therefore the surrender must be held to have been a total surrender and to have been effective.

The second question is, whether a son adopted after the death of the reversioner in whose favour the surrender was made can challenge that surrender. Upon this point there appears to be no authority. In the absence of authority the question must be considered with reference to the law of adoption in general. An adopted son can challenge any alienation made by the widow without necessity, but it does not follow that necessity is the only validating circumstance. A widow can alienate for necessity, therefore such alienation is valid but any act of a widow which is within her powers under Hindu law would apparently stand on just as good a footing. No doubt the adoption dates back to the death of the father but the adopted son would appear to be bound by acts done by the person in possession of the estate where those acts are within that person's authority. The effect of the surrender by the widow was that the then reversioner took an absolute estate and as the surrender was an act which is by Hindu law within the competence of the widow it is not easy to see any ground on which the adopted son can challenge it.

It may further be argued that the effect of the surrender coupled with the death of Rakhma was that the estate vested in the defendant as an estate of inheritance. The general rule is that adoption by a widow cannot divest any estate of inheritance unless the estate is at the time of adoption vested in the adopting widow : *Krishnarav Trimbak* v. *Shankarrav Vinayak* (9).

On these grounds I am of opinion that the plaintiff is not entitled to succeed. I would, therefore, reverse the decree and dismiss the suit with costs throughout.

Appeal allowed.

(8) [1919] 46 I. A. 259—37 M. L. J. 513—17 A. L. J. 1036—(1919) M. W. N. 860—1 P. L. T. 1—53 I.C. 347 (P. C.)

(9) [1892] 17 Bom. 164.

1923 BOMBAY 437

FAWCETT, J.

Madhavji Visram Thacker—Plaintiff—Appellant.

v.

Ramniklal Vadilal—Defendant—Respondent.

O. C. J. Suit No. 4039 of 1921, D/-12th November, 1921.

Foreign judgment—Suit for recovery of Sterling in Indian Currency—Rate of exchange.

The plaintiffs obtained a judgment against the defendants for a certain amount in sterling in the King's Bench Division of the High Court of Justice in England for costs. The defendants having failed to pay the amounts, the plaintiffs filed a suit in Bombay to recover the equiv lent in rupees of the amount as converted at the rate of exchange ruling on 23rd February 1921. The defendants contended that the rate of exchange should be held to be that prevailing on the day of the judgment against them in the suit filed in Bombay.

Held : the rate of exchange prevailing at the date of the foreign judgment sued on is the one to be taken. [P. 440 C. 1]

Campbell—for Appellants.

Wadia—for Respondent.

Judgment.—Plaintiffs sue to recover the equivalent in rupees, &c., of the sums of £138-4-1 and £21-17-5, decreed *ex parte* against defendants by the High Court of Justice, King's Bench Division, in England, on February 23, 1921, as converted at the rate of exchange ruling upon the said February 23, 1921, with costs and interest on judgment.

The judgment is conclusive under section 13, Civil Procedure Code, none of the exceptions specified in that section applying.

The only question raised by Mr. Wadia for defendants is that the rate of exchange, at which the two sums should be converted into Indian currency, should be that ruling on the date of this Court's judgment, instead of on February 23, 1921, the date of the English High Court judgment.

Mr. Campbell for plaintiffs relies on *S. S. Celia* v. *S. S. Volturno* (1) which follows *Di Ferdinando* v. *Simon, Smits & Co.* (2) in deciding that, when damages are assessed in a foreign currency, they must be converted at the rate of exchange ruling at the date with reference to which the damages in the foreign currency have in law to be assessed and not at the rate of exchange ruling at the date when the tribunal is called upon to convert into English money the damages to be ascertained. This does not, however, strictly apply to the point now arising, for even Mr. Campbell does not ask the Court to allow the rate prevailing on the day when the breach of contract occurred, in respect of which the plaintiffs obtained the English judgment sued upon. But in so far as the cause of action for the present suit is the judgment in question, and the breach of contract is the cause of action in a case like that of *Di Ferdinando* v. *Simon, Smits & Co.* (2), the principle of the decision in that case does, I think, apply to the present. That principle is that once the damages recoverable have, so to speak, crystallized at the date of default, they do not change afterwards, and the Courts do not take account of the inevitable delay which must occur before the trial of the action. This is the view taken by Mc Cardie J. in *Lebeaupin* v. *Crispin & Co.* (3), which bas been endorsed by the Court of Appeal in the two decisions already mentioned. He there says (P. 722, 2 K. B.):—

"To hold otherwise would produce extraordinary results. The damages payable would depend partly on the date when the plaintiff issued his writ, partly on the length of the interlocutory proceedings, partly on the illness or good health of the parties as the trial approached, partly on the number of prior cases which occupied the time of the Court, and partly on whether the Judge reserved his decision or not. They might depend also on whether judgment was entered for the plaintiff by the judge of first instance, or by the Court of Appeal or by the House of Lords. Such a state of things would, I think, be most unsatisfactory. It would encourage a plaintiff to hasten or postpone the trial according to his view of the money market, and he might gamble on the rate of exchange. If the damages are fixed at the date of breach where the contract is wholly to be performed in England, such also, I think, should be the result where the breach is out of England. There should not be varying rules in such a case. If the damages are once crystallized at the date of breach, then a definite date is given for the ascertainment of exchange, and the amount found payable at the hearing is awarded without regard to the fluctuations of the possible date of trial."

These considerations ayply to the present case. It is undesirable that the amount which the plaintiffs receive should depend on the particular date on which this Court gives judgment, a date which depends on varying circumstances. On the date on which the English High Court gave its judgment, defendants came under a legal obligation to pay the sums in question to the plaintiffs, for a foreign judgment is regarded as creating a debt, the defendants being under an implied liability to pay its amount (see Halsbury's Laws of England, Vol. VI, Article 417, p. 281); and the principle applicable in the case of the breach of contract which brought defendants under a legal obligation to pay damages to plaintiffs applies equally in favour of converting at the rate of exchange ruling when that legal obligation arose. The sub-

(1) [1921] 2 A.C. 544—90 L.J., P. 385—27 Com. Cas. 46—37 T.L R. 969.
(2) [1920] 3 K.B. 409—89 L.J.,K.B. 1039—26 Com. Cas. 37—36 T.L.R. 797—124 L. T. 117.
(3) [1920] 2 K.B. 714—89 L.J, K.B. 1024—25 Com. Cas. 335—64 S. J. 652—36 T.L.R. 739.

sequent variations in exchange under which those sums became of greater or less value, when expressed in Indian currency, are immaterial for reasons given in the judgment of Srutton L. J. in *Di Ferdinando* v. *Simon, Smits and Co.* (2) He says (pp. 414,415, 3 K. B:—

"On principle the matter appears to stand thus: When a plaintiff claims damages for breach of contract to deliver goods in a foreign country at a fixed date, the measure of damages is, if there is a market, the market value of those goods at the place where and on the day when they should have been delivered; and it is immaterial to prove that at the date of the judgment awarding the damages the goods were either worth more or worth less than they were at the date of the breach...The reason is that subsequent fluctuations in the value of the goods which ought to have been delivered are too remote, as a consequence of the original breach, to be taken into account by the Court. Therefore, shutting out the change in the value of the goods after the date of the breach, if the damages have to be assessed in the currency of a foreign country, the Court has to arrive at a figure expressed in foreign currency. An English Court however cannot give judgment in foreign currency, there being no power to enforce such a judgment. Therefore the Court must translate into English currency the figure arrived at as the damages in foreign currency on the date of the breach. Just as the Court has to exclude from the calculation of the damages the subsequent change in the value of the goods after the date of breach, so also it has to exclude the subsequent change in the value of the currency after the date of the breach; and for the same reason—namely, that the changes in the value of the currency are too remote a consequence of the breach to be taken into consideration by the Court."

So, here, in calculating in Indian currency the damages due to plaintiffs for defendants' failure to fulfil their obligation to pay the sums of £138-4-1 and £21-17-5 arising under the judgment of February 23, 1921, this Court must exclude from the calculation of those damages the subsequent change in the value of this currency.

It should also be noticed that the Court in *Di Ferdinando's* case (1) rely on *Scott* v. *Bevan* (4). The substance of the decision in that case is given in Scrutton L. J.'s judgment just referred to. That was a case of an action brought on a Jamaica judgment for a sum of money, and the Court held that this should be converted on the basis of the actual rate of exchange *at the date of the Jamaica judgment.* Mayne on Damages, 7th Edn., p. 256, cites this case as authority for the general proposition that the rate of exchange prevailing at the date of the foreign judgment sued on is the one to be taken; and this view has clearly been affirmed by the Court of Appeal in England.

I think the same rule should be followed here. As an analogous case I may refer to the one where "monies expressed to be payable in British currency are payable in India," under an order of Privy Council. Under section 610 of the former Code of 1882, these were to be "estimated according to the rate of exchange for the time being fixed by the Secretary of State for India in Council, with the concurrence of the Lords Commissioners of Her Majesty's Treasury, for the adjustment of financial transactions between the Imperial and the Indian Governments." The Allahabad and Bombay High Courts held that, where payment was made after execution is issued in India, the rate must be that at the time of issuing the writ: *Param Sukh* v. *Ram Dayal* (5) and *Ishwardas* v. *Mir Ajmudinkhan* (6). The Calcutta High Court on the other hand held that the rate should be that prevailing at the date of the Privy Council order: *Dakhina Mohan Ray* v. *Saroda Mohan Roy* (7) and *Mahomed Abdul Hye* v *Gajraj Sahai* (8).

(4) [1831] 2 B. & Ad. 78—9 L. J., (O. S.) K. B. 152,
(5) [1886] 8 All. 650—(1886) A. W. N. 249.
(6) [1881] P. J 40.
(7) [1896] 23 Cal. 357.
(8) [1897] 25 Cal. 283—2 C.W.N. 89.

This difference of opinion has been settled in favour of the Calcutta view by the insertion of the words at the date of the making of the order (i. e., the order of His Majesty in Council) after the words "for the time being fixed" in the corresponding provision contained in Order 45, rule 15 (3), of the present Code. This supports the view that the rate of exchange at the date of a foreign judgment sued on should similarly be chosen in preference to that prevailing on the date when the judgment is ordered to be given effect to in India.

It is agreed that the rate of exchange as on February 23,1921, was 1s. 3 & 11/16 d

The full amount due (Rs. 2,448-11-0) has already been paid to plaintiffs as admitted by Mr. Campbell.

Decree for plaintiffs for costs of the suit.

Suit decreed.

1923 BOMBAY 440

MACLEOD, C. J. AND CRUMP, J.

Timmappa Annaya Bhatta—Plaintiff—Appellant.

v.

Manjaya Jattaya Shetti and *others*—Defendants—Respondents.

S. A. No. 33 of 1921, D/-6th February 1923, from the decision of Dt. J. Kanara, in Appeal No. 114 of 1920.

Civil P.C., O 2, R. 2—Prior suit for profits as tenants-in-Common-Later suit for partition and profits not barred.

In 1916, the plaintiffs claimed to have left their moiety of the Mulgeni to defendants on Chalgeni for Rs. 50 a year and, they sued for five years' accumulation of unpaid rents. The Court held that there was no evidence of any Chalgeni. But it held also that plaintiffs and defendants were tenants-in-common, and as the defendants could not prove exclusion, they had to pay the plaintiffs their half share of the mesne profits. In the second suit they asked for partition, in addition to the profits belonging to their share.

Held: per Macleod, C. J.— The cause of action in the second suit had no connection with the cause of action in the suit of 1916. But even if the Plaintiffs in that suit had claimed a half shars of the profits in the suit property, which belonged to them and the defendants as tenants--in--common, without suing for partition the suit would not bar a later suit for partition under the provisions of Order 2, rule 2. [P 441 C 1]

Per Crump, J.—The words "cause of action" must be interpreted with reference to those facts which the plaintiff sets out as grounds for the relief he claims. [P 441 C 1]

G. P. Murdeshwar—for Appellant.

S. V. Palekar and A. A. Pais—for Respondents.

Macleod, C. J.—The plaintiffs sued for partition and separation of their half share in the plaint lands. The first issue was whether the suit was barred by Order 2, rule 2, Civil Procedure Code. That issue was found in the affirmative by the trial Court and the plaintiff's claim for partition was disallowed, but a decree was passed against certain of the defendants for Rs 150, being the plaintiffs' share of the profits of the suit property. An appeal against that decree was dismissed. It has been found that the plaintiffs were entitled to a moiety of the Mulgeni lease relating to the land, and in the Record of Rights of 1909, the plaintiffs were entered as mulgenidars along with the defendants' family.

Then in 1916, the plaintiffs claimed to have let their moiety of the Mulgeni to defendants on Chalgeni for Rs. 50 a year, and they claimed five years' accumulation of unpaid rents. The Court held that there was no evidence of any Chalgeni. But it held also that plaintiffs and defendants were tenants-in-common, and as the defendants could not prove exclusion, they had to pay the plaintiffs their half share of the mesne profits.

In this suit they asked for partition, in addition to the profits belonging to their share. Now it will be seen that the cause of action on which the plaintiffs relied in the suit of 1916, was a Chalgeni lease. It was found that there was no such lease The Court however, gave them something which they did not ask for, namely, profits belonging to their share as Mulgenidars. It is difficult to see then, how it could possibly be said that the cause of action in the present suit has any connection with the cause of action in the suit of 1916. But even if the plaintiffs in that suit had claimed a half share of the profits in the suit property, which belonged to

them and the defendants as tenants-in-common, without suing for partition, I cannot see how such a suit would bar a later suit for partition under the provisions of Order 2, rule 2. It is always open to a tenant in-common to claim his half share of the profits of the land which is jointly owned, and there is no obligation lying on him in his suit for profits, also to claim partition. The cause of action in a suit for profits would be the fact that there is a tenancy-in-common, the fact that one of the tenants has collected the whole of the rents, and that the other tenant is entitled to his share, and the relief which could be claimed on that cause of action would be half a share of the profits. There must always be a constantly recurring right for one tenant to demand partition from the other. Therefore it would always be open at any time, as long as the tenancy-in-common continued, for one tenant to file a suit for partition irrespective of any suit which has been filed between them for a share of the profits during the continuance of the tenancy-in-common. Therefore it is clear that Order 2, rule 2, does not apply to this case, and the claim for partition must be tried on its merits. The appeal must be allowed and the suit returned to the trial Court for disposal. The appellant will be entitled to his costs in this Court and in the lower appellate Court. The costs in the trial Court will be costs in the cause.

Crump, J.—It seems to me clear that the cause of action in the previous suit is not identical with the cause of action in the present suit. The words "cause of action" must, I think, be interpreted with reference to these facts which the plaintiff set out as grounds for the relief he claimed. In the previous suit he sued as a landlord to recover rent. In that suit it is difficult to see how he could have claimed partition of the property. That in the course of trial it was held that he was jointly interested in certain properties and was therefore entitled to a share in the profits does not alter the cause of action on which the suit was based. The cause of action for the later suit is the co-tenancy which was held proved in the former suit; and it is clear that those two causes of action are not identical, and, therefore, Order, 2, rule 2, has no application here. Indeed it would be unfortunate if we were compelled to dismiss the suit on any such grounds. for that would clearly lead to most inconvenient results.

Appeal allowed.

1923 BOMBAY 441

MARTEN AND FAWCETT, JJ.

Shankar Sakharam Jagdale—Plaintiff—Appellant.

v.

Ratanji Premji Shel—Defendant—Respondent.

S.A No. 737 of 1921, D/-17th November, 1922, against the decision of the Dt. J. at Thana, in Appeal No. 96 of 1921.

(a) *Compromise Decree—Execution beyond time allowed by the decree is barred—Time of essence.*

On January 29, 1920, the parties arrived at the compromise in question. There was a provision in that compromise for the payment by the defendant of a certain sum of money and the building of a new wall within two months from the date of that compromise. Admittedly the money was not paid nor the wall built within the two months. Nothing was done by either party until the defendant took out the execution. There was no evidence at all of any intervening acts of the parties after the date of the decree. There was therefore, a lapse of time of just over one year from the date fixed by the compromise for the performance of the acts. [P 442 C 1]

Held: That time was the essence of the contract; the defendant was out of Court because he was a year out of time and no waiver or a new agreement had been shown to have taken place. But supposing time was not of essence of the contract the defendant could not even then, after an unexplained delay of one year obtain specific performance of this agreement. [P 444 C 1; P 445 C 1]

(b) *Contract Act, S. 55—Time of essence—Intention.*

The question whether time is of the essence of the contract depends on the intention of the parties. Equity has never laid it down that a man must never be allowed to mean what he says. [P 442 C 2]

(c) *Specific Performance—Delay.*

An unexplained delay for one year or even less is sufficient to negative the rights of a party to obtain specific performance. [P 445 C 1]

(d) *Compromise Decree—Varying terms.*

It cannot be laid down in the hard and fast way as being a universal proposition capable of no explanation or deviation, that a consent decree differs from a contract in as much as its terms can never be varied except by consent.

[P. 446 C. 1]

G. N. Thakor and G. P. Murdeshwar—for Appellant.

W. B. Pradhan—for Respondent.

Marten, J.—The question in this case is whether, notwithstanding the lapse of time and the conduct of the parties, it is still open to the defendant to enforce the compromise embodied in the consent decree Exhibit 28 in this suit.

The plaintiff and defendant are adjoining owners, and it would appear that before the commencement of this litigation the western wall of the plaintiff's building was a mud wall, and that the eastern wall of the defendant's building adjoined it. The defendant wanted to rebuild his house and in the course of that rebuilding the plaintiff alleged that the defendant encroached upon his, the plaintiff's, rights. Thereupon this suit was brought for an injunction and other relief.

On the 29th of January 1920 the parties arrived at the compromise in question which is embodied in Exhibit 28. To indicate very briefly the nature of the point this Court has to decide, I will state that there is a provision in that compromise for the payment by the defendant of a certain sum of money and the building of a new wall within two months from the date of that compromise. Admittedly the money was not paid nor the wall built within the 2 months. So far as the evidence before us is concerned, nothing was done by either party until the defendant took out the present Darkhast of the 30th of March 1921, Exhibit 1. That Darkhast states that the defendant told the plaintiff several times in accordance with the terms of the decree to do certain things. But apart from that mere statement in the Darkhast which is not evidence, there is no evidence before us at all of any intervening acts of the parties after the date of the decree. We have therefore a lapse of time of just over one year from the date fixed by the compromise for the performance of these acts.

The defendant's answer is that his acts of payment of the money and the building of the new wall were all conditional upon the plaintiff first pulling down an old wall, and that as the plaintiff did not pull down that old wall, he the defendant is absolved from strict compliance with the provisions as to time inserted in the compromise. The Darkhast Exhibit 1 is based on the defendant's view of the true construction of the contract. There he asks that the plaintiff should be made to pull down the old wall, and that if he does not do it, the Court should have it done and direct payment of the costs out of the money the defendant was to pay. He makes there no offer of his being ready and willing to pull down the old wall at his own expense, supposing the Court is against his view of the contract. However before us, at the conclusion of the argument of his pleader, the defendant undertook to pull down the wall at his own expense, supposing the Court was against him on the true construction of the compromise.

It is, therefore, in the first place, of importance to see what actually was the compromise which the parties arrived at. I will take it as set out in the decree Exhibit 28 at page 12 of the documents before us, which the parties have agreed should be taken as containing the relevant terms, subject to this, that although the translation before us is an official translation, an alternative translation of para 5 has been put in by the Court interpreter, which I will refer to later.

Turning then to the compromise, clause 1 provides that the plaintiff should leave vacant for the purpose of a lane a space 3 feet in breadth, and the defendant should pay to the plaintiff within two months Rs. 250 as compensation, and the parties are to be the joint owners of the lane 3 feet in breadth which will be so kept and both of them may make use of it.

Stopping there for a moment, the defendant contends that as the plaintiff had to leave vacant this 3 feet, it implies that he must pull down his old

wall. But the alternative view is that this particular clause was merely a provision as to what was to happen in perpetuity as regards this particular space, viz, that it was to be a common passage way—an open space between the two houses.

Turning next to clause 2, this provides that "the defendant should build at his own cost a pukka chunam built brick wall with strong foundation of the present height at a distance of 3 feet beyond the foundation of the wall on the western side of the plaintiff's house and the stone wall of the rear compound which has to be pulled down for making the said lane." Stopping there, again, for an explanation, I understand the effect of this to be that the lane space of 3 feet was to be taken out of the plaintiff's land, and his old mud wall was to be set back by approximately 3 feet, the width of the passage, and that accordingly it was on the plaintiff's land that the new *pucca* wall was to be built. There is no doubt that the defendant was to build this wall, and it is obvious that before he could do so, the old mud wall had to be pulled down; and here in this clause there is a reference to the stone wall of the rear compound which has to be pulled down. The defendant says that it was the plaintiff who was to pull down. But on the other hand it may be pointed out that this clause is dealing with what the defendant has to do, and therefore it would seem equally consistent with the intention of the parties, or even more probable that it was their intention that the defendant should carry out the whole work, namely, not merely building the new wall but also pulling down the old one.

The rest of clause 2 and clauses 3 and 4 deal with certain matters, such as, opening windows and raising the roofs of the respective houses and keeping the lane for use in common free from obstructions.

Then comes clause 5 as to which opposing views are put forward. In the original official translation it runs as follows:—"The defendant should pay the amount fixed and build a new wall after pulling down the aforesaid wall within two months from today, and if he does not do so the plaintiff should get the wall built through the Court and each party should bear his own expenses of this suit." Now on that clause as so translated, I should have thought it perfectly clear that it was the defendant to pull the old wall down, and further it is quite clear that he was to do all these things within two months from that date.

The alternative translation of this clause by the Court interpreter is "As to the putting up of a new wall after pulling down the above wall, and as to the payment of the said sum to be made, the defendant should within two months from this day put up the same and give it. In case of his failing to do, the plaintiff is to get it built through Court. And the costs of this suit are to be borne by the parties.

I am not sure that there is really much difference between the two translations. It is at any rate quite clear that two things had to be done by the defendant, *viz*, to build a new wall and to pay money within two months. Even on this alternative translation, it would rather seem that the whole work was to be done by the one man, for the sentence runs "As to the putting up of a new wall after pulling down the above wall" the defendant was to do certain things. Speaking for myself, the view I take of this contract is that it was the defendant who was to pull down the old wall in addition to putting up the new one, and that consequently he has been wholly wrong in the course he has adopted.

But there is an alternative view that this contract is so ambiguous that it is impossible for the Court to say definitely which party it was who had to pull down and pay for pulling down the old wall. In that event it would seem that the parties were never *ad idem*, and in that view there would be no contract.

Even if it be held that the view taken by the respondent is correct, and that it was for the plaintiff to pull down the old wall, how does the matter stand on that basis? The

defendant who is in effect insisting on specific performance of the agreement has done nothing active whatever for over a year after the expiration of the stipulated time, namely, the two months. He has not paid the money He has not said to the plaintiff: "My view is that you the plaintiff ought to pull down this wall, but without prejudice I will pull down the wall in order to build up a new one, and we will determine later whether I am entitled to claim from you a refund of the expenses which ought properly to be borne by you". Nothing of the sort is done at all, and it is not as I say till the 30th of March that he comes to the Court.

First of all, then are we to consider that time was of the essence of the contract under this compromise? In the view I take, I am disposed to think that the parties did intend that time should be of the essence. This "two months" is mentioned in a couple of places. There was already litigation between the parties. The defendant on the one hand was presumably wishing to get on with his new building. The plaintiff on the other hand had alleged that his old wall was damaged. It seems to me, therefore, quite consistent with the actual words used by the parties, that the two months which they stipulated for was the time intended to be kept, unless there was a subsequent agreement by both parties to the contrary.

The respondent has cited to us a decision of Mr. Justice Beaman sitting with Mr. Justice Heaton in *Bhagvant Gopal* v. *Appaji Govind* (1), where the learned Judge is expressed to enunciate the law in these terms; "Speaking here for myself, I have not much admiration for the equity rule that in buying or selling or otherwise transferring real estate a man must never be allowed to mean what he says. That if he says the bargain is to be concluded within six months, he must not be taken to mean six months, but any reasonable time which, according to the view of the Courts, may extend to six or sixty years. The rule is, however, venerable and has the sanction of such high authority that it is useless now to criticise it". With great respect to the learned Judge, the equity rule which he is there expressed to lay down is not, I venture to think, to be found in any of the authorities recognised by the legal profession at large. The real equity rule is based on, or may be expressed, in much the same terms as will be found in the Indian Contract Act, S. 55, and is to the effect that the question whether time is of the essence of the contract depends on the intention of the parties. Equity has never laid it down that a man must never be allowed to mean what he says. Still less—I say this without looking up the authorities but in perfect confidence—will it be found that there is any case in England or elsewhere where a Court has decreed specific performance of an agreement to sell property after a lapse of 60 years. Nor will it do so after a lapse of 6 years, unless the parties themselves have expressly extended the time for completion.

A case, which is often useful to refer to where acts have to be performed within a certain time, and more especially if it is alleged that there has been a waiver, is *The Earl of Darnley* v. *The Proprietors &c. of the London, Chatham and Dover Railway.* (2) There an agreement between Lord Darnley the land owner and the Railway Company was embodied in a private Act of Parliament, under which the Railway Company obtained their statutory powers to build the railway. By article 10 of that agreement, the Company agreed "to make and maintain, for the convenience of the Earl's estate, so many crossings across the extension railway, and of such kinds, whether above, below, or on the level, as Mr. John Clutton, or him failing, the engineer or surveyor of the Earl, his heirs or assigns, shall within one month after obtaining possession of the land of the Earl, direct and notify in writing to the Company or their engineer." The

(1) [1916] 18 Bom.L R. 803—36 I.C. 598.

(2) [1867] L.R. 2 H.L. 43.

requisite notification was not given to the Railway Company, but in ignorance of the real facts, the Railway Company took up an award that was made under the agreement, and it was then said that they had waived the provision as to time. It appears from the judgment of Lord Cranworth at p. 59 that "the only written direction and notification which Mr. Clutton made was made on the 5th of March 1859, being nearly three months, instead of one month, after the respondents had got possession of the land". The learned Judge proceeds: "It was therefore impossible for Lord Darnley to obtain a decree for specific performance of the agreement on the ground that Mr. Clutton had, in the stipulated mode and in the stipulated time, indicated what was to be done. It was argued, however, that relief ought to be given on one of two grounds: either that the agreement did not mean to make the one month an essential condition of the contract; or, if it did, then there was a waiver. Then the learned Judge proceeds: "On the first point it is unnecessary to say more than that the circumstances indicate a very clear intention on the part of the contracting parties to make time an essential part of the contract". At page 60 the learned Judge said "When parties, who have bound themselves by a written agreement, depart from what has been so agreed on in writing, and adopt some other line of conduct, it is incumbent on the party insisting on, and endeavouring to enforce, a substituted verbal agreement, to show, not merely what he understood to be the new terms on which the parties were proceeding, but also that the other party had the same understanding—that both parties were proceeding on a new agreement, the terms of which they both understood". Then at page 61 he says: "Both parties showed by their conduct that they did not intend to act on the strict terms of the written agreement; but no definite terms were agreed on as to what was to be substituted for it The Court is left to discover that solely from the conduct of the parties; and that is quite as consistent with the understanding of Mr. Cubitt as of Mr. Clutton".

Now I agree that the present is not the case of a Railway Company building a railway, when no doubt it would be of great importance to know, at the earliest possible date, what level crossings would have to be constructed. But I have already indicated the grounds for considering that time was of importance to the present parties, and Lord Darnley's case may perhaps be regarded as at any rate one instance where equity did not prevent the parties from carrying out what they meant.

In that view of the case therefore, namely, that time was of the essence of the contract, for that is the view which I personally take, the defendant is out of Court because he was a year out of time, and no waiver or new agreement has been shewn to have taken place.

But supposing time was not of the essence of the contract, could the defendants even then, after this lapse of time, obtain specific performance of this agreement? We have no explanation of the delay except in so far as one can infer from the present contentions of the parties, that the question as to who was to pull down the old wall was the real bone of contention. One knows that in most cases an unexplained delay of one year or even less is sufficient to negative the rights of a party to obtain specific performance. If parties will sleep on their alleged rights, they cannot expect a Court of Equity to give them the special relief which it is able to give. On the facts as they come before us then, I think that on this ground also the defendant has failed to establish his right to obtain the relief claimed in his Dharkhast.

One other point I will mention which was relied on by the plaintiff. It is unnecessary for me to decide it, but it was claimed in reliance on *Lachiram Dagduram* v. *Jana Yesu* (3) that a consent decree differs from a contract inasmuch as you can never

(3) [1914] 16 Bom. L.R. 668—27 I.C. 830.

vary its terms except by consent. Now in a broad general sense I understand that proposition, but to my mind it cannot be laid down in that hard and fast way as being an universal proposition capable of no explanation or deviation. Admittedly one exception is in cases of landlord and tenant, and it is sufficient to say that the point was considered by Sir Norman Macleod and Mr. Justice Heaton in *Supdu Gujar* v. *Madhavrao Jivram* (4) where Sir Norman said: "The Court cannot lay down a general principle that in no case can the terms of a consent decree be varied." In that particular case the Chief Justice thought that the consent decree amounted in effect to a redemption decree. Mr. Justice Heaton thought the contract they were there concerned with was something like an agreement of sale and something like a mortgage; but whichever it was, the Court was entitled to give relief in that particular case.

One important distinction of fact exists between that case and this. In 22 Bom. L.R. 780 there was a preliminary payment to be made, and the Court held that the really important date was when possession of the lands was to be given, and that accordingly as the first payment, though made late, was paid long before the date fixed for possession, the delay in question should be excused. Here we have nothing of that sort. The date for giving completion or possession, whatever one likes to call it, was 2 months from the date of the compromise. Nothing was done up to that date: nothing was done afterwards. So that there seems to me a broad distinction of fact between that case and the present one.

There are also clear grounds on which the other decision I have referred to *viz*, of Mr. Justice Beaman in *Bhagvant* v. *Appaji* (1) could be sustained, because it would appear there that the contract had been partly performed by the party who was late in performing it. He had apparently carried out certain building operations and under these circumstances if the other party chose to stand by, seeing money expended and knowing that time had elapsed, it may be that on equitable principles he would be estopped when the work was completed from turning round and saying "I will accept that work, but I won't perform my part of the contract, because your work was performed late." If here, for instance, the defendant had built that new wall, and had finished it one or two months late without any objection by the plaintiff, in my opinion the plaintiff would not have been able to turn round and say: "I will accept that nice new wall, but as you built it late, I won't allow you to use the passage way of 3 feet. I shall claim to retain that as my own."

Under all the circumstances of the case, therefore, I think the conclusions arrived at by the lower Courts were incorrect, and that this appeal must be allowed with costs against the defendant throughout.

The effect of our decision is to render the compromise arrived at, nugatory. But in this connection I should mention that Mr Thakor, counsel for the appellant, has told the Court. He said: "I have definitely elected to treat the terms of the decree as at an end and nugatory, and therefore I forego any relief in my suit." I say this to prevent it being suggested that it is now open to the plaintiff to go on with his suit as if there never had been any decree passed in it, or to go on at all. As far as I can see, this suit is ended except in so far as any execution as regards costs is concerned

P. C. Appeal allowed with costs against the defendant throughout. Darkhast dismissed. Liberty for the defendant to withdraw the Rs. 250 paid into Court.

Fawcett, J.—The judgment just delivered by my learned Brother deals very fully and clearly with the questions arising in this appeal, and I concur generally in his observations.

I think the first question to decide is whether we are prevented in any case from granting equitable relief to the defendant against the condition in the

(4) [1920] 44 Bom. 544—22 Bom. L.R. 780—57 I.C. 534.

consent decree requiring payment and the building of a certain wall within a period of two months. The appellant's pleader relied upon 16 Bom. L.R. 668 (3) which, if accepted, might be held to prevent a Court exercising this equitable jurisdiction, in any case where there was a consent decree, except where that decree itself established the relationship of landlord and tenant. But such a reading of the Full Bench decision in *Krishnabai* v. *Hari Govind* (5) seems to me entirely to ignore the basis of the judgments of Sir Lawrence Jenkins and Mr. Justice Beaman, which proceed mainly upon the view taken in *Wentworth* v. *Bullen*(6) that "the contract of the parties is not the less a contract, and subject to the incidents of a contract, because there is superadded the command of a Judge." That is a general principle, and the Court adopted it in overruling the previous decision of this Court in *Shirekuli Timappa* v. *Mahablya* (7) that the doctrine of equitable relief against penalties could not be given effect to as regards the compromise of a suit. It seems quite clear that the case of *Krishnabai* v. *Hari* (5) follows the Madras High Court in dissenting from 10 Bom. 435 (7). A similar view is also taken by the Calcutta High Court and a recent ruling to that effect is reported in *Gopal Krishna Nath* v. *Hari Nath* (8) based again upon the same case of *Wentworth* v. *Bullen* (6).

Therefore, so far as 16 Bom. L.R. 668 contravenes what has been actually laid down in the Full Bench case of 31 Bom. 15, it is not, I think, binding upon us, and we have, as already pointed out by my learned Brother, the authority of 44 Bom. 534 (4) for holding that there is no general bar against equitable relief in cases of this nature, and that each case must be considered on its own merits.

In this particular case the main question we have to consider is whether time is or is not of the essence of the contract, and the relief which a Court of Equity gives in cases of this nature is (as stated in Halsbury's Laws England, Vol. XIII, Art. 182, page 154), analogous to relief against forfeiture. The condition as to the time within which the defendant should do the acts of payment and building is contained in a separate clause of the compromise, and it seems to me that *prima facie* the intention of the parties was that time should be of the essence of the contract. It is obvious that the plaintiff might be put to very serious inconvenience, if he was to remain in suspense for a considerable period as to whether the western wall of his house and the stone wall of the rear compound were to be pulled down or not; and inasmuch as the land in question under the compromise admittedly belonged to the plaintiff, so that compensation was given to him in respect of it, he would be in a dominant position, enabling him to stipulate that the proposed alterations must be carried out within a fixed time. This is only an application for execution and not a regular suit, and therefore no evidence has been recorded which might help the Court in deciding this question whether time was or was not of the essence of the contract. But the parties could have asked the Judge to record such evidence, if there was anything material to be brought to notice, and as they have not done so, we can only decide the question upon the available materials. I concur, therefore, with my learned Brother in thinking that on those materials we should hold that time was intended to be of the essence of the contract.

But the respondent's pleader contends that the compromise contemplates that the plaintiff should first pull down his wall and that until he did so no obligation arose against the defendant. On this point I concur with my learned Brother that the probabilities are that the intention was for the defendant to pull down the wall. If the intention had been that the plaintiff should do so, the natural thing would have been to have inserted this clearly in the first part of clause 1 of the compromise, where the obligations upon the plaintiff are first of all

(5) [1907] 31 Bom. 15—8 Bom L.R. 813—1 M.L.T. 370.
(6) [1829] 9 B & C. 840—9 L.J. (o.s.) K.B. 33.
(7) [1886] 10 Bom 435.
(8) [1921] 34 C.L.J. 157—66 I.C. 766.

stated. On the contrary the reference to the pulling down of the wall appears in clause 2 of the compromise —a clause which deals mainly with the acts that had to be performed by the defendant, the only clear exception being the plaintiff's supply of certain doors and windows for the new wall. The pulling down of the wall would not be a costly operation, so that it would naturally be put upon the plaintiff rather than the defendant. Therefore I do not think we ought to accede to this argument.

But, even suppossing that this was the real intention, it does not in my opinion follow that the defendant could stay quiet indefinitely and come at his own leisure and convenience to the Court to ask for relief of the kind he is now seeking. The compromise itself says that the new wall should only be built after the other wall had been pulled down, and as the new wall was to be built within 2 months, the obvious intention was that the pulling down of the old wall should be done within the same period, and necessarily at an early stage, so as to admit of the new wall being built within the period of two months. This circumstance clearly imposed an obligation upon the defendant, if he found the plaintiff neglecting to pull down the wall in sufficient time to enable him to comply with time-limit of the compromise, to take some definite steps to remedy this He could, for instance, have sent him a written notice, say three weeks after the date of the compromise. But it is not suggested that any such step was taken, and the defendant rested on his oars for about a year.

That being so, I think that the Court should act upon the principle that the plaintiff in equity is bound to prosecute his claim without undue delay, and that a Court of Equity should refuse to comply with his demands, where the plaintiff has slept upon his rights and acquiesced for a great length of time. I think also a further reason for such refusal is the principle on which the Court acts in an analogus case of reduction of the amount payable by a debtor to a creditor. This is dealt with an Art. 177 at page 152 of Halsbury's Laws of England, Vol 13, as follows :—" Where money is actually payable, or to become payable a provision may validly be made for diminishing the amount, or making it payable by instalments, or allowing other concessions to the debtor upon stipulated terms ; and if the debtor complies with the terms he is entitled to the benefit of the provision. But he must purchase the benefit by strict compliance with the terms ; and, if he is in default, the full debt is payable and he cannot claim relief as against a penalty.

I do not say that this case directly falls under that rule of law, but in this particular case the main concessions seem to have been made by the plaintiff for the benefit of the defendant. In particular, I refer to the grant of 3 ft. of land as a space between the two houses. That concession is given upon certain terms with which (on the principle just referred to) the defendant. being thus benefitted, must strictly comply. This is only another instance of the principle that the Court will not grant relief to a person who has slept upon his rights.

I would only add that I do not think that the ruling in 18 Bom. L.R. 803 (1) affects our decision is this case. That was a case where there had been a part performance of the conditions, and the facts are clearly very different from those of this case.

I concur therefore with my learned Brother that the appeal should be allowed with costs.

Appeal allowed.

1923 BOMBAY 449

MACLEOD, C. J. AND CRUMP, J.

Sitaram Sadashiv Shastri Sapre—Plaintiff—Appellant.

v.

Parshuram Bhau Patil—Defendant—Respondent.

S. A. No. 765 of 1921 (with S. A. Nos. 678 and 687 of 1921), D/—30th January 1923 from the Asst. J., Satara in Appeal No. 11 of 1916.

Bombay Land Revenue Code, S. 53 – Occupancy rights – Assessment paid by tenants—Presumptions—Satara District. Rent equivalent to assessment Enhancement of rent.

The fact that the tenants pay the amount of assessment may not be conclusive evidence in the Satara Dt., but it would afford strong presumption that the tenants have attained to occupancy rights by virtue of their long holding The word "Miras" should not be used in case of persons who by virtue of their long holding are presumed by reason of the provision of S. 53 to have acquired fixity of tenure.

In cases where rent is equivalent to assessment it cannot be enhanced unless a right to do so is established by custom or otherwise.

[P. 449 C. 1, 2.]

S. S. Patkar and D. R. Maneriker—for Appellant.

K. V. Joshi—for Respondent.

Macleod, C. J.—I rather doubt whether any second appeal lies. The Lower Appellant Court agreeing with the Subordinate Judge has found that the defendants pay assessment. The record of right shows that the defendants pay assessment and though this is not conclusive, it is probable that the plaintiff has been getting a trifle beyond the proportionate share from the tenants owing to the splitting up of of the Survey Number. The fact that the tenants pay the amount of assessment may not be conclusive evidence in the Satara District in a case of this nature, but it would afford a strong presumption that the tenants have attained to occupancy rights by virtue of their long holding. The trial Judge at the original hearing of the case said "It is a well established custom in the part of the country that the rent leviable on Miras lands, may be enhanced up to the limit of half the gross produce of the land." We have on more than one occasion pointed out the danger of using the word Miras in case of persons who by virtue of their long holding are presumed by reason of the provision of Section 53 of the Land Revenue Code to have acquired fixity of tenure. On the remand the Subordinate Judge found that the plaintiff was not entitled to enhance. His judgment is not printed but it may be presumed that he came to this conclusion owing to the pronouncements of this Court in the judgments remanding the case and the fact that no further evidence was called by the plaintiff that he had a right by custom or otherwise to enhance the rent in cases where the rent was equivalent to assessment. It is impossible for us in these circumstances to come to a different conclusion.

The appeal must be dismissed with costs.

Crump, J.—The previous judgment of this Court in second appeal reversed the judgment of the District Court which proceeded on the ground that S 216 of the Land Revenue Code applied to this land. The case was remanded for a decision, whether on the facts of this particular case plaintiff was entitled to enhance the rent. The judgment of this Court will be found at 23 Bom L. R 395 [*Sitaram Swashio* v. *Tukaram Gain* (1)] Certain remarks were made in these judgments as to the bearing of the alleged correspondence between the assessment on the lands and the payments made by defendants to plaintiffs in past years, but that question was left for the consideration of the Lowe Courts along with the other evidence in the case. The Courts have had found upon the evidence that in this particular case plaintiff's right to enhance must be negatived. I cannot see that there is any error of law involved in that finding. To me it appears a reasonable conclusion on the facts. I agree therefore that these appeals must be dismissed with costs.

Appeals dismissed.

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(1) [1921] 45 Bom. 994—23 Bom. L. R. 395—61 I. C. 577.

✱ 1923 BOMBAY 450

MACLEOD, C. J. AND CRUMP, J.

Dada Jinappa Vagiani—Plaintiff—Appellant.

v.

Yesu bin *Sakhoba Ugare and others*—Defendants—Respondents.

S. A. No. 183 of 192², D/—6th February, 1923, against the decision of the Dt. Judge of Satara in Appeal No. 405 of 1920.

(a) *Civil P. C. S. 47—Relief jointly against some persons parties to suit and some not parties—Separate suit not barred.*

The plaintiff was the brother of one D. who had obtained a decree in suit No. 34 of 1905, against the first defendant. In execution of that decree the suit house was sold and purchased by D. But no possession was obtained. Consequently after D's. death the plaintiff filed a suit for possession.

Held: that although the plaintiff's brother by becoming the auction purchaser in execution of his decree would not thereby cease to be a party to the suit, defendant Nos. 2 and 3, sons of the original defendant, were not representatives of the first defendant in that suit. That the plaintiff in order to get possession of the property, which the brother purchased at the auction sale could not take out execution proceedings making defendants Nos. 2 and 3, parties to those proceedings, as they were not parties to the suit. Therefore a suit was necessary if the plaintiff wished to recover the property from the defendants Nos. 2 and 3. [P. 450 C. 2]

(b) *Hindu Law—Joint family—Decree against Manager binding on all members.*

In the absence of any objection by any member of the family, when joint family property is put up for sale in execution of a decree against a manager, it may be inferred that the intention was to pass the interest of all the members of the family in the property, though it may be open to the other members of the family to dispute that intention, and to satisfy the Court either that the alienation was not binding on them, or that the debt incurred by their father was not binding on them, or on any other ground that their interests in the family property had not passed to the auction purchaser. 44 Cal. 524 Foll. [P. 451 C. 2]

K. N. Koyaji—for Appellant.

P. B. Shingne—for Respondents.

Judgment—The plaintiff in this case is the brother of one Devendra, who obtained a dacree in Suit No. 34 of 1905 against the 1st defendant. In execution of that decree the suit house was sold and purchased by Devendra. But no possession was obtained. Consequently after Devendra's death the plaintiff had to file this suit. The issues in the trial Court with their answers were:—

(1) Does plaintiff prove the auction purchase of 1st June 1907? Answer—Yes.

(2) Does he prove he succeeds Devendra? Answer—Yes.

(3) Does defendant No. 1 show that the transaction was not to be acted upon? Answer—No.

(4) Is the plaintiff's suit barred by time? Answer—Yes.

The result was that the plaintiff's suit was dismissed by the trial Judge on the ground that Section 47, Civil Procedure Code, was a bar to the suit, and though this suit could have been treated as an execution proceeding, execution was barred before the date of the suit. The learned Judge thought that the decision in *Sadashiv* v. *Narayan* t(1) was directly in point. There in execution of a redemption decree, the decree-holder (mortgagee) himself purchased the property at the court-sale. After the confirmation of the sale the legal representatives of the decree-holder (mortgagee auction purchaser) brought a suit to recover possession of the property so purchased. The defendants (representatives of the mortgagors judgment-debtors) contended that the question involved in the suit related to the execution of the decree, therefore, the suit was not maintainable under Section 47, Civil Procedure Code. It was held that the suit was barred by Section 47, Civil Procedure Code, and that the decree-holder by becoming a purchaser at a court-sale did not cease to be a party to the suit within the meaning of Section 47, Civil Procedure Code.

But although the plaintiff's brother by becoming the auction purchaser in execution of his decree would not thereby cease to be a party to the suit, the question was whether defendants 2 and 3, sons of the original defendant, were representatives of the 1st defendant in that suit. Their claim was that their interest in the property was not affected by the plaintiff's brother's purchase, and although they were up to a certain time joint with their father, they were not representatives of their father, as they could not be

(1) [1911] 35 Bom. 452—13 Bom L.R. 661—11 I.C. 987.

treated as parties to the previous suit. The plaintiff in order to get possession of the property, which his brother purchased at the auction sale, could not take out execution proceedings making defendants 2 and 3 parties to those proceedings, as they were not parties to the suit, and they could not be placed on the record as representing any party. Therefore a suit was necessary if the plaintiff wished to recover the property from defendants 2 and 3. The question is whether defendants 2 and 3 could resist on the contention that all that the vendor purchased was the interest of their father. The learned Judge seemed to consider that they were separated from their father, and that their shares were not affected by the decree. But when the decree was passed they were joint with their father, and in certain circumstances a decree against the head of a joint family governed by Mitakshara law would be binding upon his sons, though they might take proceedings to prove in the case of an alienation by their father that the alienation was not justified, or in the case of a suit for a debt, that the debt was not incurred for a proper purpose.

However those questions do not arise here. The decree was passed on a mortgage effected by the father of defendants 2 and 3 in favour of Devendra. It has never been alleged that that mortgage was not for a proper purpose, or that it was not binding on the family property. No attempt has been made in this suit to suggest that defendant 1 had not properly pledged the family property. Therefore it must follow in the ordinary course, when the decree was passed against defendant 1, and defendants 2 and 3 raised no objection that it was not binding on them, that when the family property was put up for sale in execution of the decree the whole interest passed.

That was decided in *Sripat Singh Prodyot Kumar* (2). The property of a joint Mitakshara family, consisting of a father and two sons, was sold in execution of decrees against the father, the order and notices providing for the sale of the "right, title and interest", of the judgment-debtor. It appeared from the circumstances in which the above words had been inserted, from the conduct of the sons, and from the price paid by the execution creditor, who became the purchaser, that the intention was to sell the whole property over which the father had a disposing power. In a suit instituted by the sons to set aside the sale as to 2/3rd of the property, both Courts in India held that the decrees were for debts binding upon the joint family. It was held by the Privy Council, that the substance, and not the technicalities, of the transaction should be regarded, and that the entire property passed to the purchaser.

Therefore we deduce from that decision, that in the absence of any objection by any member of the family, when joint family property is put up for sale in execution of a decree against a manager, it may be inferred that the intention was to pass the interest of all the members of the family in the property, though it may be open to other members of the family to dispute that intention, and to satisfy the Court either that the alienation was not binding on them, or that the debt incurred by their father was not binding on them, or in any way possible, that their interests in the family property had not passed to the auction purchaser. In this case no attempt has been made to prove any of the necessary facts which would entitle these defendants to succeed. They really attempted to rely entirely upon technicalities which, as their Lordships point out in the case we have just cited, could not be regarded.

The result is that the appeal succeeds and plaintiffs are entitled to possession of the suit property with costs throughout.

Appeal allowed.

(2) [1916] 44 Cal. 524—44 I.A. 1—32 M.L.J. 133—15 A.L.J. 147—(1917) M.W.N. 193-21 C.W.N.442—25 C.L.J. 220—21 M.L.T. 222—19 Bom.L.R. 290-39 I.C. 252 (P.C.)

1923 BOMBAY 452

MACLEOD, C. J. AND CRUMP, J.

Saraspur Manufacturing Company — Plaintiffs - Applicants.

v.

B. B. and C. I. Railway Company— Defendants - Respondents.

Civil Extra Application No. 261 of 1922, D/- 5th April 1923 from an order of S. C. C. Judge at Ahmedabad in C. S. No. 2538 of 1921.

Civil P. C., O. 6 R. 17—Mis-description of the name of defendant—Amendment allowed—Civil P. C., O. 29 R. 1.

Plaintiffs desired to sue the Bombay Baroda and Central India Railway Company to recover damages for the loss of goods. The title of the defendant was entered as follows :—" The Agent, B. B. & C. I. Ry. Company Ltd." but the prayer was that the defendant company should pay the amount sued for. The defendant Company filed written statements objecting that the plaintiffs' suits could not lie as they were filed against the defendant's agent.

Held. *Per Macleod, C. J.*- Although it may be conceded that the title of the defendant was not in accordance with the forms in Appendix A, First Schedule, to the Civil Procedure Code, under heading " Title of suits" the fact that the word " Agent" preceded the name of the Railway Company in the description of the defendant amounted merely to a mis-description and the plaintiff should be allowed to amend the plaint accordingly. 64 I. C. 125 Diss.

Per Crump, J.—This is little more than a clerical error which can be amended at any time without any prejudice to the opposite party.

H. V. Divatia—for Applicants.

Campbell—for Respondents.

Macleod, C. J.—These are four companion applications under S. 25 of the Provincial Small Cause Courts Act. In all the four cases the plaintiffs desired to sue the Bombay, Baroda and Central India Railway Company to recover damages for the loss of goods. The title of the defendant was entered in each plaint as follows:- "The Agent, B. B. and C. I. Ry. Company Ltd.", but the prayer was that the defendant company should pay the amount sued for. In two of the suits the defendant company filed their written statements pleading to the merits without taking any objection to the form of the title In the other two suits they filed written statements, not only pleading to the merits, but also objecting that the plaintiffs' suits could not lie as they were filed against the defendant's Agent. The Small Cause Court Judge dismissed all the suits on the ground that they were badly framed. He relied upon a decision of Mr. Justice Ross in *Sinehi Ram Behari Lal v. E. I. Ry.* (1).

Now it cannot be disputed that in the past there have been a very large number of suits filed by traders in this Presidency against railway companies in many of which the title of the defendant has been entered in the plaint in this form: " The Agent A. B. Railway Company, Ltd ", and that hitherto no objection whatever has been taken to this description. There can be no question that the railway companies considered that they were the defendants in such suits although it may be conceded that the title of the defendant was not in accordance with the forms in Appendix A, First Schedule, to the Civil Procedure Code, under heading " Title of Suits".

If a company is a party to a suit it should be described either as " The A. B. Company Ltd, having its registered office at " or as " A. B. a public officer of the C. D. Company."

Now in the case to which I have referred, the East Indian Railway Company appeared and filed a written statement pleading to the merits of the case. It was only when the case came on for hearing that the pleader of the defendant company took the objection that the suit was not maintainable inasmuch as the Agent of the East Indian Railway Company and not the Company had been sued. The learned Judge said :—

" This is not a case of mere misnamer, which could have been made a basis of defence. The suit was brought against the Agent of the East Indian Railway Company and the Company was not impleaded according to law. In law the Company is not a defendant to the suit and is not before the Court as defendant The frame of the suit can only be amended by substituting the Company as defendant in place of the Agent, and it is a well-recognised principle that, however liberal the Court may be in allowing

(1) [1921] 2 P.L.T. 679—64 I.C. 125.

amendments in the interest of justice, an amendment will not be allowed which would prejudice the rights of the opposite party existing at the date when the proposed amendment is to be made. At this stage the East Indian Railway Company has acquired a right by virtue of the Statute of Limitation and this right should not be prejudiced by any amendment at this stage."

With all due respect I cannot agree with this reasoning. It seems to me in the interests of justice that if it can be said that there has been a misdescription of a party in the title of a plaint the necessary amendment ought to be allowed, if otherwise the rights of the parties would be prejudiced. If the defendant company could be considered as having had no notice that these suits had been brought against it by the plaintiffs then undoubtedly limitation would be considered as running up to the date when the defendant company had notice of the claims by being made a party to the suits. But the defendant company not only knew perfectly well that the various claims had been made against it, but also considered itself the party being sued. If the company was not a party no appearance should have been entered. In my opinion the fact that the word "Agent" preceded the name of the Railway Company in the description of the defendant amounted merely to a misdescription and therefore the learned Sm C. C. Judge should have allowed the title to be amended. The suits must be restored to the Board to be tried on their merits.

It is desirable, however, to point out that in future parties who wish to sue a company must follow the directions in Appendix A to the Code.

Rule will be made absolute with costs.

Crump, J.-In my opinion we should in this question look to the substance rather than to the forms and if we do that I agree that we must dissent from the decision in *Sinehi Ram Bihari Lal v. E. I. Ry. Co.* (1). It seems to me that there is no doubt whatever that all the parties were perfectly well aware that the suit was against the railway company and that it was against the railway company that the relief was asked for. Though the description of the company may not have been that which is in conformity with the Schedule A to the Code of Civil Procedure, nevertheless, the company was substantially on the record, and it appears to me impossible to argue that if the title in the plaint were amended so as to bring it in conformity with the Schedule, the result would be to prejudice any rights acquired by the company by virtue of the Statute of Limitation. For, as I have said, the company was in substance the defendant at the time the plaint was first filed, and it was not a case of adding a new party, in which case, considerations of that kind might be relevant. It seems to me that really this is nothing more than a misdescription, and as has been pointed out by my Lord the Chief Justice the practice certainly has been to describe railway companies in the manner which has been done in the present case. No body up to this time has ever been misled or has ever suggested that any formal amendment to the plaint was necessary. All that would be required to bring the title of the plaint in conformity with the Schedule would be to strike out the word "Agent". Therefore it seems to me that this is little more than a clerical error which can be amended at any time without any prejudice to the opposite party.

Rule made absolute.

✱ 1923 BOMBAY 453

MACLEOD, C. J. AND CRUMP, J.

Vishnu Vishvanath Nimkar and another —Defendants—Appellants.

v.

Ramachandra Sadashiv Nimkar and others—Plaintiffs—Respondents.

S. A. No. 286 of 1922, D/- 9th April, 1923 from the decision of D. J. Ratnagiri in Appeal No. 95 of 1920.

Hindu Law—Alienation by manager—Sale advantageous—Not sufficient reason.

It is going too far to say that a manager of a Hindu joint family can justify a sale of joint

family property merely on the ground that the sale at the time appeared to be advantageous. It would be going much further than any principle of Hindu law warrants to hold that because a manager of joint family considers it advantageous at the time to exchange joint family land for money, such an alienation can be treated as justified and therefore binding on the minor members of the family. [P. 454 C. 1, 2]

V. R. Virkar—for Appellants.

P. V. Kane—for Respondents.

Macleod C.J.—We think that this appeal must succeed. Defendants Nos. 3 and 4 were minors at the time when the property was sold and the sale would only affect their share if it be proved that it was for necessity. It is going too far to say that a manager of a Hindu joint family can justify a sale of joint family property merely on the ground that the sale at the time appeared to be advantageous. The pertinent passage on the subject in Mayne on Hindu Law and Usage can be found at pages 476 and 477, last edition At the bottom of page 477 there is the following passage from the judgment in *Palaniappa Chetty* v. *Deivasikamony Pandara Sannadhi* (1) :—

" No authority has been cited giving any countenance to the notion that a Shebait is entitled to sell debottar lands solely for the purpose of so investing the price of it as to bring in an income larger than that derived from the probably safer and certainly more stable property, the debottar land itself."

The commentary says :—

" The case referred to the latitude of of alienation permissible to a Shebait in charge of debottar lands. But it was argued and decided on the footing that the same principles were applicable as those which regulate the rights of alienation passed by the manager of joint family property."

It would be going much further than any principle of Hindu Law warrants to hold that because a manager of joint family considers it advantageous at the time to exchange joint family land for money, such an alienation can be treated as justified and therefore binding on the minor members of the family.

The decree, therefore, of the trial Court must be restored and the appellants will be entitled to their costs throughout.

Appeal allowed.

(1) [1917] 40 Mad. 709—44 I.A. 147—21 C.W.N. 729—15 A.L.J. 485—1 P.L.W. 697—33 M.L.J. 1—19 Bom. L.R. 567—22 M.L.T. 1—(1917) M.W.N. 507—26 C.L.J. 153—6 L.W. 222—39 I.C. 722 (P.C.)

✱ 1923 BOMBAY 454

MACLEOD, C. J. AND CRUMP, J.

Venkatraman Rama Hegde Kanni—Defendant—Appellant.

v.

Baburaya Venkatesh Prabhu—Plaintiff—Respondent.

S. A. No. 501 of 1922. D/-6th April, 1923 from the decision of the Dt. J. Kanara in App. No. 150 of 1921.

Jurisdiction—At the date of institution to be considered—Provincial Small Cause Courts Act (1887), S. 32 (2).

The Plaintiff sued to recover Rs. 100 as balance due for Mulgeni rent in the Court of the Subordinate Judge of Honawar. The Judge then presiding in that Court had no Small Cause Court powers, but when the suit came on for trial, it was decided by a Judge who had Small Cause Court powers up to Rs. 100.

Held: that the suit was a regular and not Small Cause suit and therefore an appeal lay to the Dt. Court. [P. 455 C. 1]

G. P. Murdeshwar and D. R. Grankar—for Appellant.

Nilkant Atmaram—for Respondent.

Macleod, C.J.—The plaintiff sued to recover Rs. 100 as balance due for Mulgeni rent in the Court of the Subordinate Judge of Honawar. The Judge then presiding in that Court had no Small Cause Court powers, but when the suit came on for trial, it was decided by Mr. Halbhavi who had Small Cause Court powers up to Rs. 100.

The defendants filed an appeal to the District Court, when the District Judge held that there was no appeal on the ground that it was a Small Cause Court suit, and although it had been tried as a regular suit the question of appeal would depend upon the nature of the suit and not on the way in which it was described.

The attention of the District Judge does not seem to have been drawn to

the decision of this Court in *Sambhu Dhanaji* v. *Ram Vithu Sarang* (1). In that case the suit was filed for recovery of Rs. 81-4-0 in the Court of the Subordinate Judge who had only at that time Small Cause Court powers up to Rs. 50. His powers were subsequently raised to Rs. 100 before the suit came on for hearing. But the suit was decided by him as a regular suit and the claim was allowed. In appeal it was held by the District Judge that no appeal lay. In revision it was held by the High Court that under S. 32 (2) of Act IX of 1887. It was necessary that the Judge should, before the institution of the suit, be invested with Small Cause Court jurisdiction entitling him to hear the particular suit. In this case when the suit was filed the Judge had no Small Cause Court powers at all, and therefore on that circumstance depended the question whether the appeal lay to the District Court when the suit came to be ultimately decided in the Subordinate Judge's Court. This is not a second appeal, but an appeal from order, as the District Judge held that no appeal lay to this Court.

The appeal must be allowed and the case sent back to the Court of the District Judge to be disposed of according to law.

Costs to be costs in the appeal.

Appeal allowed.

(1) [1903] 28 Bom. 244—5 Bom. L. R. 1008.

1923 BOMBAY 455

MACLEOD, C. J. AND CRUMP, J.

Joita Bechar—Applicant.

v

Parshottam Sankalchand—Opposite Party.

Criminal Rev. No. 87 of 1923, D/-5th April 1923 against an order of acquittal passed by Sec. Addl. S. J. Ahmedabad, in S. C No. 13 of 1923.

Criminal P. C., S. 439—No appeal by Local Government against order of acquittal—Revision at the instance of complainant not competent.

Per Macleod, C. J.—If in a case tried by a Sessions Judge sitting with assessors the Government do not exercise their right of asking the High Court to admit an appeal from the order of acquittal, the High Court would not be justified in interfering in revision at the instance of the complainant. 9 Bom. L. R. 156 Dist. [P. 455 C. 2]

Per Crump, J.—It would be only in the most exceptional cases that the High Court would be justified in interfering under S. 439 when there is no appeal by the Local Government under S. 417. [P. 455 C. 2]

A. G. Desai—for the Complainant.

Macleod, C. J.—The four accused were charged before the Additional Sessions Judge of Ahmedabad, *viz.*, the third with an offence under S. 494, Indian Penal Code, and the other three accused with abetting that offence. The Sessions Judge agreeing with the assessors acquitted all the accused.

This is an application by the complainant to the High Court to interfere under its revisional powers. We have been referred to a decision in *Ahmedabad Municipality* v. *Maganlal* (1) in which Mr. Justice Batty said :—

"Although this Court does not ordinarily interfere with orders of acquittal in revision, yet it cannot be expected that it would hesitate to do so, where the acquittal is based not upon an appreciation of doubtful evidence, but upon a manifest error in law appearing on the face of the judgment."

The order of acquittal in that case was passed by a First Class Honorary Magistrate, and it constitutes a material difference that the present case was tried by a Sessions Judge sitting with assessors. Speaking for myself if in such a case Government do not exercise their right of asking us to admit an appeal from the order of acquittal, I find it difficult to imagine any circumstances which would justify this Court in interfering in revision at the instance of the complainant.

Crump, J.—I agree. This is not a case in which we ought to interfere in the exercise of our powers in revision. It would perhaps, in my opinion, be difficult to lay down any general rule, but it is, I think, at all events, safe to say that after a regular trial in the Sessions Court it would be only in the most exceptional cases that this Court would be justified in interfering under S. 439 when there is no appeal by the Local Government under S. 417, Criminal Procedure Code.

Application rejected.

(1) (1906) 9 Bom. L. R. 156—5 Cr. L. J. 171.

1923 BOMABY 456

SHAH, AG. C. J. AND CRUMP, J.

Natha Lal Ram 'as Vaghji and others —Plaintiffs—Appellants.

v.

The Nadiad Municipality—Defendants—Respondents.

Appeal from Order No. 10 of 1921, D/- 21st September, 1922 from an order of Dt. J., Ahmedabad, in A. No. 475 of 1919.

Bombay District Municipal Act, Ss. 50 and 3 (17)—Government not a necessary party.

In a suit against Municipality which by necessary implication seeks to set aside the order passed first by the City Survey Officer, and then by a superior officer in appeal that a certain land was "street land" Government is not a necessary party. The decision of Survey Authorities that the site in question formed part of a street as defined in the Bombay District Municipal Act, does not mean that the decision was that the Government had any interest in the land. It is really a decision relating to a dispute between private owners and the Municipality, that it was part of street land, which would mean that the Municipality would have certain powers with reference to such land which had been given under the Statutes. It is not necessary formally to sue to set aside the decision of the Survey authorities. Even if there was a prayer to set aside that decision, that would not render it necessary to join Government as a party. [P 457 C 2; P 458 C 1]

Thakor and *R. J. Thakor*—for Appellants.

N. M. Desai, and *S. S. Patkar*—for Respondents.

Judgment.—This is one of the several companion appeals which we have to decide; but it will be convenient to deal with this appeal first before considering what orders should be passed in the other appeals. It arises out of a suit filed by the plaintiffs for a declaration that a certain land situated at Nadiad was of their ownership and for a permanent injunction restraining the Defendant Municipality from obstructing them in their enjoyment thereof. The occasion for the suit was that in pursuance of a resolution passed by the Nadiad City Municipality, the Government had in accordance with the provisions in the Land Revenue Code directed a survey within the Municipal limits of the town of Nadiad and the City Survey Officer had held that the land in question was a "street land" as defined in S. 3 clause 12 under the Bombay District Municipal Act (Bom. Act III of 1901). That would involve the result that the Municipality would have certain rights in respect of the site in question under the District Municipal Act and the whole purpose of the suit was to prevent the Municipality from interfering with the plaintiff's enjoyment of this site. With that view a declaration and an injunction as stated above were sought by the plaintiffs.

The Defendant Municipality raised several objections to the suit but no objection was raised that the suit was defective for want of a necessary or proper party. Four preliminary issues were raised:—

1. Whether the plaintiff's claim is time barred?

2. Whether the plaintiff's suit is barred under S. 167 of the District Municipal Act.

3. When the disputed site is decided to be a street land, whether it vests in and belongs to the Municipality; whether Government and street people have any and what interest therein? Whether this suit can be heard in their absence? When Government is held to be a necessary party, whether this Court has jurisdiction to hear this suit?

4. Whether the Defendant Municipality can dispute plaintiff's right when the disputed site is a street land?

The trial Court held that the street people were not necessary parties, but that the Government was a necessary party, that the suit could not be heard in the absence of Government and that if Government were joined as a party, the Court could have no jurisdiction to entertain this suit. The Court also held that the suit was time-barred. In the result the suit was dismissed with costs.

The Plaintiffs appealed to the District Court. The learned District Judge who heard the appeal held that Government was a necessary party and that the other issues could not be and should not be considered. He set aside the order dismissing the suit and made an order returning the plaint for presentation to the proper Court.

It is from that order returning the plaint that the present appeal is preferred to this Court and the only question that we are really concerned with on this appeal is whether the lower Courts are right in their view that the Government is a necessary party.

It is important to remember at the outset that the question of the joinder of Government as a party in this case is one of great practical importance, for if the Secretary of State for India in Council is a necessary or a proper party, it is clear that the suit must be tried in a different Court altogether. It is only the District Court that would have jurisdiction to try such a suit under S. 32 of the Bombay Civil Courts Act (XIV of 1869). It is not therefore a simple question of adding a party as a matter of additional caution or convenience but it is a question of importance as affecting the constitution of the suit

The lower Courts have proceeded upon the view that the decision of the City Survey Officer that this land is "street land" is one which requires to be set aside; and secondly that, as the plaintiffs claim a declaration as to the ownership of the land in suit, the interests of the Government are necessarily involved. They hold that in the case of "street land" the property would not be vested in the Municipality. and though the Municipality would have certain control over the land, and certain statutory rights with reference to the land, the real dispute must be taken to be between the plaintiffs and the Government.

Though Government was not a party in the lower Courts, notice was issued in this case to the Government Pleader here on this appeal. We have heard the Government Pleader on behalf of Government though not a party to the suit. We think, however, after a consideration of the arguments urged before us on both sides and of the relevant provisions of the District Municipal Act and of the Land Revenue Code, that Government is not a necessary party to the present suit The survey was undertaken in this case as contemplated and provided by S. 50A of the District Municipal Act. This section was inserted by Bombay Act X of 1912 and by another Act in the same year a similar provision was inserted in the Land Revenue Code by way of addition to S. 37 of the Land Revenue Code. For our present purpose it is enough to point out that in this Municipal area the survey was undertaken as contemplated by S. 50A; sub-section (2) of that section clearly provides that any suit instituted in any Civil Court after the expiration of one year from the date of any other order passed by the collector under Sub-Section (1) or if one or more appeals have been made against such order within the period of limitation then from the date of any order passed by the final appellate authorily, as determined according to S. 204 of the Bombay Land Revenue Code, 1879, shall be dismissed if the suit is brought to set aside such order or if the relief claimed is inconsistent with such order provided that the plaintiff has had notice of such order.

The order in the present case was passed first by the City Survey Officer and then by the superior officer in appeal and the decision was that it was "street land". The definition of the word "street" as given in S. 3 clause (12) does not in any sense negative the idea of private ownership. 'Street' shall mean any road, foot way, square, court, alley or passage accessible whether permanently or temporarily to the public whether a thoroughfare or not and shall include every vacant space, notwithstanding that it may be private property partly or wholly obstructed by any gate, post chain or other barrier if houses, shops or other building abut thereon, and if it is used by any persons as a means of access to or from any public place or thoroughfare, * * * but shall not include any part of such space which the occupier of any such building has a right at all hours to prevent all other persons from using as aforesaid" The decision of the survey authorities that the site in question formed part of a street as defined in the District Municipal Act, does not mean that the decision was that the Government had any interest in the land. It was really a decision relating to a dispute

between private owners and the Municipality, that it was part of street land which would mean that the Municipality would have certain powers with reference to such lands which had been given under the statute. For instance under S. 90 of the District Municipal Act the Municipality will have power to call upon the owners of the houses in the street to do certain things, and to declare it to be a public street if so advised under certain conditions. That affects the rights of private owners and to that extent the Municipality is interested in upholding the decision of the City Survey Officer and the plaintiffs are interested in questioning that decision. That is a dispute which is between the private owners and the Municipality in which so far as I can see, the Government have no manner of interest. At least the cause of action as stated in the plaint does not disclose any such interest and whatever view may be taken of the effect of the vesting clause in the District Municipal Act with reference to public, streets I do not think so far as the cases which relate to the decision of the City Survey Authorities that the land in question was a street land would be affected by those considerations. The decision so far as it goes, is entirely a matter in which the Municipality and the plaintiffs are interested and in the suit the adjudication is sought with reference to the rights of these two parties. It is not necessary formally, in my opinion to sue to set aside the decision of the Survey Authorities. Even if there was a prayer to set aside that decision it would not render it necessary to join Government as a party. That is a mere matter of form and the wording of sub-section (2) of S. 50 A in my opinion clearly indicates that whether the relief claimed is inconsistent with that order or whether the relief is to have the order set aside, the suit has to be filed within a particular time and that the suit as there contemplated is clearly a suit—between a private party and the Municipality.

I do not desire to say anything more in this appeal as to whether, where the decision of the Survey Authorities was that a particular piece of land formed part of a public street, Government would be a necessary party or not. For the purpose of this appeal it is enough to say that Government is not a necessary party because the decision of the Survey Authorities is not in favour of Government in any way and the parties interested in that decision are the plaintiffs and the Municipality who are before the Court.

We have to consider what course we should adopt now in view of the fact that the trial Court has decided the question of limitation. We think that on the whole the best course and practically the only legal course under the circumstances is to set aside the order made by the lower appellate Court and to remand the appeal to that Court for disposal according to law. If after remand the learned District Judge upholds the view of the trial Court on the question of limitation so far as that Court is concerned, the suit will end there. If the learned District Judge, however comes to the conclusion that the suit is not time-barred, it will be for him to consider what order to make in order that the suit may be disposed of according to law. We therefore allow this appeal set aside the order of the lower appellate Court and remand the appeal to that Court for disposal according to law.

[The rest of the judgment is not material to the report.]

Appeal allowed.

1923 BOMBAY 458

MACLEOD, C. J. AND CRUMP, J.

Gangadas Narayandas and others — Defendants—Appellants.

v.

Jekisondas Mancharam and others — Plaintiffs—Respondents.

S. A. No. 307 of 1921, D/- 23rd March, 1923 from the decision of Ag. Dt. J. Surat, in A No. 50 of 1920.

Contract Act, S. 30—Wagering nature to be proved by person alleging—Evidence Act S. 101.

The party disputing that he was liable under the contracts on the ground that they were wagering contracts would have to show that at the time the contracts were entered into, the parties did not intend to carry out the contracts, but agreed to abide by the prices ruling at the due dates, when differences would be paid or received. [P.460C1]

H. C. Coyajee, and M. B. Dave—for Appellants.

G. S. Rao and P. B. Shingne—for Respondents.

Macleod, C. J.—The plaintiffs filed this suit against the defendants to recover Rs. 1396-9-0 being differences on the suit contracts for purchase and sale of cotton seeds The defence was that the contracts were of a wagering nature, and the onus would lie upon the defendants to prove that fact. The trial Court held that the contracts were wagering contracts and dismissed the suit. The appellate Court came to a different conclusion and decreed the suit in favour of the plaintiffs.

The question whether the contracts were of a wagering nature was really a pure question of fact, that is to say, the party disputing that he was liable under the contracts would have to show that at the time the contracts were entered into, the parties did not intend to carry out the contracts, but agreed to abide by the prices ruling at the due dates, when differences would be be paid or received. It is unfortunate that on such a simple question, it was considered necessary in the Courts below, before deciding the case, to cite so many authorities. When it is a question of fact in each case as to what was the intention of the parties, there is no necessity whatever to refer to other cases. The test to apply has long ago been definitely settled. The appellate Judge in dealing with the oral evidence found that he could not come to a definite conclusion in favour of the defendants, and it would necessarily follow, as the defence was not made out, that the defendants could not escape from the legal consequences of the breach of the contracts. The defence having failed in the opinion of the learned appellate Judge, the plaintiffs were entitled to a decree. As a matter of fact no second appeal lies as no question of law arises in the appeal.

The appeal must be dismissed with costs.

Appeal dismissed.

1923 BOMBAY 459

SHAH, Ag. C. J. AND CRUMP, J.

Bai *Parwati*—Plaintiff—Appellant.

v.

The Nadiad Municipality and others—Defendants—Respondents.

Appeal from Order No. 20 of 1921, D/-21st September, 1922 from the Dt. J., Ahmedabad, in App. No. 351 of 1919.

Bombay District Mun. Act, S. 50 A.—Government not a necessary party—Rights of Govt.

Even where a specific relief of setting aside an order of the city surveying officer is prayed for Government is not a necessary party. [P. 461 C. 1]

In spite of the vesting of public streets, the Government have some interest in the sub-soil of and in the column of air above the public streets. 44 Mal. 689 ; 25 Mad. 635 and 38 Bom. 565, Foll. [P. 460 C. 1]

Thakor with M.B. Dave-for Appellant.

N. M. Desai and the Govt. Pleader—for Respondent No. 1.

Judgment.—In this case the facts are similar to the facts in the appeal which we have just disposed of with this difference that the decision of* the Survey Authority was that the land in question formed part of a public street. There is a further point as to whether the suit was barred under S 50A. The trial Court held that the suit was also barred under S. 50A, sub-Section (2).

The lower appellate Court, however, has decided the case on the general ground that the Government is a necessary party, and that, therefore, the plaint should be returned for presentation to the proper Court, and we have to consider whether the decision of the Survey Authorities that the land in suit forms part of a public street which is the question in this suit, involves the result that the Government is a necessary party to the suit. As we have already indicated in the other case, the suit in substance is really a suit as contemplated by S. 50A, sub-section (2). The Survey having been introduced under circumstances which would show that it was undertaken as contemplated by S. 50A, the matter was really one between the Municipality and the private parties ; and the Survey Authorities decided that the plot in suit formed part of a public

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street. Here in the plaint the decision of the City Survey Enquiry Officer is sought to be set aside in terms. We do not think, however, that the form of the relief makes any difference in the real nature of the suit. In our opinion, the plaintiff seeks to establish that the land in suit is not part of a public street, and to restrain the Municipality, which is interested in disturbing the enjoyment of the plaintiff as owner of the disputed site. The main ground on which it has been held by the lower Courts that Government is a necessary party, is that the vesting of all public streets in the Municipality does not mean that Government have no interest in the land. They refer to certain decisions which go to show that in spite of the vesting clause Government have certain interests in the land, which may be a public street. Under S 50 of the District Municipal Act, it is clear that all public streets are vested in and belong to the Municipality, and are under their direction, management and control, and are held by them as trustees, subject to the provisions, and for the purposes, of the Act.

Various decisions which have been referred to in the judgment of the trial Court and some of which have been referred to in the judgment of the lower appellate Court, no doubt establish the proposition that in spite of this vesting of public streets, the Government have some interest in the sub-soil of and the column of air above the public streets. See *Gunendra Mohan Ghosh* v. *Corporation of Calcutta* (1); *S. Sundaram Ayyar* v. *Municipal Council of Madura* (2) and *G. I. P. Ry.* v. *Corporation of Bombay* (3). But we do not understand how we are concerned in the present case with that question. The plaintiff finds on account of the decision of the City Survey Authority that the land which she claims to be of her ownership, has been declared to form part of a public street. That public street is vested in and belongs to the Municipality, and it is to get rid of the interference with her rights by the Municipality in virtue of the powers which the Municipality could exercise under the Act, on account of this public street being vested in that Municipality, that the plaintiff has filed this suit. That is the object and the scope of the suit. In that suit the parties interested are the plaintiff on the one hand and the Nadiad City Municipality on the other. We say nothing for the moment as to the other defendants who are joined in the suit. The mere fact that Government would have some interest in all public streets vested in Municipalities is not any reason for holding that Government is a necessary party in a suit of this nature which really concerns a private party on the one hand and the Municipality on the other. In all those cases where this interest of the Government in the sub-soil of the public streets has been referred to, we do not find any indication that Government has been held to be a necessary party. In fact most of these suits have been suits in which the Government is not joined as a party Except in the case of *S. Sundaram Ayyar* v *Municipal Council of Madura* (2) we have not been able to find any indication that any attempt was made to join the Government as a party In this case the learned Judges considered it desirable in 2nd appeal, when certain issues were sent down for findings, that Government might be added as a party; and it does not appear that the addition of Government as a party involved any such result as the addition of Government as a party in the present suit in this Presidency would involve. We have not been able to find any provision in the Madras Civil Courts Act corresponding to S 32 of the Bombay Civil Courts Act. We are unable to find in this decision any indication that Government was considered a necessary party. On the contrary the Madras High Court distinctly held in *Krishnayya* v. *The Bellary Municipal Council* (4): that the Secretary of

(1) [1917] 44 Cal. 689—24 C. L. J. 358—21 C.W.N. 234—37 I C. 96.
(2) [1902] 25 Mad 635—12 M L J 37.
(3) [1914] 38 Bom. 565—16 Bom. L.R. 104—23 I. C. 765.
(4) [1892] 15 Mad. 292.

State for India was not a necessary party to such a suit. The learned Government Pleader who argued in favour of the view that Government should be joined, if not as a necessary party, at any rate as a proper party, was unable to point to any decision of this Court in which a suit between a private party on the one hand and the Municipality on the other with reference to any part of a public street, the Government was held to be either a necessary or a proper party. It seems to us that if Government were held to be a necessary party to suits of this character, it would mean that a number of suits which are at present triable by, and in fact are tried by Subordinate Judges, would have to be tried in this Presidency by the District Courts. That is a result which does not appear to have been contemplated under the District Municipal Act. S. 9 of that Act provides that every Municipality shall be a body corporate, and shall have perpetual succession and a common seal, and may sue and be sued in their corporate name That is the body, in which the "public streets" are vested according to law. That is the body which is interested in questioning the right of a private owner who claims a particular part of a public street as his or her private land, and that is the body which can effectively interfere with the rights which would be exercisable by a private owner of the land under the Act. It is that interference which is sought to be removed by the plaintiff in the present case, and it is sufficient for the purposes of the present suit if that interference is guarded against. In our opinion the suit as originally framed was properly constituted, and it makes no difference in the result whether in form there was any prayer to set aside the decision of the City Survey Authorities. Such interest as the Government may have in public streets according to the decisions has never been held to be such interest as would render the joinder of the Secretary of State for India in Council in such suit necessary : we do not think it desirable or right that such suits which really relate to private disputes should be unnecessarily complicated by the joinder of Government as a party. For the purposes of procedure the vesting clause is sufficient to indicate that the Municipality is the proper party to be sued. We are, therefore, of opinion that the lower Courts have erred in holding that Government is a necessary party. Apart from necessity, the question whether Government is a proper party is not a matter of real difficulty in the case We have already referred to the considerations which render it desirable that such suits should be left to be fought out between the parties who are really interested in the particular questions which arise in the suit for decision, and if Government were not a necessary party, as we hold they are not, we do not see any propierty in directing them to be joined as a party in this suit The result of adopting such a procedure would be that a suit which could be tried out at Nadiad in the Court of the Second Class Subordinate Judge would have to be reconstituted and tried in the District Court of Ahmedabad. We do not see any need for adopting a course which involves that result We would, therefore, allow this appeal and make the same order as in the other appeal.

[The rest of the judgment is not material for the report.]

✱ 1923 BOMBAY 461

MACLEOD, C. J.,

Vishnu Nagappa Venkatesh Bhat — Appellant.

v.

Narasinha Pranduang Prabhu—Respondent.

S. A. No. 174 of 1923, D/-3rd April 1923 from the decision of Dt. J. Kanara in A. No. 153 of 1921.

Limitation Act Art. 182—Application to postpone Darkhats-Not step-in-aid.

An application made by both the parties to the Court to postpone the application in the Darkhast, with a view to a compromise being arrived at between the parties is not a step-in-aid of execution 38 M. 695 Foll. [P. 462 C. 1]

G. V. Murdeshwar—for Appellant.

Macleod, C J.—This is an application made by the decree holder for execution of his decree, the application having been made on June 15, 1921. The previous application for execution was presented on May 25, 1918,

and it is conceded that the present application must be time-barred unless between these two dates something has been done which would set a new period of limitation running. The appellant relied upon an application made by both the parties to the Court to postpone the application in th Darkhast of May 25,1918, with a view to a compromise being arrived at between the parties. It is difficult to see how such an application can be considered as a step-in-aid of execution. There was no application made to the Court to do something which would assist the decree-holder in furthering the execution of the decree. On the other hand the application was similar to the application in *Abdul Kader Rowther* v. *Krishnan Malaval Nair* (1) which was called an application to get an order in retardation, which would not in the ordinary course be considered as a step-in-aid of execution. We think the learned Judge was right in saying that this application was not intended as a step towards execution, but it was intended as a step which, if successful, would avoid the necessity for execution. If the suggestion for a compromise failed, then it was necessary for the decree-holder, within three years from the date of the Darkhast to file another Darkhast. The appeal therefore, is dismissed.

(1) [1913] 38 Mad. 695—1 L. W 271—(1914) M.W.N. 563—26 M L.J. 433—15 M.L.T. 305—23 I.C. 533.

1923 BOMBAY 462

MACLEOD, C.J. AND CRUMP, J.

Ahmad walled *Balu Dabir and another*—Defendants—Appellants.

v.

Ganesh Vishnu Pendse—Plaintiff—Respondent.

S A. No.37 of 1921, D/-19th February, 1923 from the Dt. J., Thana in Appl. No. 129 of 1919.

Landlord and Tenant - Vatandar Khot in Kolaba District-Right to Injali trees in Khoti nisbat lands.

Where in a suit by Vatandar Khot the question was whether the plaintiff or the defendants were the owners of certain injali trees standing upon lands which were in the occupation of the vendors of defendants who were not dharekaris, but held their lands since the introduction of the Survey Settlement as tenants of the Khot, subject to certain rights in the nature of the right of occupancy:

Held: that by virtue of Dunlop's Proclamation of 1824, the Khots became the owners of the Injali trees standing in Khoti *nisbat*, and there has been nothing to extinguish those rights or to transfer those rights to the present defendants. [P 462 C 2]

Held: further that the mere failure on the part of the plaintiff to sign the annual Kabuliyat should have this result only, that he would not be entitled for the time being to the right of management of the village. That would not, however, affect any other right which he might have independently of that right of management, such as the right to timber growing in Khoti *nisbat* lands. 8 B. H. C. Foll. [P 463 C 2]

N. M. Patwardhan and P. B. Shingne—for Appellants.

G S. Rao and P. A. Bhat — for Respondent No. 2.

Crump, J.—The plaintiff in this case was a Vatandar Khot of the village of Padhvan in the Mangoon Taluka of the Kolaba District, and the substantial question in the suit is whether the plaintiff or the defendants were the owners of certain *injali* trees standing upon lands which were in the occupation of the vendors of defendants. These vendors, it is now conceded, were not dharekaris, but held their lands since the introduction of the Survey Settlement as tenants of the Khot, subject to certain rights in the nature of rights of occupancy.

The case appears to have been approached in the lower Court on the footing that the Government were formerly owners of the trees growing upon these lands; and there seems little reason to doubt that that is the true view of the matter: The lands are Khot *nisbat* lands, and it has been held by this Court in the *Collector of Ratnagiri* v. *Vyankatrao* (1) that by virtue of Dunlop's Proclamation of 1824, the Khots became the owners of the trees standing in such lands That decision, if followed, is practically conclusive on the facts of the present case, and the same conclusion must follow if the particular circumstances here are considered.

(1) [1871] 8 Bom.—C.R., A. C.J. 1

There are 3 persons, and 3 only, in whom the rights to these trees are conceivably vested, viz,-the Government, the Khot, and the vendors of defendants, and if it is true, as appeears to be the case, that trees were originally the property of the Government then whatever rights Government may have had were conceded by the Proclamation alluded to, and the person in whose favour that grant was made was the person on whose lands the trees were actually growing at the date of Proclamation.

Now it is proved in the present case that before the introduction of the Survey Settlement, the lands were let out from year to year by the Khot on an annual lease or *matka*. That was the general system of the village, and there is nothing whatever to show that these *hisbat* Khoti wers dealt with on any terms different from there which lands were applied to the generality of the Khoti lands in the village. If that it is so, there was before the introduction of the Survey Settlement no one other than the Khot who can be said to have had any permanent occupation of the lands, or to have been the "occupant" of the lands in the popular sense, which was the explanation placed on Dunlop's Proclamation in *Sadashiv Parshram* v. *Secretary of State* (2). The Khot's connection with the lands *qua* Khot was continuous, and as regards the Khoti *nisbat* lands he had at least *quasi* proprietary rights which would suffice to make Dunlop's Proclamation operative in his favour.

Therefore, in accordance with the decision in the *Collector of Ratnagiri* v, *Vyankatrao* (1) the conclusion would by virtue of that Proclamation became the owner of these trees. If that is so, then there has been nothing to extinguish those rights or to transfer those rights to the present defendants. Apart, therefore, from the question of the annual Kabulayat which as to trees govern the rights of the Khot and of the Covernment as between themselves, it is clear that the title of the plaintiff is established. In this view of the case, it seems unnecessary for the plaintiff to fall back upon the Kabulayat, or consider the effect of his having failed to sign that Kubulayat, owing to the difference that has arisen between himself and Government. But if it is necessary to decide that point, it seems obvious that the mere failure on the part of the plaintiff to sign the annual Kabulayat could have this result only that he would not be entitled for the time being to the right of management of the village. That would not however, affect any other rights which he might have independent of that right of management, such as the right to timber growing in Khoti *nisbat* lands. Put shortly, it is clear that the defendants have made out no right in their vendors, so that in accordance with the decisions of this Court the Khot must be taken to be the grantee of the rights of Government, at all events as regards Khoti Khasgi and Khoti *nisbat* lands. It follows, therefore, that defendant obtained nothing by their purchase, and the plaintiff was rightly awarded damages, and an injunction.

The decree of the lower Appellate Court must be confirmed and the appeal dismissed with costs.

Macleod, C. J.—I should like to add one word with regard to the following passage in the judgment of the lower Appellate Judge with regard to the rights of the plaintiff as a Vatandar Khot. "In the absence of a Sanad conferring on him the proprietorship of the village, he cannot claim to be owner of the soil." Reference was made to *Tajubai* v. *Sub-Collector of Kolaba* (3) and *Nagardas Sanbhagyadas* v. *Conservator of Forests* (4). But the latter case does not support the proposition that a Vatandar Khot cannot claim to be owner of the soil in the absence of a Sanad. Their Lordships of the Privy Council in referring to *Tajubai* v. *Sub-Collector of Kulaba* (3) said :—"In that case the Government had resumed the Khoti, had granted certain rights to the sub-tenants of the estate, and were willing to allow

(2) [1918] 20 Bom. L. R. 141—44 I.C. 872.

(3) [1866] 3 Bom. H.C.R., A.C.J. 132.

(4) [1879] 4 Bom. 264—7 I.A. 55—4 Sar. 89 (P.C.)

the plaintiff to take the Khoti again upon certain conditions, namely, that she should be bound by the terms which the Government had entered into with the sub-tenants or holders of the land; and it was held that she was not entitled to have the Khoti except upon those conditions. The reasons for the decision were that the Khot was not the proprietor of the soil. The learned judge who decided the case in the first instance, went very fully into the matter, and held that the Khot was merely a hereditary farmer of the revenue. The reasons are given in the report, and it will be unnecessary to read them. It is sufficient to say that that decision was opposed to the view taken by Captain Wingate to which reference was made from the records of the Government of India." Their Lordships without expressing any opinion that no Khot is or can be the proprietor of soil, thought it was sufficiently clear that the proprietorship of the soil is not vested in every Khot.

It also appears that Mr. Justice Tucker dissented from the opinions expressed by Arnold and Newton, JJ. in *Tajubai* v. *Sub-Collector of Kolaba* (5).

Therefore there is no general rule that no Vatandar Khot can claim to be owner of the soil. Certainly it would appear to me that with regard to Khoti *Kasji* and Khoti *nisbat* lands, he is very much in the position of an owner It was so held in *The Collector of Ratnagiri* v. *Vyankatrao* (1). It seems to me, therefore, that the plaintiff has established his case, considering the land from which the jungle was cut was Khoti *nisbat* land, and unless the defendants would satisfy the Court that they were Dharekaris in whom the ownership of the trees might then have been vested they were not entitled to succeed.

Appeal dismissed.

1923 BOMBAY 464

MACLEOD, C. J. AND CRUMP, J.

Kasturibhai Manibhai and another—Appellants.

v.

Bai Mahalaxmi (widow of Chimanlal Laibhai) and others—Respondents.

F. A. No. 144 of 1921, D/- 14th February, 1923, against the decree of the the Joint First Class Sub. J. Ahmedabad in Suit No 251 of 1918.

(a) *Hindu Law—Partition—Portion left undivided—Right of widow of one of the members to demand partition.*

When members of a joint family divide portions of the family property, a state of severance would in all probability result though it depends upon the circumstances in each case, and the facts proved, whether family still remained joint, each member holding his share of the property divided as his own separate property, and all the members holding the undivided property as members of a Hindu joint family. Where it was found that a very large portion of the family property was divided in 1889 amongst the members and from that date they began to separate, and had separate business and enjoyment in respect of their respective properties, it would be a legitimate presumption that they intended from that date to live divided, and consequently they would own the property still remaining undivided as tenants-in-common and therefore a widow of one of the members is entitled to a formal partition of the property left undivided. [P. 465 C. 1 & 2, P. 466 C. 1.]

(b) *Civil P.C., S. 95—Partition suit.*

The general rule is that in partition suits parties should have their own costs, except with regard to the institution fee which should be borne proportionately by all the parties. [P. 466 C. 2.]

(c) *Registration Act, S. 17 (b)—Kaccha deed of partition.*

Crump J.—Where the whole tenor of a deed shows that the intention was that the parties should be the owners of their separate shares as from the date of the document, it is impossible to escape from the bar created by S. 17, clause (*b*), of the Registration Act, 1908. The mere fact that parties had in contemplation the execution of a formal document in the future, does not suffice to take it out of the scope of that section. [P. 466 C. 2.]

G. N. Thakor and R. J. Thakor—for Appellants.

Strangman and K. V. Divatia—for Respondent No. I.

Macleod, C. J.—The plaintiff sued to have it declared that she had become absolute owner of certain properties mentioned in para 6 of the plaint; to recover possession of the properties allotted to her in partition, except a certain house of which

she had already got possession; for mesne profits; and for a registered deed in terms of the *Kacha* instrument of partition passed in respect of the family property on the 30th March 1915. The pedigree of the family is set out at para 3 of the print. It is not disputed that Mayabhai, Manibhai and Chimanbhai, a minor son of Lalbhai, deceased, divided a considerable amount of joint family property in 1889. It is also found by the Judge that since 1889 these 3 persons began to live separate, and to have separate business and enjoyment, and to have their respective properties.

Defendants 1 and 2, sons of Mayabhai in their written statement said that the suit properties were the joint family properties of the descendants of Sheth Premabhai, and that the plaintiff was not entitled to file the suit in the present form. The 3rd defendant asserted that the plaintiff had no interest in the joint properties specified in the plaint; that the said properties devolved upon defendants by right of survivorship. It is important to note what the 3rd defendant said with regard to the document relating to partition relied upon by the plaintiff in para 5 of the plaint. Para 5 of the written statement is as follows:—"With reference to what is stated in para 5 of the plaint, we say that the said property is not held in common nor was it so held. But the said property is joint and as the parties thought of dividing the same at the time mentioned in para 5 of the plaint, a draft was prepared but a dispute arose with regard to the preparation of a formal document (a partition deed) and hence a formal document in respect thereof was not made. Not only that but on taking legal advice as regards the partition matter as my brother defendant No. 4 was a minor, I came to know that the plaintiff could not have any right to the joint property and that if the plaintiff's husband has made any will with regard to the joint property, the same would be void to that extent, and the plaintiff does not get any right thereunder. And therefore the work of partition has been stopped since then, and it has not been at all given full effect to."

On these pleadings the 1st issue would be whether the suit properties were joint family property; and that would involve the question whether the family remained joint after 1889. Certainly if the family was joint and the members held the properties as joint family property, then Chimanbhai's will would be inoperative, and the widow would only have a right to maintenance. It was never suggested in the pleadings that the document, Exhibit 81, of the 30th March 1915 required registration. The 3rd defendant's evidence goes to show that it was a draft, and that no formal document, although one had been thought of, was ever executed.

The learned Judge, however, raised an issue whether the deed relied upon by the plaintiff was a deed of partition and required registration, and whether it was inadmissible in evidence for want of registration. He found that issue in the negative, and accordingly passed a decree in favour of the plaintiff for specific performance of the agreement. The plaintiff's legal advisers would have been wise when that issue was raised if they had asked the Court to allow them to amend their pleadings so as to insert an alternative prayer to the effect that if the document was inadmissible as requiring registration, an equitable partition might be decreed by the Court. That however was not suggested by plaintiff's Counsel, and as the decision on the 7th issue was in their favour, there was no necessity for them to ask for any amendment after judgment was delivered.

Defendants 3 and 4 appeal from the decision of the trial Court and ask us to hold that the suit properties remained joint family property after 1889 so that the plaintiff could have no interest in them. It seems to me that when members of a joint family divide portions of the family property, a state of severance would in all probability result though it depends upon the circumstances in each case, and the facts proved, whether the family still remained joint, each member holding his share of the property divided as his own separate property, and all the members holding

the undivided property as members of Hindu joint family. Here we have the fact that a very large portion of the family property was divided in in 1889 amongst Mayabhai. Manibhai, and Chimanbhai and from that date they began to live separate, and have separate business and enjoyment in respect of their respective preperties. In those circumstances it would be a legitimate presumption that they intended from that date to live divided and consequently they would own the property still remaining undivided as tenants-in common. The 3rd defendant thought that Chimanbhai was separate from the other members of the family, and therefore his widow was not entitled to the family property. But clearly from the written statement of the 3rd defendant it appears that there were negotiations for partition of the family property. I am, therefore, of opinion that at the date of the suit these properties were held by the family as tenants-in-common, and as there has been no question of exclusion, the plaintiff was entitled to sue for partition. I am also of opinion that as the plaintiff was not put on notice by the defendants' pleading that Exhibit 81 was inadmissible for want of registration we are entitled even in First Appeal to allow her to make that amendment in the plaint, which undoubtedly she would have been advised to make if the defendants had raised in their written statement the question of registration with regard to Exhibit 81.

We, therefore, allow the plaintiff to amend the plaint so as to enable her to sue in the alternative for partition of the property which remained undivided aftet the partition of 1889; and if any additional Court fees have to be paid on such amendment, the plaintiff will have to pay them, and when that has been done, the directions which we now give that the suit properties should be equitably partitioned between the plaintiff, defendants 1 and 2, and defendants 3 and 4, will become effective, and it will be for the trial Court to give the necessary directions for partitioning the suit properties.

The general rule is that in partition suits parties should have their own costs, except with regard to the institution fee which should be borne equally by all the parties. Therefore the plaintiff will pay one-third of the institution fee and defendants two-third. With regard to the other costs each party should bear his own costs.

Crump, J.—In my opinion it is impossible to construe the document, Exhibit 81, as being anything but an instrument of partition. It is clearly a document which purports to create or to declare an interest in immoveable property of the value of more than Rs. 100. That the value of the shares is more than Rs. 100 is clear on the face of the document itself, and the whole tenor of it shows that the intention was that the parties should be the owners of their separate shares as from the date of the document; and that being so, it is impossible to escape from the bar created by S. 17, clause (b), of the Registration Act, 1908. The mere fact that parties had in contemplation the execution of a formal document in the future, does not suffice to take it out of the scope of that section.

It was suggested that it might be regarded as an agreement to effect a partition in future, and therefore, an agreement of which specific performance could be directed. But that is not the plain meaning of the language of the document and therefore the result must be that it is a document which is compulsorily registerable, and therefore, one which cannot be used in evidence for any of the purposes indicated in S. 49 of the same Act.

Now it is clear from the plaint, as originally presented, that it was sought to use that document as evidence of a completed partition, and if it cannot be used for that purpose, the transaction, of which it is evidence becomes incapable of proof for no other evidence except the document itself is admissible under S. 92 of the Indian Evidence Act.

Therefore the case must be approached on the footing that at the date of that document there had been

no partition. That before that date the parties were tenants-in-common of such property as remained undivided at the partition of 1889 appears to me to be proved beyond doubt upon the evidence. The Judge says that it is not denied that since the date of that partition Mayabhai, Manibhai and Chimanbhai, the husband of the present plaintiff, began to live separate and to have separate business and enjoyment and to have their respective properties. Though the partition-deed of 1889, Exhibit 62, is not itself clear upon the point, still when it is read in the light in which the parties acted upon it, there can be no doubt that there was severance of interest in the family, and that therefore, they remained tenants-in-common of such portion of the joint estate as remained undivided by that document It follows clearly, therefore, that the plaintiff, failing to prove the alleged partition, evidenced by Exhibit 81, is entitled to partition by metes and bounds of the property which the parties still held as tenants-in-common. It would be, in my opinion, extremely unjust in view of the pleadings of the defendants to allow that claim to be defeated now because of the question of registration which was raised, not by the partie , but by the Court of its own motion. I, therefore, agree in the order proposed.

✱ 1923 BOMBAY 467

MACLEOD, C. J. AND CRUMP, J.

Mahadevappa Chansomappa Desai—Plaintiff—Appellant.

v.

Kashirao Somappa—Defendant—Respondent.

F. A. No. 31 of 1921, D/-21st February, 1923, from the decision of 1st Class Sub. J., Bijapur, in Suit No. 41 of 1918.

(*a*) *Civil P. C., S. 11—Might and ought—First suit to enforce partition effected by father dismissed—Second suit for partition after father's death—Not barred.*

The plaintiff filed a suit to recover his one-third share by partition of the property. Plaintiff's father had three sons, including the plaintiff. During his life-time he divided the plaint property into four shares and gave each of his sons one share, keeping one for himself. Subsequently he willed away his own share in favour of his sons. In a prior suit by the plaintiff to recover his share under the partition and the will, the Court held that the partition was unequal and unfair, so the Court dismissed the suit.

Held: that the plaintiff's present suit is not barred by *res judicata* because the cause of action in the prior suit was the partition deed executed by his father and there was no obligation on him to sue in the alternative for a partition of the property as joint family property. He certainly might have done so and had even asked the Court for leave to amend his plaint at a late stage and his application was rejected by the Court. If a plaintiff realises his mistake before the record is closed and asks for leave to amend, though the omission of the claim from the plaint, was due to the plaintiff, the rejection of the prayer for amendment would be the direct cause of the omission from the suit. [P. 468 C. 2]

(*b*) *Hindu Law—Impartible estate—Desghat Vatans impartible.*

The question must be determined in each case whether the Deshgat is impartible. Impartibility is the rule rather than the exception and evidence is admissible to show that the custom exists in other families, not as being in any way conclusive by itself, but as assisting to show that the custom set up in the particular case before the Court was not an unusual one in the District in which the parties resided. [P. 470 C. 1]

G. N. Thakor and V. D. Limaye—for Appellant.

H. C. Coyajee, and H. B. Gumaste and G. R. Madbhavi—for Respondent.

Macleod, C. J.—The plaintiff filed Suit No. 4 of 1918 in the Court of the First Class Subordinate Judge of Bijapur to recover his one third-share by partition of the property specified in Schedules A to E to the plaint, to get a declaration that the alienation of the property in Schedule D by his father by an award decree in suit No. 2 of 1906 in the Bijapur District Court, was null and void after his father's death and to get a declaration that he was entitled to a one-third share in the property in Schedule E after the death of defendant No. 6 together with past and future mesne profits.

Somappa, his father, had three sons, Krishnarao defendant No. 1, Krishnappa defendant No. 2, and Mahadevappa, the plaintiff. During his life-time he divided the plaint property into four shares and gave each of his sons one share, keeping one for himself. Subsequently he willed

away his own share in favour of his sons. In suit No. 221 of 1913 filed by the plaintiff in the Court of the First Class Subordinate Judge of Bijapur to recover his share under the partition and under his father's will, it was held that the partition was unequal and unfair, so the Court dismissed the suit. It was contended by the present defendant No. 1 in that suit that the property in suit was impartible, but no finding was recorded on that issue.

With regard to the property in Schedule D, an award decree was passed in suit No. 2 of the 1906 filed by the plaintiff's father whereby it was decided that defendants Nos. 3, 4 and 5 should get possession of the property and remain in possession until March 2, 1926. Defendant No. 6 was the mother of Somappa and the property in Schedule D was held by her for her life-time only. The plaintiff claimed that all these properties were joint family properties in which he was entitled to a share by partition.

The first defendant pleaded that the property in suit was impartible, that there was a custom in the Gani Deshgat that the property descended by primogeniture, the junior members of the family being entitled to maintenance only, and this is the main issue in the case. It was also contended that the plaintiff's claim for partition was barred by *res judicata* by reason of Suit No. 221 of 1913 in which the plaintiff might and ought to have asked, as an alternative, for partition.

The second defendant in his written statement admitted the plaintiff's claim and asked that his one-third share should be awarded on the partition. Defendant No. 5 claimed to be in possession of the lands in Schedule D under a lease from defendant No. 4 and that he was entitled to enjoy them in pursuance of the decree in Suit No. 2 of 1906 Moreover, the plaintiff's claim was barred by S. 4 (*a*) of the Bombay Revenue Jurisdiction Act as the Collector refused to restore the lands to the plaintiff when he applied under S. 5 of the Watan Act.

Defendant No. 6 claimed the property in Schedule E as her absolute property

I cannot agree with the learned Judge that the plaintiff's suit is barred by *res judicata*.

The cause of action in Suit No. 221 of 1913 was the partition deed executed by his father and there was no obligation on him to sue in the alternative for a partition of the property as joint family property. He certainly might have done so and he even asked the Court for leave to amend his plaint at a late stage but his application was rejected by the Court. In the first place, I do not see myself why the plaintiff was bound to claim equal partition. He may very well have been content, if the Court declined to give effect to the partition made by the father, which was extremely favourable to him, to remain joint with his father. Secondly, if the Court refused to allow his amendment and referred him to a separate suit for partition, it is difficult to see how it can be said that the omission to have the question of equal partition decided was not due to the action of the Court. If a plaintiff realises his mistake before the record is closed and asks for leave to amend, though the omission of the claim from the plaint was due to the plaintiff, the rejection of the prayer for amendment would be the direct cause of the omission from the suit. On the question of the impartibility of the property as Deshgat Vatan, we had recently in *Sidraj* v. *Bhojraj* (1) to consider the same question with regard to a Deshgat Vatan in the District of Belgaum. My learned brother, as he stated in his judgment in that case, has considerable familiarity with the Vatans of these hereditary offices in the Southern Maratha Country and apart from that there is the experience acquired in the cases which have come before this Court that the evidence is generally conclusive in each case that the Deshgat Vatan descends according to the rule of primogeniture. Though as pointed out by the Privy Council in *Adrishappa* v. *Gurusidappa* (2) the question must be determined in each case whether the Deshgat is impartible

(1) F. A. No. 3 of 1920, D/- 14-11-1922.

(2) [1880] 4 Bom. 494—7 I.A. 162—7 C.L.R. 1—4 Sar. 154 (P.C.)

it is impossible to exclude from one's mind the fact that impartibility is the rule rather than the exception, and as pointed out by this Court in *Thimangangavda* v. *Rangangavda* (3), evidence is admissible to show that the custom exists in other families, not as being in any way conclusive by itself, but as assisting to show that the custom set up in the particular case before the Court was not an unusual one in the District in which the parties resided. The evidence in this case is all on the side of the first defendant. As plaintiff was unable to prove any previous partition in the family, he could only rely on the fact that his father had attempted to divide the property. But considering the inequality of the division he made, it would appear as if he had attempted to divide the property before his death as if it were his own instead of dividing it as if all were equally entitled as members of a joint family.

The first defendant relies on the various exhibits which have been put in from the Records of the Inam Committee. Exhibit 148 is the statement made by Kasappa, father of Somappa. The earliest Sanad he produced was granted in 1077 Hijri, 1666 A. D. and as in 1855 the whole of the Vatan was entered in Kasappa's name that is evidence that the Vatan had never been divided That of course would not be sufficient to prove impartibility, but there is a considerable body of evidence to show that when there were opportunities for division no division was made, and that at various times lands were given to the Kumars or members of the junior branches of the family for maintenance and not as representing their shares. Exhibit 149 is the pedigree of the family produced from the records of the Inam Committee. The first defendant detailed in his evidence how lands were given to Bhaubands for maintenance, and what lands were in the possession of living Bhaubands. He said in cross-examination that such lands were to be continued to the Bhaubands till the line of male descendants became extinct when they reverted to the Desai. He was willing to give lands to the plaintiff and defendant No. 2 for maintenance. Witnesses (Exhibits 119 and 120) Kshatriya Desai of Achali and Patalkal State deposed as to the custom of impartibility existing in their families. Exhibits 121 and 122 were acquainted with the family in suit and deposed to the fact that lands were given to the Kumars for maintenance. Exhibit 131 was Bhimrao one of the Kumars. He was the great-grandson of Kallappa, brother of Narasappa Naik in Exhibit 149, and had four lands in his possession which had been given to his ancestors, though in cross-examination he said they were given to his father by Somappa. This witness' name appears in Exhibit 116 which was a list of Survey Numbers given for enjoyment to Kumars purporting to have been written by one Venkaji Krishna and was exhibit 105 in Suit No. 221 of 1913. Venkaji, who is now dead, was examined in that case and his evidence has been put in as Exhibit 139 under S 32 of the Indian Evidence Act.

That evidence was very important as Venkaji was the Mukhtyar of Somappa. Appellant's counsel contended very strongly that his statement and the list were inadmissible in evidence, but it is difficult to see how they can be excluded. Venkaji was called by the plaintiff in Suit No. 221 of 1913 to prove the will made by Somappa, and was apparently hostile to defendant No. 1. He had to admit, however, in cross-examination that lands were given to the Kumars and that he had written the list Exhibit 105.

I think that as the suit property is very ancient Deshgat Vatan in the Southern Mahratta country which has never been divided, lands being given to the Kumars for maintenance and reverting to the eldest branch when their lines of descendants became extinct, the learned Judge was justified in holding that it was impartible. I think that the appeal fails and should be dismissed with costs.

Crump, J.—The parties to this suit are the three sons of one Somappa, and the plaintiff seeks for partition of the family property claiming to be entitled to a share of one-third. The property in question forms part of a

(3) [1878] 11 Bom. 94 n.—(1878) P.J. 240.

Deshmukhi Vatan, and defendant No. 1, who is the eldest son, claims that the succession is by lineal primogeniture. The only substantial question in the appeal is whether defendant No. 1 has established the defence which he sets up.

There is no possible doubt as to the nature of the estate. It was suggested in argument that this was not a service-tenure, but the evidence is conclusive to the contrary Though the Sanad is not produced, it is clear from Exhibit 148 that Kasappa, the grandfather of the parties, appeared before the Inam Committee in 1855 when proceedings were being taken for the commutation of the Vatan. From his statement it would appear that the original grant was made in the sixteenth century and that it was as remuneration for services to be rendered as hereditary Deshmukhs of the Chimalgi Pargana. The word "Chawrat" (vide Exhibit 116) shows at once the nature of the property. The matter is not open to any doubt. It is common ground that the lands were held by plaintiff's ancestor in the capacity of Desais or Deshmukhs and a Desai or Deshmukh in the Southern Maratha Country is a hereditary District Officer. Their duties were to collect the revenue in the "Pargana" or revenue division, and as every one knows, the British Government introduced a settlement whereby these services were dispensed with on payment of a "Judi" or quit rent amounting to four to six annas in the every rupee of the assessment. These settlements received legislative sanction by clause (2) of S. 15 of Bombay Act III of 1874. The property continues to be Vatan property within the meaning of S. 4 of the Act, and subject to the restrictions which that Act or Act II of 1886 enacts as to succession or alienation. Those restrictions do not, however, touch the point before us but I have thought it well to preface my judgment by these remarks in view of what was said in argument.

For the purposes of the present question there is, I apprehend, no distinction between the various classes of District Hereditary Officers. Whether it be a case of a Desai, a Deshmukh, a Nadgowda, or a Deshpande, the general rule must be taken to be that such Vatans are ordinarily partible and impartibility is an exception which may be established by evidence. It has been so decided by the Privy Council [*Adrishappa* v. *Gurushidappa* (2).]. A custom of primogeniture, if clearly proved, supersedes the general Hindu law of descent: *Shidhojirav* v. *Na ikojirav* (4). There can, however, be little doubt that such a custom is not an unusual feature of these Vatans: it has indeed been judicially recognized by the Court in more than one instance—the latest in the case of the Deshgat, which came before us in *Sidraj* v. *Bhojraj* (1). It is not indeed surprising that this should be so if it is remembered that the lands were originally the emoluments of an hereditary office Nevertheless, it is for the party who sets up the custom to establish it in each case.

The best evidence of impartibility is that over a long period of years there has been no partition. If at the same time it appears that the eldest member has succeeded to the bulk of the property, and that comparatively trifling portions have been assigned to the younger members, then we have an ordinary feature of these Vatans. There may be a practice in a Vatan family of long standing to lease the performance of the services of the Vatan in the hands of the elder branch and to provide the younger branches with maintenance only. When the practice is the result of an established custom, it will not be affected even if the services of the Vatan are dispensed with: *Savitriava* v. *Anandrav* (5) and *Ramrao Trimbak* v. *Yeshvantrao Madhavrao.* (6).

The pedigree of the family was produced by Kasappa in 1855. He was the tenth holder from the original grantee Kenchappa, and the heir by lineal primogeniture. At that date there were many branches in the family but the bulk of the estate was with Kasappa and he says. "The *vahivat* came into my hands because I was the heir." The plaintiff admits that so far as he knows there has never been any partition in the family,

(4) [1873] 10 B.H.C. 228.
(5) [1875] 12 B.H.C 254.
(6) [1885] 10 Bom. 327.

and there is evidence that distant collateral members are in possession of small grants of land "for maintenance" which are far less than would have fallen to their shares, had the ordinary Hindu law of succession been applicable. One of these, Bhimraya, is a witness. He is the grandson of Basappa, son of Kallappa, who is shown as living in the pedigree of 1855. He says. "I have four lands in my possession: they have been given to me for maintenance. I do not know if I have any share in the Deshgat Vatan." In a previous suit between the parties one Venkaji was called as a witness for the plaintiff. He is dead and his evidence has been placed on the record in this suit (Exhibit 139). He was the agent of Somappa the father of the parties and was instrumental in drafting the partition deed which led to this litigation. He stated that defendant No. 1 objected on the ground that the property was impartible. He was hostile to defendant No. 1. He said: "I do not know whether the Deshgat property in dispute is partible or not. If Achutappa and Somappa (these are collateral members) were to get lands according to their shares they would have obtained more than this," that is to say, more than they actually hold. This witness was constrained to admit that Exhibit 105 (now 116) was a statement in his handwriting. It appears that the members of the junior branches are styled "Kumars", and this statement is entitled: "List showing the survey numbers given for enjoyment to the Kumars" the statement shows that if any "Kumar" dies without an heir the lands revert to the Desai. It also shows that the lands are given for maintenance.

This evidence affords, in my opinion, *prima facie* proof that there is a family usage whereby the lands of this Deshgat are held by the eldest male member alone There is evidence further that this is a local usage in the case of such tenures. The plaintiff has adduced no evidence whatever to the contrary and in my opinion the finding of the lower Court on the point is undoubtedly correct.

Appeal dismissed.

✱✱ 1923 BOMBAY 471

MACLEOD, C. J. AND CRUMP, J.

Bhausaheb Shidgauda Patil and others — Defendants--Appellants.

v.

Ramgauda Annagauda Patil and others—Plaintiffs—Respondents.

F. A. No. 178 of 1921, D/-19th March, 1923 from the decision of 1st Class Sub. J., Belgaum in Suit No. 203 of 1919.

(a) *Hindu Law—Alienation by widow with consent of reversioner who gets a part of her husband's property in lieu of consent—His descendants cannot impeach.*

A Hindu widow alienated most of her husbands property by virtue of three deeds:—By one she gifted certain property to her brother; by the second she sold half of five Survey numbers to a Bhauband of her husband and by the third she sold the other half of those properties to her son-in-law. After her death the descendants of the Bhaubands desired to set aside the alienations in favour of her brother and son-in-law;

Held that the transactions which were effected by the widow with the consent of the Bhaubands were evidently pre-arranged as a proper disposition of her husband's property between these parties, and these transactions must be considered as a whole and since the Bhauband received considerable advantage from giving his consent to the alienations, it would be most inequitable if his descendants, while retaining that advantage, should be allowed to set aside the other alienations. [P. 472. C 2]

(b) *Hindu Law—Adoption—Succession to maternal grand-father's property barred.*

The theory of adoption involves the principle of a complete severance of the child adopted from the family in which he is born, both in respect to the paternal and the maternal line and therefore the adopted son cannot succeed to the property of his maternal grandfather in his natural family. 10. I. A. 138 Ref. [P. 473 C. 2]

T. Strangman and *G. S. Rao*—for Appellants.

H. C. Coyajee and *Nilkanth Atma-Ram*—for Respondents.

Macleod, C. J.—The plaintiffs sued to recover as owners possession of the plaint house and open site and land from the defendants.

The property originally belonged to one Akkagauda who died about 1846 leaving a daughter Kashibai, and two widows, Lingava, who died before 1868 and Tayava, who died in 1912. Tayava, therefore, succeeded on the death of Lingava to a widow's interest in Akkagauda's property. Kashibai was married to one Shivgauda and

had by him a son Shidgauda who was six years old, when Akkagauda died.

In 1868 Toyava, alienated most of her husband's property by virtue of three deeds:—By one she gifted certain property to her brother Basappa, by the second she sold half of five survey Numbers to Annagauda, a bhauband of her husband; and by the third she sold the other half of those properties to Shivgauda.

Kashibai the daughter died in 1907 a few days after the death of Shivgauda, Pirgauda, another son of Kashibai, had been given in adoption into another family some years before. Shid gauda adopted Bhau the son of Pirgauda. He is the first defendant in the suit and Pirgauda is the second defendant. The plaintiffs are the son and grandsons of Annagauda. The whole pedigree is set out at page 4 of the print.

The first issue was. "Do the plaintiffs prove that the deceased Annagauda was the next reversionary heir to Akkagauda when his widow Tayava died in 1912?" That was found in the affirmative and that decision cannot be questioned.

The next issue was "Are the plaintiffs estopped from bringing this suit.

That issue was found in the negative and we think rightly, as no question of estoppel arises in the case.

But the learned Judge found that the plaintiffs were entitled to recover possession of the property in suit by setting aside the alienations made by Tayava as not extending beyond her life and that decision depended on the question whether the gift to Basappa and the sale to Shivgauda by Tayava were binding on the plaintiffs. It is important to notice that the plaintiffs presumably were in possession of the lands sold by Tayava to Annagauda, and the real question is whether Annagauda, having consented to the gift of property to Basappa and to the sale of property to Shivgauda, and having at the same time obtained a considerable portion of the property from Tayava, his descendants can now be allowed to reprobate the consent which he then gave.

In *Bassappa* v. *Fakirappa* (1) it was held:—

"where a Hindu widow makes a gift of a portion of her husband's property to her husband's brother s grandson. with the consent of the next reversionher, another brother of her husband, the gift is valid, and cannot be impeached by the consenting brother."

Mr. Justice Shah said.

"So far as the consenting reversioner is concerned, I see no substantial difference between a gift and an alienation by way of sale when the legal necessity is negatived on the evidence apart from the consent. In *Vinayak* v. *Govind* (2) though the plea of legal necessity was negatived the alienation of two plots by the widow was upheld on the ground of Venkatesh's consent. In both the judgments delivered in that case it has been pointed out that if Venkatesh had survived the widow, he would undoubtedly have been bound by his own consent; and on the facts of that case the Court held that Venkatesh's consent was sufficient to validate the sale as against the reversioner who was Venkatesh's son. Apart from the decisions it seems to me that where, as in the present case, we have a gift b a Hindu widow in favour of the grandson of her deceased husband's brother for whom she would naturally have affection, and where that gift is consented to by the next reversioner, there is no reason why at least consenting reversioner should not be held bound by his consent, and why he should not be estopped from questioning the validity of such a gift."

It seems to us that this is a still stronger case. The transactions which were effected by Tayava with the consent of Annagauda and Shidgauda were evidently pre-arranged as a proper disposition of Akkagaudua's property between these parties and those transactions must be considered as a whole; and since Annagauda, received considerable advantage from giving his consent to Tayava's alienations, it would be most inequitable if his descendants, while retaining advantage, should be allowed to set aside

(1) [1921] 23 Bom. L. R. 1040.
(2) [1900] 25 Bom. 129–2 Bom. L. R 820

the other alienations. One property Survey No. 207, which is now in the possession of the second defendant and which had remained with Tayava, was not included in any of the three documents executed by her in 1868, and the plaintiffs were clearly entitled to possession of that property.

Apart from the question, whether the plaintiffs were bound by Annagauda's consent, it has been contended that the second defendant, although adopted into another family, could still succeed to the property of his maternal grandfather in his natural family. Dewan Bahadur Rao relied on a passage in Colebrooke, Vol. II, page 395. Whatever authority might be given to that passage in Bengal, the authorities in this Presidency are perfectly clear. We need only refer to the latest decision of the Privy Council in *Nagindas Bhugwandas* v. *Bachoo Hurkissondas* (3) where their Lordships, while referring to a decision in *Kali Komul Mozoomdar* v. *Uma Shunkur Moitra* (4) cited with approval the following passage in the judgment of Mr. Justice Romesh Chunder Mitter :—

"The theory of adoption involves the principle of a complete severance of the child adopted from the family in which he is born, both in respect to the paternal and the maternal line, and his complete substitution into the adoptor's family *as if* he were born in it."

In the judgment of the lower Court in *Kali Komul Mozoomdar* v. *Uma Shunkur Moitra*, (4) various passages in Dattaka Mimamsa were referred to, from which it is clear that the appellants' contention cannot be sustained. Section VI, page 51, in Dattaka Mimansa says —

"'The funeral cake follows the family and estate,' the family and estate are declared to be the cause of performing the funeral repast; and the estate of the maternal grand father also, like that of the father, lapses from the son given. His incapacity to perform a funeral repast in honour of his original maternal grandfather is properly declared."

This passage is in direct conflict with the passage in Colebrooke Vol II page 395 on which Dewan Bahadur Rao has relied. Again it is stated in that judgment:—

"It is, therefore, clear that the adopted son confers the same spiritual benefit upon the relative of his adoptive mother as a legitimate son does, and that he is cut off from the inheritance of the relatives of his original mother."

We think, therefore, defendant No. 2 by virtue of his adoption cannot succeed to the estate of his maternal grandfather Akkagauda. The appeal, therefore, must be allowed except with regard to Survey No. 207. In other respects it is dismissed.

There will be the usual inquiry as to mesne profits of Survey Number 207.

Plaintiffs should pay three-fourths of defendants' costs throughout.

By consent, we direct that in the trial Court defendants Nos. 1 and 2 between themselves ought to have one set of pleader's fees, and that defendants Nos. 4 to 7 between themselves ought to have another set.

Decree varied.

(3) [1915] 40 Bom. 270—43 I.A 56—18 Bom L. R. 172—14 A.L.J. 185—23 C.L.J 395—20 C.W.N 702—30 M.L J. 193—5 L W. 259—19 M. L. T. 193—(1916) 1 M. W. N. 258—32 I C. 403 (P.C.)

(4) [1884] 10 Cal 232—10 I. A. 138—14 C.L.J. 379—4 Sar. 458. (P. C.)

✱ ✱ 1923 BOMBAY 473

MARTEN AND FAWCETT, JJ.

Sandu Valji & another—Appellants.

v.

Bhikchand Surajmal & others—Respondents

S A. No. 768 of 1921, D/- 20th November 1922, from the decision of Asst. J., Khandesh, in Appeal No. 120 of 1920.

(a) Deed—Construction—Mortgage or sale.

One of the two documents purported to be a sale-deed by the plaintiff to the defendants for Rs. 1,200. The other document purported to be an agreement by which the plaintiff was to pay the defendant Rs. 125 per annum for ten years and on such repayment the defendant was to execute a deed of re-sale, and in default of payment the annual instalments were to carry interest, and if the plaintiff failed to pay off the money he should not have any right left in the property.

Held that these two documents taken together constitute a mortgage and not a sale. [P. 474 C. 2]

(*b*) *Registration Act, S. 17 (2) (A)—Agreement to effect a sale deed.*

Survey Nos. 76 and 394 were mortgaged with A in 1906 and in 1908; it was agreed that No. 394 should be taken back by mortgagor free from mortgage and No. 76 to be given to mortgagee in lieu of mortgage money. The deed in respect of that ran thus:—

"You (the mortgagee) have agreed to effect the re-sale of that at my convenience by a regular registered deed. "Survey No. 76 from out of the properties involved in that mortgage by way of sale has been given this day to you in lieu of the debt of your shop and has been given into your possession this day".

Held: *Marten J.* (Fawcett J Dissenting) that the document did not amount to an actual transfer of the equity of redemption, but only amounted to an agreement to transfer; and therefore was admissible in evidence without registration 20 B.553 Dist. [P.475 C.1 P.476 C.2]

(*c*) *Part performance—Applicability to India.*

The English doctrine of part performance applies in India as being a principle of natural justice, viz., to prevent the success of fraud in land transactions. No doubt to establish the application of that principle, it must be shown that the respective parties have so changed their respective positions that the change can only be referable to the contract alleged 42 I. A. 1; 23 Bom. L. R. 506 Foll. [P. 475 C. 2]

S. R. Gokhale for D. R. Patwardhan—for Appellants.

K. H. Kelkar—for Respondents.

Marten, J.—The point on the appeal is whether the plainfiffs-appellants are entitled to treat Survey No. 76 as still subject to the mortgage of January 24, 1906. The respondents contend that as the result of a contract arrived at in 1908 it was agreed that they should acquire the equity of redemption in Survey No. 76 but should re-convey the other property originally comprised in the mortgage, viz., Survey No. 394.

The controversy has mainly turned on the document of March 23, 1908 Exhibit No 34, which is alleged to evidence this agreement. The appellants contend that it is inadmissible in evidence for want of registration, and alternatively, that, on the true construction of it, it only amounted to putting the defendants in possession of one of the plots whereas up to that date they had not obtained possession of either plot.

As to its admissibility in evidence, one main question is whether the document amounts to a transfer of the equity of redemption, or whether on its true construction it only amounts to a contract to transfer the equity. The Full Bench decision in *Bapu Appaji* v *Kashinath* (1) establishes that in this Court a contract for sale which is capable of specific performance may be set up in answer to a claim for possession by a vendor. And *Venkatesh Damodar* v. *Mallappa* (2) shows that where a purchaser has obtained possession, it is immaterial that more than three years have elapsed since the date for completion of the original contract. Further, the Indian Registration Act itself draws a clear distinction between what I will call conveyances, which require registration, and mere agreements which do not. Broadly speaking, this may be described as the difference between sub-section (1) (*b*) and sub-section (2) (*v*) of S 17 of the Indian Registration Act. Accordingly it was decided by Sir Charles Sargent and Mr. Justice Telang in *Shridhar Ballal* v. *Chintaman Sadashiv* (3) that an agreement to sell an equity of redemption need not be registered.

To understand the document of 1908 one must appreciate what was the then position under the two documents of January 24, 1906, Exhibits 28 and 32. The first of these documents purported to be a sale deed by the plaintiff to the defendants for Rs. 1,200. The other document purported to be an agreement by which the plaintiff was to pay the defendant Rs. 125 per annum for ten years, and on such repayment the defendant was to execute a deed of re-sale, and in default of payment the annual instalments were to carry interest, and if the plaintiff failed to pay off the money he should not have any right left in the property. In my opinion the lower Courts have rightly arrived at the conclusion that these two documents taken together constitute a mortgage and not a sale.

(1) [1916] 41 Bom. 438—19 Bom. L.R. 100—39 I.C 103 (**F.B.**)
(2) 1922 Bom. 9—46 Bom 722—24 Bom. L.R. 242—66 I C. 868.
(3) [1893] 18 Bom. 396.

Turning next to the document of March 1908 (Exhibit 34), I am of opinion that on its true construction the parties intended that the mortgagee was to take Survey No. 76 free from redemption, and that the mortgagor was to take Survey No. 394 free from the mortgage debt. In effect, therefore, in my opinion, the agreement was that the mortgagor was to sell Survey No. 76 to the defendant for the amount of the mortgage debt.

It will be seen, therefore, that a reconveyance or deed of resale was necessary as regards Survey No. 394. Accordingly Exhibit 34 provided as follows:—"You (the mortgagee) have agreed to effect the re-sale of that at my convenience by a regular registered deed." But as regards Survey No. 76 the parties seem to have thought that it would be sufficient to leave the original deed of sale, Exhibit No. 28, standing, and merely to cancel the contemporaneous document, Exhibit No. 32. Accordingly Exhibit 34 provides that "Survey No. 76 from out of the properties involved in that mortgage by way of sale has been given this day to you in lieu of the debt of your shop and has been given into your possession this day...and the possession of Survey No. 76 has accordingly been given to you this day. And the survey number has accordingly been transferred to your ownership itself...the field of Survey No. 76 is given to you for cultivation and has been given into your possession...the said Survey Number shall be treated as sold on the basis of that *kararnama* and an endorsement has been made in the said *kararnama* and is cancelled and has been given into your possession."

Now it is common ground that no endorsement has been made on the *kararnama*, Exhibit 32, nor has it been cancelled formally. On the whole I am of opinion that this document, Exhibit 34, did not amount to an actual transfer of the equity of redemption but only amounted to an agreement to transfer, or alternatively, an argeement to cancel Exhibit 32. and that consequently Exhibit 34 is admissible in evidence as an agreement and can be relied on by the defendants accordingly. The case of *Vani* v. *Bani* (4) is, I think, clearly distinguishable, as there the Court construed the particular document before it as creating a charge in the nature of a mortgage. It was not therefore a document which *merely* created a right to demand another document. Accordingly on this point, I disagree with the lower appellate Court, and I agree with the conclusion which I understand the learned trial Judge to have arrived at at p. 10, lines 20–32 of his judgment, viz., that the document itself did not purport to be the sale-deed, but created a right to get formal sale-deeds if necessary.

But there is an alternative way of putting the defendant's case. In *Mahomed Musa* v. *Aghore Kumar* (5) it has bean held by the Privy Council that in effect the English doctrine of part performance as explained in *Maddison* v. *Alderson* (6) applies in India as being a principle of natural justice, viz., to prevent the success of fraud in land transactions. No doubt in *Mahomed Musa* v. *Aghore Kumar* (5) the documents in question were before the date when the Transfer of Property Act came into operation. But their Lordships were fully aware of that fact and yet in no way qualified the principles which are there laid down. Further, in Bombay that decision has been followed in *Hiralal* v. *Shankar* (7) by Sir Norman Macleod and Mr. Justice Shah in a case arising in 1916 long after the Act came into operation in this Presidency. No doubt to establish the application of that principle, it must be shown that the respective parties have so changed their respective positions that the change can only be

(4) [1895] 20 Bom. 553.
(5) [1914] 42 Cal. 801—42 I. A. 1—17 Bom. L. R. 420—21 C.L.J. 231—28 M.L.J. 548—19 C.W.N. 150—13 A.L.J. 229—17 M.L.T. 143—2 L. W. 258—(1915) M.W.N. 621—28 I. C. 930 (**P.C.**)
(6) [1883] 8 A. C. 467—52 L.J., Q. B. 737—49 L.T. 303—31 W.R. 820-47 J. P. 821.
(7) [1921] 45 Bom. 1170—23 Bom. L. R. 506—62 I. C. 637

referable to the contract alleged. A mere payment of purchase money, for instance is insufficient (see Halsbury, Vol. XXV, pp. 294-295). In the present case I think the defendants satisfy that test. Since 1908 they have been in exclusive possession of Survey No. 76; they have paid the assessment; no accounts have ever been demanded by the plaintiffs, nor have the paintiffs made any payments. On the other hand plaintiffs have been in exclusive possession of S. No 394 and no demand for payment has been made on them This is exactly in accordance with the views I have expressed as to the intention of the parties under Exhibit 34. But it seems to me a complete variation of the original agreement Exhibit 32 of 1906 under which the plaintiffs were to pay Rs. 125 every year for ten years, and under which, as we know, the mortgagors remained in possession till 1908 of both plots of land. Further, the suit was not brought till 1919 and this length of time strengthens the inference that otherwise I would be prepared to draw.

The plaintiffs relied on *Kurri Veerareddi* v *Kurri Bapireddi* (8) and *Ramanathan* v *Ranganathan* (9) but the decision in *Salamat-uz-zamin Begam* v. *Masha Allah Khan* (10) is to the contrary effect, and under the circumstances I would prefer to adopt what appears to me to be the true effect of *Mahomed Musa* v. *Aghore Kumar* followed as it is in this Court by *Hiralal* v. *Shankar* (7). Accordingly, if necessary, I think that the defendants are also entitled to succeed upon this alternative ground.

In my opinion, therefore, the result arrived at by the lower Courts was correct, and this appeal must be dismissed with costs.

Fawcett, J.—The document, Exhibit 34, recites that Survey No. 76 has not only been given into the possession of the defendant mortgagee, but also that its ownership has been transferred to him. It also says that Survey No. 76 is to be treated as sold, and the *kararnama*, Exhibit 32, is cancelled to that extent In view of these provisions I do not think the document can be treated as falling under clause (*v*) of sub-section (2) of S. 17 of the Indian Registration Act 1908. Even if the document is taken to contemplate a further document cancelling Exhibit 32 to the extent mentioned, this makes no difference: see *Vani* v. *Bani* (4).

The test is whether the document does not itself by its express terms create interest in immoveable property, but expressly contemplates the creation of that interest by a subsequent instrument: *cf.* Birdwood J.'s remarks in *Chunilal* v. *Bomanji* (11), a decision approved in *Shridhar* v. *Chintaman* (3). Other-wise proper effect is not given to the words "not itself creating, declaring, limiting or extinguishing any right," &c. and "merely creating a right to obtain' etc. in S. 17 (2) (*v*). Here it seems to me the parties clearly intended Exhibit 34 to be the main document evidencing the sale of the equity of redemption, and the endorsement on Exhibit 32 as a subsidiary affair. In my opinion it goes beyond "merely creating a right to obtain another document' to effect the sale, and itself purports to create or declare a transfer of ownership. I regret therefore, I do not agree with my learned brother's view that the document can be treated as a mere agreement for sale.

Accordingly, I think the lower appellate Court was right in holding that the document required registration, and is, therefore, inadmissible in evidence for the purpose of affecting the Survey Number in question under S. 49 of the Indian Registration Act. It can no doubt be looked at for a collateral purpose; but that must be one other than that of creating or extinguishing a right to the land: see

(8) [1906] 29 Mad. 336—1 M.L.T 153—16 M.L.J. 365 (F.B.)
(9) [1917] 40 Mad. 1134—33 M.L.J. 252—6 L W. 300—22 M. L. T. 173—(1917) M. W .N. 757—43 I. C. 138.
(10) [1917] 40 All. 187—16 A. L. J. 98—43 I. C 645.
(11) [1883] 7 Bom. 310.

Bai Gulabbai v. *Shri Datgarji* (12). I think this excludes looking at it even for the purpose of evidence as to the nature of defendant's possession, which he obtained under the arrangement of 1908: *cf. Muthukaruppan* v. *Muthu Samban* (13).

But the mere fact that the lower Court wrongly looked at the document does not necessitate a reversal of its decision: S. 167, Indian Evidence Act. There was other clear evidence of a new arrangement in 1908, which has been considered by both the lower Courts who hold that it establishes the arrangement asserted by defendant as against that asserted by plaintiffs. The evidence seems sufficient to justify their conclusion, and no sufficient ground has been shown for our taking a different view of the facts in second appeal.

But it is contended that in law this arrangement is invalid, because it involves a sale of plaintiffs' equity of redemption which (as it is worth more than Rs. 100) can only be effected by a registered instrument under s. 54 of the Transfer of Property Act and S. 17 of the Indian Registration Act.

The answer to this is suggested in the lower Court's judgment which refers to the two cases of *Mahomed Musa* v *Aghore Kumar* (5), and *Nilkanth Bhimji* v. *Hanmant Eknath* (14). In the former case an equity of redemption was held to be extinguished, because, even if a regular conveyance was necessary, or if some other formal defect had occurred, the acts of the parties had been such as to supply all defects, on the equitable doctrine of performance or part-performance of an agreement. In this case, on the findings of the lower Court, the agreement to make defendant complete owner of Survey No. 76 and to cancel the mortgage of 1906, had been acted on by the parties for some eleven years prior to the suit; and if the equitable principle in question can be properly applied to this case it gives a clear answer to plaintiffs' contention.

No doubt the Madras High Court has held that this principle has no operation in the case of a sale governed by S. 54 of the Transfer of Property Act: see *Kurri Veerareddi* v. *Kurri Bapireddi* (8) and *Ramanathan* v. *Ranganathan.* (9). The latter decision was not, however, unanimous, Wallis C. J and Abdul Rahim J. dissenting. It has also been dissented from by the Allahabad High Court [*Salamat-uz-zamin Begam* v. *Masha Allah Khan* (10)] where the equitable principle of part performance was applied to the case of a transfer falling under S. 54, Transfer of Property Act. In this Court the Madras view was taken in *Lalchand Motiram* v. *Lakshman Sahadu* (15), but this has been virtually overruled by the Full Bench case of *Bapu Apaji* v. *Kashinath Sadoba* (1), where S. 54 of the Transfer of Property Act is considered, and it is held that, in spite of its provisions, a defendant in possession under an agreement of sale but without a registered conveyance can resist an action in ejectment by the plaintiff, who agreed to sell him the land and put him in possession. In the argument the Privy Council case of *Mahomed Musa* v. *Aghore Kumar* (5) was referred to

I think it is clear that this ruling, which is binding on us, governs the present case: and personally I have the less hesitation in following it, in that the judgment in that case is based on Indian statutory provisions, which (it is held) qualify S. 54 of the Transfer of Property Act. If that is so, the equitable principle in question is one recognised by the Legislature: and the view taken by their Lordships in *Mahomed Musa* v. *Aghore Kumar Ganguli* (5) and *Lakshmi Venkayamma Rao* v. *Venkata Narasimha Appa Rao* (16) that the law in India is not

(12) [1907] 9 Bom. L.R. 393.
(13) [1914] 38 Mad. 1158—1 L.W. 754—16 M.L.T. 344—(1914) M. W. N. 768—27 M.L.J. 497—25 I.C. 772.
(14) [1920] 22 Bom. L.R. 992—58 I.C. 415.
(15) [1904] 28 Bom. 466—6 Bom. L.R. 510.
(16) [1916] 39 Mad. 509—43 I.A. 138—20 C.W.N. 1054—14 A.L.J. 797—31 M.L.J. 58—(1916) 2 M. W.N. 23—20 M.L.T. 137—4 L.W. 58—18 Bom. L R 651—24 C.L.J. 279—34 I C. 921 (P.C.)

inconsistent with this equitable principle, is shown to be justified. The case of *Maung Shwe Goh* v. *Maung Inn* (17) does not affect this, for that only concerned the English rule that a contract for sale of real property makes the purchaser the owner in equity of the estate, which is clearly opposed to the express previsions of S. 54 regarding a contract for sale.

I was at first inclined to think that *Bapu Apaji* v. *Kashinath Sadoba* (1) would not apply to this case, as it was not a suit for possession but merely for an account. On further consideration I think the same principle applies, for in both cases a liability to account for profits arises, and defendant is entitled to show that he is not so liable : *cf.* the passage from Story's Equity Jurisprudence cited in *Bapu Apaji* v. *Kashinath Sadoba* (1). And both *Mithiram Bhat* v. *Somanatha Naickar* (18) and *Mahomed Musa* v. *Aghore Kumar Ganguli* (5), where the principle in question was held applicable, were suits for redemption of a mortgage and not for possession.

I also think that the fact that defendants' right to a decree for specific performance may now be barred, is immaterial. In *Mithiram Bhat* v. *Somanatha Naickar* (18) the defendant's claim was similarly barred, as pointed out in *Ramanathan* v. *Ranganathan* (9). And a similar view has also been taken in *Venkatesh* v. *Mallappa* (2).

The provisions of S. 92, proviso (4), Indian Evidence Act, were also relied on; but it is not a mere case of setting up an oral agreement in modification of a registered instrument, and in *Mahomed Musa* v. *Aghore Kumar Ganguli* (5) a similar contention was unsuccessful.

I agree, therefore, that the appeal should be dismissed with costs.

Appeal dismissed.

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(17) [1916] 44 Cal. 542—44 I.A. 15—21 M.L.T. 18—15 A.L.J. 82—(1917) M.W.N. 117—32 M.L.J. 6—25 C L.J. 108—19 Bom. L.R. 179—21 C.W.N. 500—5 L.W. 532—10 Bur. L.T. 69—38 I.C. 938 (P.C.)

(18) [1901] 24 Mad. 397.

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PRATT AND FAWCETT, JJ.

Dhondi Subhane Powar—Plaintiff—Appellant.

v.

Secretary of State—Defendant—Respondent.

L. P. A. No. 16 of 1922, D/- 23rd February, 1923 from the decision of Macleod, C. J. in S. A. No. 722 of 1921, from the decision of Dt. Judge, Satara.

(a) Bombay Hereditary Offices Act (III of 1894), Ss. 11 and 11 A—Rent due from date of declaration " Thenceforward revert to vatan " meaning.

The predecessor-in-title of defendants Nos. 2 to 8 had in the year 1886 alienated their Vatan land to the plaintiff. After the death of the alienor, the defendants applied to the Collector to take proceedings for the protection of the Vatan and the Collector on October 5th, 1904, made a declaration under S. 11 that the alienation was null and void, but did not fix the assessment on that date. Later, on July 6, 1908, the Collector held further proceedings and assessed the land at a rental of Rs. 75 per annum.

Held: that the assessment levied under S. 11 A would be charged from the date of the declaration *i. e.*, the 5th October 1904.

The words "thenceforward revert to Vatan" in S. 11 A. can only mean that the act regards the restoration of the Watan complete after dispossession or assessment. But they do not indicate that the assessment should not be levied from the date of the order requiring such assessment to be made. [P. 479 C. 2]

(b) Bombay Land Revenue Code, S. 166—Notice containing wrong descriptian of years—Valid.

Where notice was given but there was a mistake of detail as to the years for which the land revenue was in arrears.

Held. that it was a misdescription which in no way misled the plaintiff as he was aware that the rent was due from the date of the Collector's order in 1904. Nor this misdescription in any way involves a violation of the terms of S. 166 for the terms of that section do not make it obligatory upon the Collector to specify for what years the land revenue was in arrears. [P. 479 C.2]

K. N. Koyaji—for Appellant.

S. S. Patkar—for Respondent.

Pratt, J.—The plaintiff sued for a declaration that the order of forfeiture made by the Collector on March 10, 1915, was invalid. The order of

forfeiture was made under the following circumstances:—

The predecessors-in-title of defendants Nos. 2 to 8 had in the year 1886 alienated their Vatan land to the plaintiff. After the death of the alienor, the defendants applied to the Collector to take proceedings for the protection of the Vatan and the Collector on October 5, 1904, made a declaration under S. 11 of Bombay Act III of 1874 that the alienation was null and void.

Thereafter there were two courses open to the Collector under S. 11—either (1) to summarily resume possession of the land; or (2) to assess it at the rate prescribed under clause 2 of S. 9, i. e. at the full rent ordinarily paid by tenants of land of similar description in the same locality.

The Collector acted on the second alternative and decided not to summarily resume possession but to assess the land at the full rent. His order is quoted in the judgment of the District Judge and is as follows: "Having no material to decide at once what a full rent would be, I close these proceedings, leaving it to the respondent to move further in the matter when he is ready." Later, on July 6, 1908, the Collector held further proceedings and assessed the land at a rental of Rs. 75 per annum.

The Collector, in 1915, forfeited the land because the plaintiff had not paid the full amount of arrears of rent then due. The plaintiff claims that the full amount had been paid and the question is whether rent was due from July 6, 1908, when the assessment was fixed, or from October, 5, 1904 when the Collector made his declaration that the alienation was null and void. If the rent ran from the former date there were arrears of rent due, and if from the latter no arrears were due.

Mr. Koyajee's contention is that the plaintiff is liable to pay rent only from the date when the assessment was made. But I think the terms of S. 11 A negative that construction. The assessment of land was an alternative to the summary resumption of possession. The order that the land was liable to assessment must, therefore, mean assessment from the date of the order. From that date the person in possession is either in possession or a tenant liable to pay either mesne profits or rent from the date of the order.

Again the assessment was made under clause 2 of S 9 which refers to cases in which Vatan property is resumed after an alienation prior to the date of the Act, and it is clear from clause 1 of S. 9 that in such a case profits from the date of the order declaring alienation to be null and void are resumable. The inference must be that any assessment levied under S. 11 A would also be charged from the date of the same declaration.

Mr. Koyajee lays stress on words "thenceforward revert to Watan" in S. 11 A—perhaps these words would have been better placed at the end of S. 11. They can only mean that the Act regards the restoration of the Vatan complete after dispossession or assessment but they do not indicate that the assessment should not be levied from the date of the ordere requiring such assessment to be made.

I, therefore, conclude that there were arrears of land revenue for the recovery of which the Collector had jurisdiction to declare the land in holding forfeited under S. 153 of the Bombay Land Revenue Code.

It is next contended that the Collector has not complied with one of the conditions precedent to the exercise of his jurisdiction in that no proper notice of forfeiture was given under Ss. 153 and 166 of the Bombay Land Revenue Code. Notice was given but there was a mistake of detail as to the years for which the land revenue was in arrears. It was a misdescription which in no way misled the plaintiff because he has admitted in his statement (Exhibit 7) that he himself was aware that the rent was due from the date of the Collector's order in 1904. Nor can it be said that this misdescription in any way involves a violation of the terms of S. 166 of the Bombay Land Revenue Code, for the terms of that section do not make it obligatory upon the

Collector to specify for what years the land revenue was in arrears.

As the Colletor's order was *intra vires* the suit is barred not only by Article 14, Schedule I, of the Indian Limitation Act, but also by S. 4 (*c*) of the Bombay Revenue Jurisdiction Act. I would, therefore, dismiss this appeal with costs.

Fawcett, J.—I agree. I would only add on the first point that has been argued that S. 9, clause 1, of the Bombay Hereditary Offices Act, III of 1874, expressly says that an order giving the Vatandars profits of the Vatan should have effect from the date of the Collector's order, and there is nothing in S. 11 A that can, in my opinion, be held to apply a different principle. When that section says "he may assess it at the rate prescribed in clause 2," it seems to me to refer to his directing that the person in possession should pay the full rent specified in clause 2 of S. 9. It is not, in my opinion, essential for the efficacy of such an order that he should in the same order state the amount this full rent comes to. As in the present case, it may obviously be necessary to make further inquiry on that point, and though of course the amount of full rent should be determined within a reasonable time, yet the case falls within the principle "*id certum est quod certum reddi potest*". Accordingly I think there is no reason to differ from the view taken by both the lower Courts that the appellant became liable to pay the full rent, whatever it was, from the date of the Collector's order.

Appeal dismissed.

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MACLEOD, C. J. AND CRUMP, J.

Irappa Bin *Adviappa Kapparad* — Plaintiff—Appellant.

v.

Ningappa bin *Rudrappa Kapparad and others*—Defendants—Respondents.

Appeal from Order No. 32 of 1922, D/- 1st February, 1923 against the order of First Class Sub.Judge, Bijapur, in Mis. Appl. No. 74 of 1921.

Civil P. C., O. 9 R. 9—Party appearing only after a few minutes.

When a party appears before a few minutes after the case has been called on and dismissed during his absence, he should be made to pay the costs of the application to restore the suit and his suit should be restored and heard on merits. [P. 480 C. 2]

A. G. Desai—for Appellant.

P. S. Bakhale—for Respondent No. 2.

Judgment. — The appeal must be allowed. In cases of this kind when a party appears a few minutes after the case has been called on and dismissed during his absence, it should only be a question of costs on an application for restoring the case to the Board. The appellant should have been made to pay the costs of the application to restore the suit in the lower Court, and that is the order which we make now. The appellant must get his costs of the appeal as the opponents contended in the lower Court that the story of the applicant was false. We allow the appeal and direct that the suit be restored and heard on the merits, subject to the appellant paying the costs of the application to restore the suit in the lower Court.

Appeal allowed.

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1923

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ALL INDIA REPORTER

1923

MADRAS HIGH COURT.

1923 Madras (F. B.) 1.

SCHWABE, C.J., OLDFIELD AND COUTTS-TROTTER, JJ.

P. Subrahmanya Somayajulu v. *T. Seethayya.*

Letters Patent Appeal Nos. 28 to 37 of 1921, dated 5th April 1922 against the judgment of Offg. C. J., dated 19th October 1921 in Appeal Nos. 310 to 319 of 1919.

(*a*) *Evidence Act, S.* 90—*Copies.*

The presumption under S. 90 applies to copies as well as to originals. If the copy is proved to be a true copy a presumption in favour of the genuineness of the original can be made. (P. 2, Col. 1).

(*b*) *Madras Estates Land Act—S.* 3 (5) *and* 3 *Cl.* (2) (*d*) *Agraharam village—Shrotriem grant.*

In a grant of *an agraharam* village, the word "Shrotriem" was used. The *agraharamdars* were authorized to harvest and thrash the crops and appropriate the produce. There was no record of the actual cultivators of the land claiming permanent occupancy rights till about 1885 and it was clear that the claims were disputed when made. It was also clear that in many instances of fairly recent date, the *agraharamdars* were treating the land as their own mortgaging it, selling it and letting it on terms quite inconsistent with any one else having permanent occupancy rights. *Held, shrotriem* grant may be either of land itself or of the revenue only. But in this particular case, the grant was a grant of both the *Kudiwaram* and *Melwaram* and that consequently it is not an estate within the Act. (P. 5, Col. 2).

P. Narayanamurthi and K. Ramamurthi—for the Appellants.

Ch. Raghava Rao—for the Respondents.

THE CHIEF JUSTICE :—The question to be decided in these appeals is whether the Civil Courts have jurisdiction to entertain the suits, the subject of the appeals, or whether their jurisdiction is ousted by the Madras Estates Land Act. The suits are between the inhabitants of the village of Arepalli and their immediate landlords, the agraharamdars of that village. If the agraharamdars are landlords within the meaning of S. 3 (5) of the Madras Estates Land Act of 1908, the Civil Courts have no jurisdiction by reason of S. 189.

"*Landholder*" means a person owning an estate or part thereof and includes every person entitled to collect the rents of the whole or any portion of the Estate.

Whether this village is an "estate" or not depends on S. 3 (2) (*d*) which includes in the definition :

"Any village of which the land revenue alone has been granted in inam to a person not owning the *kudivaram* thereof".

It has been established that, where a grant in inam is a grant of both the landlord's and the tenant's rights in the land or as they are called the *melwaram* and the *kudiwaram* the land is not an "estate"; but if the grant is of the landlord's rights or the *melwaram* alone, it is an "estate" so that the question to be decided is whether the grant is of the land itself or only of the right to the revenue from the land. There is no question in this case of the village being part of an estate and the question which has recently been decided by a Full Bench of this Court in A.A.O. No. 121 of 1920 (1) where it was held that minor inamdar who was granted both *warams* in respect of a small part of an estate was a landholder, does not arise, because the village in question has not been shown to be part of an estate. I am conscious of the absurdity if that case was rightly decided and the view which we are about to express in this case is right, for the result is that a minor inamdar of a few acres would be a "landholder" while a major inamdar of a whole village would not. But such apparent inconsistencies are not surprising in view of the draftsmanship of the statute.

The first question to be decided is whether an alleged copy of the grant

1. 1922 Mad. 373=43 M. L. J. 229.

itself which was made in the year 1689 is admissible in evidence to prove the terms of the grant. The document Ex. I purports to be a copy of two documents of a grant in the Telugu language with a schedule annexed showing the boundaries, and of a Telugu translation of another document written in the Persian language, the translation being, it is stated, written on the right hand margin of the document in Persian. The copy is dated 11th May, 1858, and is signed by the three agraharamdars at that time and contains the statement over their signatures that they "retain the original and that this copy is written and filed." At that date, litigation was pending and I have no doubt that the meaning of that statement is that this is a true copy made for use in Court in that litigation. We have examined the records in that litigation and find that the grant was put in evidence. The agraharamdars who signed the statement, that it was a true copy are all dead. Under the Evidence Act of 1872, S. 65 secondary evidence may be given of the contents of a document where the original has been lost. Under S. 90 when a document is produced from what the Court considers proper custody purporting to be more than 30 years old the Court may presume that the signatures to the document are genuine, and in the case of a document executed or attested that it was duly executed and attested by the persons by whom it purports to be executed and attested. This applies to copies as well as to originals. If the copy is proved to be a true copy, it has been held that a presumption in favour of the genuineness of the original can be made. It follows that this document is admissible as secondary evidence provided it can be proved that it is a true copy. There is a statement in it by these three deceased persons that it is a true copy and under S. 32 (7) a statement made by a person who is dead contained in any document which relates to any such transaction as is mentioned in S. 13, Cl. (*a*) is admissible as a relevant fact and under S. 13, Cl. (*a*) where the question is as to the existence of any right, any transaction by which the right was created is a relevant fact. In my judgment the grant is a transaction by which the right now in question was created and the statement of the deceased persons is contained in a document which relates to that transaction. It follows that in my judgment the statement that this is a true copy is admissible. There is no reason for not accepting that statement and the document must be admitted as a true copy. That part of the document which purports to be a Telugu translation of the Persian stands on a somewhat different footing because, although it is proved that it is a true copy of the translation, there is no evidence that the translation is a correct translation and, therefore, in my judgment the second of the two documents copied is of no value and cannot be taken into consideration.

The question then to be determined is whether on the true construction of the grant and on the evidence relating to the subject-matter of the grant at its date that is, 1689 (A. D.) the grant was of the land itself or only of the right to collect the revenue. If it were proved that there were ryots with permanent occupancy rights on the land, at the date of the grant, it would be strong evidence that the grant was of the *melwaram* and not of the land itself. Since the decision of the Privy Council in *Suryanarayana* v. *Patanna* (2) and *Upadashtra Venkata Sastrulu* v. *Divi Seetaramudu* (3) it must be taken that there is no presumption that the grant of an agraharam in inam conveys only the *melwaram*, and since that decision it has been held by a Full Bench of this Court in *Muthu Goundan* v. *Perumal Iyen* (4) that there is a presumption in law in such cases that both the *melwaram* and *kudiwaram* are included.

The grant as translated by the Chief Interpreter is in the following terms :—

"In the year 1610 of the era of Salivahana commencing Jaya year namely, this Prabhava year on the 15th Suddah of Adhika Chaitra, the Patta or Deed of charity, ('udana' gift of land) executed and given to Ponnapalle Annappa Garu who is devoted to the six duties (of a Brahmin), namely, Yajana, Adhyayajana, Adhyayana, Adhyapana, Dana and Danapratigraha, by Komaravolu Rajah, Puligadda, Mallapparaju Lukkaraju, Perraju and Muzumdar Papanna, Desasshas (natives) of Nizampatna. Whereas we have on the holy occasion of Lunar Eclipse given to you, treating it as a dedication to God

2. (1918) 41 Mad. 1012=45 I. A. 209 (P.C.).
3. (1920) 43 Mad. 166 at p. 172=46 I. A. 123 (P.C.).
4. (1921) 44 Mad. 588=40 M. L. J. 429 (F. B.).

Siva (as) Shrotriem the village called Are (mouza), Sircar Nizampatnamta (taluk) for 6 six pagodas, you shall be enjoying the Shrotriem in this manner from son to grandson and so on in succession and be happy. (Sanskrit verse-Proper administration of a charity gift by another person is twice as meritorious as a charity gift by oneself)."

Signature of Rajahs. (Sd.) MALLAPARAJU. (Sd.) PERRA. (Sd.) PAPANNA.

SRI NAGESWARA.

Memorandum of boundaries of the Agraharam written and given to Ponnappalle Annappa who is devoted to the six duties of a Brahmin namely, Yajana, Adhyajana, Adhyyayana, Adhyyapana Dana and Danapratigraha by Komaravolu Rajahs, namely, Puligadda Mallaparazu, Lekkarazu Perraju and Muzumdar Papanna Natives of Nizampatam on the 9th Adhika Chaitra Bahula of this Prabhava year namely, the year 1610 of the era of Salivahana commencing Jaya year. Whereas we, fixing the shrotriem at 6 pagodas have given to you Agraharam in the village called Arepalle, *M*. Niz Patnam Taluk, the boundaries and limits shown therefore are as follow :

"Boundary on the north-west (by) Kudally (place of meeting) of the limits of the two villages of Cherukumalle and Arambakkam ; on the north by Kudali of the limits of the villages of Cherukumalle Gunvapalle and Ponnapalle roughly along the pata gattu (old ridge) on the north-east (by) the limits of Nadimpalle and Razavolu; on the east (by) Chakirevuguntа (Dhoby pond) lying roughly along the channel forming the boundary of Dhulipudy roughly from the middle of the vada (Wharf) along the limits of Razavolu on the south-east (by Kudali) of the limits of Nagaram and Dhulipudy : on the south roughly by Kudali of Basulapalam and Pudivada through Peddaputtalu from the middle of the Vada roughly south of Thurakkalaguntalu along the middle of Chittapaggulakatta south of Chavutavalu : on the south-west (by) Jammalagunta from the middle of Nallavadu, and on the west (by) roughly the North-western limit of Daggulamadugu through Chavuta Bibbala through the middle of Vada, through the middle of Kudali and along the old bridge and boundary limit of Arambakkam. Whereas we have given to you according to these boundaries you shall enjoy the Agraharam paying the Shrotriem, from son to grandson and so on in succession and be happy."

It is argued on behalf of respondents that the terms of the grant show that it was the *melwaram* only and the matters relied upon in support of this contention are four. The first, on which most reliance is placed, is the use of the letter *M* which occurs twice, once in the grant itself and once in the schedule, the words being 'the village called Arepalli *M*.' It is agreed that the letter *M* is an abbreviation for a word *Mauza* or *Mauja*. This word is derived from the Arabic and literally means *defined* and hence '*a defined place*,' '*a village*' and "*an inhabited village*." It is then argued that this shows that in 1689, the date of the grant, there were ryots cultivating the land who had occupancy rights, from which it follows that all that was granted was a right to collect the rent from this village and not a right to the land or the village itself. This meaning of the word was given to it by Sadasiva Aiyar, J., in *Venkata Sastrulu* v. *Seetharamudu*, (5) where referring to another village granted in inam in 1748 he says that "the village was then a *Mauja* village that is a village in which there were peasant proprietors owning cultivable lands even then." That case went up to the Privy Council and the decision was reversed and their Lordships deal with the matter in these words in *Upadashtra Venkata Sastrulu* v. *Divi Seetaramudu* (3):—

"Reliance was placed on the fact that in the register of 1802, Billapadu is called a *Mauja* (or Mauza) these expressions indicating, it is suggested, that the village was the home of proprietary inhabitants.....But it does not appear to their Lordships that it would be safe to build on the use of the expressions of this character in 1783 and 1802 an inference as to the existence in 1748 of tenants having permanent rights of occupancy."

So, as far as authority goes, this interpretation of the word rests only on the passage I have quoted from the judgment of Sadasiva Aiyar, J. I do not find that evidence was given in that case as to the meaning of the word. But Wilson's Glossary of 1855 was referred to as it has been in this case, where he at page 360, gives the meaning as "a village, understanding by that term, one or more clusters of habitations and all the lands belonging to the proprietary inhabitants." He states too that it is defined in "Directions to Settlement Officers" to be "a parcel or parcels of lands having a separate name in the Revenue records and of known limits." We are referred to Maclean's Manual of Administration, Vol. III, page 522, but this is merely a verbatim copy of Wilson's definitions referred to above. I do not think that on the material before us it is possible to say that this word

5. (1915) 38 Mad. 891=26 M. L. J. 585.

necessarily imports the meaning that there were occupancy ryots on the land. There is no evidence at all before us of how this word was used in 1689, and if it be a fact that at the time that Mr. Wilson compiled his glossary, it had come to have that meaning, that would not in my judgment be sufficient evidence of its meaning in 1689 to enable us to act upon it. It is to my mind reading too much into the meaning of the word which simply means *defined* and so a *defined* place or *village*.

Secondly it is argued that the use of the word *Shrotriem* shows that the grant was of the *melwaram* rights only. This word is derived from Shrotriya meaning a Brahmin well read in the Vedas and literally means nothing more than the grant of a land to such a person. It is used in this document in two senses, firstly as describing the rights that were granted, and secondly as meaning the rent to be paid to the grantor, in this case 6 pagodas. Here again reliance is placed on Wilson's Glossary. At page 490 he gives Shrotriem as meaning lands or a village held at a favourable rate, properly an assignment of land or revenue to a Brahmin learned in the Vedas and he adds, a Shrotriem grant gives no right over the lands and the grantee, cannot interfere with the occupants as long as they pay the established rent. It is to be observed that he begins by saying that it is a grant of land or of revenue, and I have little doubt that the term was used for any grant to a Brahmin in inam, whether the grant was of land or of revenue. It is true that in the latter part he qualifies his statement by tho statement that "it gives no right over the lands." But it is to be remembered that this was written at a time when it was the accepted view of the Courts in this Presidency that in a Shrotriem grant there was a presumption that the *melwaram* only was granted and I have little doubt that Mr. Wilson was merely stating what he understood the law to be. That view of the law as I have pointed out has been decided by the Privy Council to be erroneous. In the "Land Systems of British India" by Baden Powell Vol. III, page 140 the following passage occurs.

"Only in the case of grants to Brahmins called Shrotriem, I understand that the land was not necessarily held by the grantee. Such grants in fact are assignment of revenue, and whether the land was unoccupied and was acquired with the grant, is a question of fact in each case."

and at page 79

"All native Governments were in the habit of rewarding favourites providing for the support of mosques temples, religious schools, shrines, and for alms-giving and the maintenance of Brahmin and Mahomadan Saints, etc., by granting the revenue on the land, whether they granted the land itself or not."

and at page 80 it is stated that

"The Inam commission dealt with all kinds of grants whether they included the right in the land or only the Government Revenue; they were Shrotriems and Agraharams, grants to certain classes of Brahmins which did not give more than the revenue leaving the land in its original occupancy unless it could be shown that the occupancy was also granted."

In these passages it would appear that the author, in stating that the shrotriem or agraharam grant could be either of revenue or of the land states what was then supposed to be the rule that the grant was to be presumed to be of the *melwaram* only unless the contrary was proved.

It is to be observed that in *Venkata Sastrulu* v. *Sitaramudu* (5) and *Venkata Sastrulu* v. *Divi Seetharamudu* (3) the grant was an Agraharam grant in inam to Brahmins: In *Ponnusamy Padayachi* v. *Karuppudayan* (6), the grant was a Shrotriem grant: in *Muthu Goundan* v. *Perumal Iyen* (4), the grant was a moniyam grant to a temple and in all these cases it was held that the grant was of both warams. In the *Secretary of State for India in Council* v. *Srinivasa Chariar* (7), where a village was granted as a Shrotriem inam their Lordships of the Privy Council held that such a grant could be either an assignment of revenue or a grant of the land. In my judgment it is fully established that Shrotriem grant may be either of the land itself or of the revenue only. The use of this word therefore is of no importance.

The third matter relied upon is that the grant being a Shrotriem grant was to Brahmins learned in the Vedas and it is suggested that it was unlikely that such Brahmins would cultivate the lands themselves. The same contention might have been made in the cases referred to above. Ultimately the suggestion was limited to non-resident Brahmins. But all the in-

6. (1915) 38 Mad. 843=26 M. L. J. 285.
7. (1921) 44 Mad. 421=48 I. A. 56 (P. C.).

formation before us is that the Brahmins to whom the original grant was made lived about two miles from Arepalle and the argument in my judgment is of no value.

Lastly it was proved that the grantors were Deshapandyas and it is contended that this shows that it was of revenue alone, as it is suggested that Deshapandyas were farmers of revenue only and could not, or at any rate were most unlikely to, have land to grant. This must depend upon the position of Deshapandyas in 1689 and there is nothing inherently impossible or even improbable in their either being or acting as if they were the owners of the soil. We have had our attention called on this matter to the Manual of Kistna District of 1843, page 343; to the Appendix to the fifth Report from the Select Committee on the East India Company's affairs, Vol. III, page 24 and Wilson's Glossary, page 132. It would appear that these Deshapandyas were originally Hindu Revenue Officers under Muhamadan Rulers acting as accountants and registrars of the District and being under a Deshmukh. They were originally paid by commission on the revenue collected or by a grant of land. These Deshapandyas after a time became as powerful as Deshmukhs. Both, provided they produced the necessary Revenue, were left without interference by the Ruler. The office soon became hereditary. Gradually they obtained the position of territorial magnates in their Districts, somewhat resembling the feudal barons of early English History. It is to be observed that the History of the Zemindars is much the same. They too originally were collectors of Revenue but became in effect the owners of the territory. Before long these Hindu Hereditary Officers began to call themselves Zemindars and to act as if they were independent princes. It follows that there is nothing to show that in 1689 it was impossible or even improbable that these particular Deshapandyas either in fact owned this village or acted as if they owned it.

Another word in Ex. I is relied upon by the other side as showing that the land itself was granted. This is the word "*Bhudana*" meaning a gift of land. That the word was used, I have no doubt, although it appears in Ex. I as "*Udana*" with a space before it. We have been satisfied that this *U* is not used at the beginning of a word but only after and attached to a consonant and that the only consonant that could be used in this connection is *Bh*. The space is no doubt explained by the fact that it is a copy and an accurate copy of the original grant in which the initial letter had somehow become defaced. But unfortunately no inference can be drawn from the use of this word. It would appear from Wilson's Glossary, page 82 that the word is used either of a gift of land or of a gift of the revenue of the land.

I have therefore come to the conclusion that we get no assistance at all from the words of the grant and that they are equally consistent with the grant of the revenue or of the land itself. That being so, if the matter stood there, it would be sufficient to say that, on the decision of the Privy Council in *Suryanarayana* v. *Patanna* (2) there is no presumption that the grant was of revenue only and on the decision in *Muthu Goundan* v. *Perumal Iyen*, (4) that there is a presumption that the grant is of both warams. I can find nothing in the evidence adduced in the case to negative that presumption. On the contrary I think there is cogent evidence, apart altogether from the presumption, in favour of holding this grant to have been of both warams. The evidence has been fully and most carefully analysed in this case on the issues submitted to him by Mr. M. O. Thirumalachari, Principal District Munsif of Tenali. I attach most importance to the inam register Ex. G to Ex. V series ranging from 1750. Dumbalas or authorities from the rulers of the country, to the agraharamdars to harvest and thrash the crops and appropriate the produce, and to the documents in the litigation of 1864 Exs. F and F2. There is no record of the actual cultivators of the land claiming permanent occupancy rights till about 1885 and it is clear that the claims were disputed when made. It is also clear that in many instances of fairly recent date the agraharamdars were treating the land as their own, mortgaging it, selling it and letting it on terms quite inconsistent with any one else having permanent occupancy rights. I see no reason for dissenting from the findings of facts of the Principal District Munsif and I hold that the grant of this agraharam village

was a grant of both the *kudiwaram* and *melwaram* and that consequently it is not an estate within the Madras Estates Land Act and that the Civil Courts have jurisdiction to try these cases.

The appeals are therefore allowed, the suits being remanded for admission of the plaints in the District Munsif's Court and disposed of according to law. Costs in this Court and the District Court will be paid by defendants—respondents. Costs to date in the District Munsif's Court will be in his discretion and be provided for in the decree to be passed.

Oldfield, J.—I agree.

Coutts-Trotter, J.—I agree.

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SCHWABE, C. J. OLDFIELD AND COUTTS-TROTTER, JJ.

Raja of Ramnad ... Defendant-(Appellant).

v.

Minor Venkatarama Iyer by next friend Sundarammal and another...Plaintiffs-(Respondents).

S.A. No. 612 of 1920, dated 13th March 1922 against the decree of Temp. Sub-Judge of Ramnad at Madura in A. S. No. 17 of 1918.

(*a*) *Madras Estates Land Act, S.* 112—*Service of notice.*

Per Kumaraswami Sastri and Devadoss, JJ. *in the referring judgment*—It is difficult to construe the clause in S. 112 enabling the landlord to affix the notice 'on some conspicuous part of the last known residence if he has any, within ten miles of the holding, should he be unable to effect personal service,' to mean, that a tenant is bound to reside within 10 miles of his holding and that should he reside outside the ambit, personal service is unnecessary.

(P. 6, Col. 2).

(*b*) *Madras Estates Land Act, S.* 189—*Scope.*

A suit by the ryot which says that his property has been unlawfully sold is triable by Civil Courts.

(P. 8, Col. 2).

C. V. Ananthakrishna Aiyar and S. Sundararaja Aiyangar—for Appellant.

K. Jagannatha Aiyar—for Respondents.

Order of Reference to a Full Bench.

This appeal arises out of a suit filed by the respondents to set aside a revenue sale at the instance of the appellant, the Zemindar, who claimed that arrears of rent were due by the respondents, his tenants, and brought the holding to sale under the provisions of Chapter VI of the Madras Estates Land Act. Various contentions were raised, but for the purposes of this Second Appeal it is only necessary to refer to the contentions raised by the tenants that no notice was served on them as required by S. 112 of the Act and to that of the landlord that the Civil Court has no jurisdiction to entertain the suit.

As regards the first contention it is admitted that there was no personal service of the notice required by S. 112. The finding is that the respondents (tenants) were residing in Madura and that there was nothing to prevent service on them. Section 112 requires service to be effected by delivering a copy to the defaulter, or to his authorized agent, or to some adult male member of the family at his usual place of abode, and it is only if such service cannot be effected that substituted service either by affixture "on some conspicuous part of the last known residence, if he has any within 10 miles of the holding, or on some conspicuous part of the holding" is allowed.

It is a well-established rule that when the law requires service of notice or process it should wherever possible be personal. There is nothing in the Estates Land Act which requires the tenants to reside in the village where their holding is, and it is difficult to construe the clause in S. 112 enabling the landlord to affix the notice 'on some conspicuous part of the last known residence, if he has any, within ten miles of the holding, should he be unable to effect personal service' to mean that a tenant is bound to reside within 10 miles of his holding and that should he reside outside the ambit personal service is unnecessary.

When the Act wishes to relieve the landlord from the duty of serving a tenant who resides several miles away from his holding, it expressly provides for it. For example, S. 78 of the Act which provides for notice of distraint states that notice is to be served on the tenant by delivering a copy to him or to some adult male member of his family at his usual place of abode *provided that it is in the neighbourhood to which the distress refers*, or to his authorized agent, or when such service cannot be effected, by affixing a copy of the notice on some conspicuous part of the land to which it refers. Comparing S. 78 with S. 112 it is clear that whereas in the case of distraint and sale of moveables the law relieves the landlord of the neces-

sity of personal service in cases of tenants who do not reside in the neighbourhood of the holding, it requires personal service wherever the tenant may reside in cases where the holding itself is to be sold for non-payment of arrears. This difference in the wording of Ss. 78 and 112 is all the more significant when it is remembered that the Madras High Court in construing S. 39 of the Rent Recovery Act of 1865 held in *Oliver* v. *Anantha Ramayyan*, (1) that the service of the notice required under S. 39 of the Rent Recovery Act of 1865 by affixture on the land was sufficient where the tenant was residing in foreign territory, as they were of opinion that the words "the usual place of abode" seemed to denote that it was contemplated that the notice would ordinarily be served upon the tenant himself, or his relations or his authorized agent in the neighbourhood of the land in respect of which the patta was tendered; and it could not have been intended that the landlord would go personally or send an agent to the foreign territory to tender the notice. The legislature in S. 78, Cl. 2 provides that personal service is necessary only if the defaulter resides in the neighbourhood of the land to which the distress refers and that if there is no such residence a copy of the notice may be affixed on some conspicuous part of the land. In providing for the sales of tenure itself the legislature omitted the words in S. 78 as to any residence in the neighbourhood. It is doubtful how far any presumed intention of the legislature or any hardship that may exist would be a valid reason for overriding the plain provisions of a section. But having regard to the difference in the wording of Ss. 78 and 112 we do not think we can in construing S. 112 import any such consideration as weighed with the Judges who decided *Oliver* v. *Anantha Ramayyan* (1). It is not suggested in the present case that there would have been any difficulty in serving the tenants who were residing in Madura only a few miles from the holding and there is no reason for not complying with the provisions of S. 112 which direct that the Collector shall cause service to be effected by delivering a copy to the defaulter or to his authorized agent, or to some adult male member of his family at his usual place of abode and it makes the other mode of service valid only if such service cannot be effected. In *Kumud Nath* v. *Jotindra Nath* (2) it was held that 'substituted service under O. XVII, C. P. C. can only be justified when it is shown that proper efforts were made to find the defendant and serve him at his residence and that though the defendant had an ancestral family house, affixture on the door of that house was not justified in law where the defendant was living and working in a different district for some years. We are of opinion that the service in this case does not comply with the provisions of S. 112.

On the second question as to the jurisdiction of Civil Courts to entertain suits to set aside sales, the authorities are conflicting. The right of suit is not denied. S. 189 of the Madras Estates Land Act enacts that a Collector or other Revenue Officer specially authorized under the Act shall hear and determine as a Revenue Court all suits and applications of the nature specified in Parts A and B of the Schedule and no Civil Court in the exercise of its original jurisdiction shall take cognizance of any dispute or matter in respect of which such suit or application might be brought or made. The present suit is one for a declaration that the Revenue sale held at the instance of the appellant and the purchase by him at such a sale of the holding of the respondents are fraudulent and invalid and not binding on the plaintiffs (respondents), for setting aside the auction sale, for a declaration that the respondents possessed occupancy right in the land and the appellant had no such right and for an injunction restraining the appellant from ejecting the respondents from the land. So far as parts A and B of the Schedule to the Act are concerned the only clause relating to sales under S. 112 is No. 12 of Part A which relates to suits to contest the right of sale of holdings and it provides 30 days within which a suit could be filed from the date of service of notice on the defaulter requiring him to pay the amount due or to file a suit contesting the right of sale. It is clear that this clause only refers to suits instituted before the sale is held contesting

1. (1895) 18 Mad. 80.

2. (1911) 38 Cal. 394.

the right of the landlord to bring the property to sale. It cannot, on the plain meaning of the clause, refer to suits instituted after the sale, and the period of limitation and the time from which it begins to run could have no application to such suits. The Act is silent as to where the suit is to be filed after the sale takes place and the plaintiff wants to set aside the sale. It is well settled that Civil Courts have jurisdiction in all cases where they would have had jurisdiction prior to the Estates Land Act except so far as that jurisdiction is expressly or by necessary implication taken away by the provisions of S. 189. In *Chidambaram Pillai* v. *Muthammal*, (3) it was held by Ayling, J., that a suit for a declaration that the sale of a holding under S. 111 and the subsequent sections of the Madras Estates Land Act was void, was maintainable in a Civil Court. The learned Judge observed: "It seems clear that a suit of this nature is maintainable in a Civil Court, in the absence of any statutory bar. Vide *Dorasamy Pillai* v. *Muthusamy Moopan* (4) and *Zemindar of Ettiyapuram* v. *Sankarappa Reddiar* (5). Respondent relies on S. 189 of the Estates Land Act. This makes it clear that a suit for damages sustained in consequence of the alleged illegality would lie in a Revenue and not in a Civil Court which is also specifically laid down in S. 213 (3). But a suit for declaration like the present one is not one of those set forth in the Schedule to the Act. It may seem anomalous to give the jurisdiction to award damages for the illegality to the Revenue Court which ordered the sale and the jurisdiction of setting it aside to the civil tribunal. But if the view taken by the lower Court is correct, then in spite of the mandatory directions of S. 115, an order of a Collector for sale which was passed without jurisdiction must stand and cannot be questioned; for, admittedly, no suit to set aside the sale will lie in a Revenue Court." In *Gouse Mohideen Sahib* v. *Muthialu Chettiar* (6) it was held by Sadasiva Aiyar and Spencer, JJ., that S. 189 of the Estates Land Act does not take away the right to bring a suit in the Civil Courts to set aside a sale on the ground of fraud. The learned Judges observe: "The argument of the appellant's (1st defendant's) learned vakil that S. 189 of the Estates Land Act takes away the right to bring a suit in the Civil Court to set aside a sale on the ground of fraud cannot be accepted. It only takes away the right to apply to the Civil Courts under S. 131 of the Estates Land Act to set aside the sale in accordance with the provisions of that section." In *Jagannadha Charyulu* v. *Satyanarayana Varaprasada Rau* (7), it was held by Spencer and Krishnan, JJ., following *Chidambaram Pillai* v. *Muthammal* (3) and *Gouse Mohideen Sahib* v. *Muthialu Chettiar*, (6) that a suit by the purchaser of a holding at a sale held under the provisions of Chapter VI of the Madras Estates Land Act for a declaration that the order of the Deputy Collector setting aside the sale was *ultra vires* and void lay in a Civil Court and not in a Revenue Court. A contrary view was taken in *Ramanathan* v. *Ramaswami*, (8) where it was held that S. 189 and Cl. 12 Part A of the Schedule to the Madras Estates Land Act precluded a Civil Court from taking cognizance of a suit by a ryot to recover possession of a holding sold under the Madras Estates Land Act for non-payment of rent on the ground that the land-holder had no right to sell the holding on the ground that Cl. 12 is not confined to a suit to question an intended sale of the holding. But that clause and S. 189 preclude Civil Courts from taking cognizance of any dispute in respect of which a suit might be brought before a Collector and that it was not likely that the legislature would allow the validity of a sale to be impeached after the sale while prohibiting a suit for a declaration that no valid sale could be effected. The learned Judges distinguish *Gouse Mohideen Sahib* v. *Muthialu Chettiar* (6) on the ground that the sale was sought to be set aside on the ground of fraud. With all respect it seems to us that if there is a right to set aside a sale which has been effected by a Revenue Court on the ground that the conditions requisite to give the landlord a right to bring the property to sale have not been complied with, the question as to the forum has to be determined by the ex-

3. (1915) 38 Mad. 1042.
4. (1904) 27 Mad. 94.
5. (1904) 27 Mad. 483.
6. (1914) 26 M. L. J. 36.
7. (1920) 43 Mad. 351.
8. (1916) 39 Mad. 60.

press words of S. 189 and Cl. 12 of Part A to the Schedule and that we are not at liberty to speculate as to what the intention of the Legislature was. It is also difficult to see how the allegation of fraud will take away the jurisdiction of Revenue Courts, if the Estates Land Act conferred the jurisdiction to set aside sales on Revenue Courts. The decision in *Chidambaram Pillai* v. *Muthammal* (3) has not been referred to by the learned Judges. In Second Appeal No. 1563 of 1920 there are observations of the Officiating Chief Justice and Odgers, J., which support the view that S. 189 of the Estates Land Act bars the jurisdiction of Civil Courts to entertain suits to declare that a Revenue sale is invalid.

Having regard to this conflict of authority and to the importance of the question we refer the following question for the decision of a Full Bench :—

Has a Civil Court jurisdiction to entertain a suit by a ryot to set aside a sale of his holding which was held under the provisions of Chapter VI of the Madras Estates Land Act ?

OPINION OF THE FULL BENCH.

The question referred to the Full Bench is " Has a Civil Court jurisdiction to entertain a suit by a ryot to set aside a sale of his holding which was held under the provisions of Chapter VI of the Madras Estates Land Act ?" It is found as a fact in this case for the purpose of the reference that no notice was given to the ryot by the landholder of his intention to sell. The sale was therefore illegal and Civil Courts of this country have a right to set aside illegal sales unless there is some statutory provision to prevent them from doing so. It is therefore necessary to look at the Madras Estates Land Act of 1908 to see if the Civil Courts are precluded from setting aside such a sale. Under S. 213 " Any person deeming himself aggrieved by any proceedings taken under colour of this Act.....shall be at liberty to seek redress by filing a suit for damages before the Collector " and then Sub-S. (2) says: " This section shall not be deemed to bar any right of action in a Civil Court in any case not taken out of its jurisdiction by this Act." In order to ascertain what cases are taken out of the jurisdiction of the Civil Courts by the Act, one has to look at S. 189. Under S. 189 suits and applications of the nature specified in Parts A and B of the schedule can be brought before the Revenue Court and are taken out of the jurisdiction of Civil Courts expressly. Turning to the schedule the only article in the schedule which it is suggested could apply is Art. 12, Part A—where among the suits triable by a Collector are included suits under S. 112 of the Act to contest the right of sale of a holding and then that article gives a limit of thirty days in which to commence that suit from the date of the service of the notice on the defaulter and looking at S. 112, the landholder who has to avail himself of the powers of sale has to give notice in writing to the defaulter that notice having to be given in a particular way and to contain certain particulars, and has to inform the defaulter, that if he does not pay the amount or file a suit within that date, the property will be sold. That is the suit and the only suit which is referred to in Art. 12, Part A of the schedule, namely, a suit by the ryot within 30 days of the service on him of the notice to contest the right of sale. This suit is nothing of the kind. This is a suit by the ryot which says that his property has been unlawfully sold and there is nothing in the Act or in the schedules of the Act to take away the jurisdiction of the Civil Courts to try such suits.

That being so, the answer to the question referred to us must be in the affirmative.

1923 Madras. 9 F. B.

SCHWABE, C. J., COUTTS TROTTER AND KUMARASWAMI SASTRI, JJ.

P. Joseph ... Petitioner.

v.

P. Ramamma and another ... Respondents.

R. C. No. 6 of 1921, dated 28th August 1922 by District Judge, Godavari at Rajahmundry, dated 8th August 1921.

Indian Divorce Act, S. 7—Scope.

In Divorce and Matrimonial causes in England there is a definite established practice there that the evidence of the husband or the wife alone is never to be accepted without corroboration either by witnesses or at least by strong surrounding circumstances. Where charges of

adultery are made against a known person that man must be made a co-respondent unless the Judge shall otherwise direct. (Page 10, C. 1 & 2).

SCHWABE, C.J.:—This an application to confirm a decree for divorce given by the District Court of Godavari. It involves questions of considerable importance and questions our views upon which, it is most desirable, should become public property. The suit was a simple one. The petitioner claimed divorce from his wife on the ground, as shown in his petition, of adultery with two persons, the first a man called T. Jivaratnam who is not cited as a co-respondent in the suit, and the second Boyi Guruvalu, who is cited as a co-respondent in the suit. The co-respondent did not appear and the evidence except the formal proof of the marriage consisted entirely of the evidence of the petitioner, and that evidence was a statement that two weeks after the marriage the respondent was found by him to be in adultery with one Jeevaratnam, and that she admitted her guilt before elders of his church.

As regards the second case against the respondent, his evidence was that the co-respondent contracted intimacy while she was at Pittapore and that she is now living at Bezwada with this co-respondent. Further he produced a letter in which she said that he could marry any girl whom he liked according to his pleasure and added "this is the deed of relinquishment caused to be written and given with my free will".

By S. 7 of the Indian Divorce Act of 1869, "the High Courts and District Courts shall, in all suits and proceedings hereunder act and give relief on principles and rules which, in the opinion of the said Courts, are as nearly as may be conformable to the principles and rules on which the Court for Divorce and Matrimonial causes in England for the time being acts and gives relief". In this case the learned Judge expressed the view that, as she was *ex parte* and he saw no reason to disbelieve the petitioner's evidence, a decree should be granted. That is absolutely contrary to the principles and rules on which the Court of Divorce and Matrimonial causes in England acts. There is a definite established practice there that the evidence of the husband or the wife alone is never to be accepted without corroboration either by witnesses or at least by strong surrounding circumstances, and the reason for that rule is that but for it, there would be nothing easier than a collusive divorce, there would be no necessity for the respondent to appeal and the petitioner need only go into the witness-box and say that the respondent committed adultery. In this case there was no corroboration of any kind. I doubt if there was any evidence of adultery, because what the petitioner said was that he discovered that she was committing adultery. He says that she is living in the house with the named co-respondent. He does not say how he knows or whether it is hearsay, or give any facts. It must be understood that it is absolutely essential that there should be corroboration. Secondly there is a rule in England that where charges of adultery are made against a known person, that man must be made a co-respondent unless the Judge shall otherwise direct. It has been put in the shape of a rule in England—Divorce Rule No. 4. "A husband filing a petition for dissolution of marriage on the ground of (alleged) adultery, the alleged adulterers shall be made co-respondents in the cause, unless the Judge ordinarily shall otherwise direct"; under that provision if the name is unknown the Judge can dispense with that co-respondent. In this case the first alleged act of adultery is with a known man. He is not added as a co-respondent nor is there any application to the Court for dispensing with his being made a co-respondent. The result is that we cannot confirm this decree.

As regards the evidence in respect of Jeevaratnam, he not having been a party to the suit, that evidence ought not to have been admitted. As regards the evidence against the co-respondent there is no corroboration as I have pointed out. That corroboration in a case of this kind can in all probability easily be obtained. It is only necessary for some one who knows the respondent by sight to give evidence that he has been to the place where it is alleged that she is living in adultery with the co-respondent and that he has seen them living together under conditions that lead to presumption that they are guilty. If there is no person available such as a relative of the petitioner who knows her by sight, the

petitioner himself, must go with somebody else, *e.g.*, the local police and identify the person living with the co-respondent as being his wife.

The proper course in this case is to set aside this decree and remand the case to the District Court so as to enable the petitioner to adduce corroborative evidence in respect of the charge against the co-respondent or if so advised, and if he finds that course necessary, to join the other alleged adulterer as a co-respondent and adduce evidence in respect of that act of adultery.

COUTTS TROTTER, J.:—I am of the same opinion. This difficulty arises because people do not take the trouble in this country to get up divorce cases properly, and do not appreciate that the Courts of this country are bound of themselves to guard against the possibility of collusive litigants. I agree that this case should be retried in the way suggested by my Lord.

KUMARASWAMI SASTRI, J.:—I agree with my Lord the Chief Justice.

1923 Madras. 11.

AYLING AND ODGERS, JJ.

Rajambal Ammal and others ... Plaintiffs-(Appellants).

v.

Shanmuga Mudaliar and others ... Defendants-(Respondents).

S. A. Nos. 1077, 1572 to 1574 and 1926 to 1929 of 1920, dated 7th December 1921 from the Temp. Sub-Judge, Vellore, in A.S. No. 276.

(*a*) *Civil P. C., O. 41, R. 2—Adoption.*

Where the finding of the lower appellate Court against the *factum* of adoption was not questioned in the grounds of second appeal, *held*: validity of the adoption could not be allowed to be urged at the further proceedings.

(*b*) *Evidence Act, S. 115—Adoption- Representation.*

Representation on a matter of law, *i.e.*, as to the validity of an adoption creates no estoppel. (P. 12 C. 1).

(*c*) *Hindu Law—Prescription—Survivorship.*

The status of joint ownership with rights of survivorship cannot be acquired by prescription.

C. V. Ananthakrishna Iyer—for applnts.

A. Krishnaswami Iyer—for Respdts.

AYLING, J:—I agree that the appeals preferred on behalf of Shanmuga Mudaliar must be dismissed with costs. The Subordinate Judge's finding against the factum of adoption has not been questioned in the grounds of Second Appeal; and if it be accepted there could have been no misrepresentations of facts against him so as to give rise to an estoppel. Nor do I see how the status of joint ownership with rights of survivorship could be acquired by prescription.

Second Appeal 1077 of 1920 is concluded by findings of fact which we are not justified in refusing to accept and must also be dismissed with costs.

ODGERS, J:—In these second appeals the question is what was the position of one Shanmuga Mudali—1st defendant in all the suits—with regard to the property of one Parasurama Mudali. The latter was one of a co-parcenary of four brothers who became divided in 1891 and Shanmuga is the son of a deceased divided brother of Parasurama. The property in question is (subject to further observations) the self-acquisition of Parasurama. The first contention put forward was that Shanmuga Mudali was the adopted son of Parasurama Mudali and the first Court found the adoption as a fact, but held it was invalid. The lower appellate Court found against the fact of adoption and this question is not raised in second appeal. This is enough to dispose of the contention but Mr. A. Krishnaswami Iyer has argued that though there may have been no valid adoption, the plaintiffs and Parasurama Mudali are estopped from setting up its invalidity. He relies on *Parvati Bayamma* v. *Ramakrishna Rao* (1) and *Santappayya* v. *Rangappayya*. (2) In order to effect an estoppel there must be a declaration, act or omission by which a person has intentionally caused or permitted another person to believe a thing to be true and to act upon such belief and to support this, documents such as Exhibits IV and V are relied on to show that Shanmuga Mudali in 1903 and 1908 described himself as the adopted son of Parasurama

1. (1895) 18 Mad. 145=5 M. L. J. 44.
2. (1895) 18 Mad. 397=5 M. L. J. 66.

Mudali and that Parasurama Mudali was an attesting witness of these documents and thus held out Shanmuga Mudali as his adopted son. It should have been stated that Shanmuga was an orphan when the alleged adoption took place in 1899. In the first of the two cases referred to above Muthuswami Iyer, J. (who was a party to both decisions) said at page 151. "The doctrine of estoppel is but a graft, somewhat incongruous though equitable on the law of the adoption, to be applied in cases in which by the invalid adoption the status of the adopted boy is so irrevocably altered as to render it impossible for him to resume his original position in his natural family." In the latter case, it was held on the evidence that there was such an estoppel on account of a course of conduct for 25 years and the fact that the adoptee was no longer in a position to resume his rights in his natural family. I do not apprehend that this would apply to the case of an orphan whose status in his natural family would not thus be impaired. I do not on a consideration of the evidence in the case, consider that it is anything like the cogency of the evidence in the case last cited and in any event I am not prepared to say that there was actually any representation of fact in this case. Both Parasurama Mudali and Shanmuga Mudali no doubt believed that the adoption was a fact; there can be no estoppel when the other side knows the full facts; representation on a matter of law, *i.e.*, as to the validity of an adoption creates no estoppel. *Gopee Lall* v. *Mt. Sree Chundrasbe Bhuboo Jee* (3) and *Aryana Chariar* v. *Lakshmi Ammal.* (4) I am therefore of opinion that no estoppel arises in this case.

The next point argued by Mr. A. Krishnaswamy Iyer is that the alleged adopted son acquired the joint estate of himself and his alleged adoptive father by survivorship after the lapse of the statutory period, *viz.*, 12 years. The alleged adoption was in 1899 and differences arose in 1914 when the adoption was repudiated by Parasurama Mudali. Both the lower Courts have found that Parasurama Mudali and Shanmuga Mudali were co-owners of the suit properties which were purchased from the joint earnings in the tobacco trade which they carried on together for these 14 or 15 years. Now it is clear that joint tenancy with right of survivorship is confined in the Hindu Law to the single case of a co-parcenary between the members of an undivided family. See the judgment of the Privy Council in *Jogeswar Narain Deo* v. *Ram Chandra Dutt.* (5) It is also settled that in questions of limitation regard must be had to the animus with which the possession is taken or held. *Rajyalakshmi* v. *Suryanarayana.* (6). The case in *Venganna* v. *Chalamayya* (7) is only authority for holding that an estate known to and sanctioned by the Hindu Law can be granted to a Hindu female though it may change the course of devolution after her death. In this case the lower appellate Court has found against the fact of adoption, and accepting that as a finding of fact (as to which as stated there has been no ground taken in the second appeal petition) there can in law be no animus to adopt on the part of Parasurama Mudali. His property therefore cannot have been held by Shanmuga Mudali with the animus of an adopted son, and the fact that he held (or affected to deal with) this for over 12 years could not change his position into that of an adopted son-in-law at the end of that period. It therefore appears to me that this point goes also. The appeals of Mr. A. Krishnaswamy Iyer, *viz.*, Nos. 1926 to 1929 must be dismissed with costs.

Mr. Ananthakrishna Iyer for the widow of Parasurama Mudali in S. A. No. 1077 of 1920 argues that the whole property should have been decreed to his client. Both the lower Courts have however found as a fact that the suit properties were acquired from the earnings of the jont trade of Parasurama, and Shanmuga, and have declared that they are joint owners thereof. I am not prepared to disturb those findings of fact and do not consider that there are any good reasons to call for a fresh finding on this point. This appeal must therefore be dismissed with costs. So also Second Appeals Nos. 1572 to 1574 of 1920 are dismissed with costs.

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3. 11 B. L. R. 391.
4. (1911) 21 M. L. J. 500.
5. (1896) 23 Cal. 670=23 I. A. 37=6 M. L J. 75.
6. (1878) 3 M. L. J. 100.
7. (1913) 36 Mad. 484=23 M. L. J. 168.

1923 Madras. 13.

AYLING AND ODGERS, JJ.

Musaliarakath Muhamad alias *Rava* ... Appellant.

v.

Manavikrama the Zamorin Rajah Avergal (represented by the Court of Wards Agent and Estate Collector K. Sreenivasa Rao Avergal,) and others... Respondents.

S. A. No. 1499 of 1920 and Civ. Rev. Pet. No. 682 of 1920, dated 23rd March 1922 from the Sub-Judge, South Malabar, in appeal Suit No. 72 of 1919.

Civil P. C., O. XLI *Rr.* 17 *and* 19—*Pleader only instructed to apply for adjournment.*

Where a pleader is only instructed to apply for an adjournment and is in no position to argue the merits of the appeal, and has not studied the appeal and has been given no papers, the party must be deemed to be unrepresented. Under the old Code, the Court apparently had no power to adjourn the appeal in order to give the absent appellant a further opportunity to put in an appearance. Under the present Code that course is ordinarily open to it. This seems to be the object of the change. Where an order under O. 41, R. 17 ought to have been passed, and the Judge decided the case on merits, *held* the order was *ultra vires*. (1907) 34 Cal. 403 and 24 M. L. J. 235, foll.). (1903) 26 Mad. 267 Exp.)

(P. 13 C. 2, P. 14 C. 1, P. 15 C. 1 & 2).

K. P. M. Menon—for the Appellant.

C. Madhavan Nair and L. P. Radhakrishna Iyer—for the Respondents.

AYLING, J.:—Appellant (and petitioner before us) was the 5th defendant in Original Suit No. 354 of 1917 on the file of the Court of the Additional District Munsif of Tirur which was decreed in favour of Plaintiff. He preferred an appeal which was posted for disposal before the Subordinate Judge of Palghat on 10th February 1920. On that date, as appears from the record, appellant was not present but a vakil Mr. V. Sivarama Panikkar holding *vakalat* from him was present in Court and applied for an adjournment (M. P. No. 378 of 1920). This was refused. As far as I can gather he seems to have then simply informed the Court that as he had no instructions or papers, he could not argue the appeal and to have taken no further part in the proceedings. In these circumstances the Subordinate Judge instead of at once dismissing the appeal for default under O. XLI, R. 17 considered the evidence bearing on appellant's claim with reference to his appeal memo. (I use his own words) and dismissed the appeal with costs.

Mr. K. P. M. Menon contends that it was not competent to the Court to inquire into the merits of the case in the absence of appellant and his pleader; but only to deal with it under O. XLI, R. 17 against an order under which he would have the right of application for re-admission under R. 19.

I think in the circumstances set out above we cannot distinguish the case from one in which the appellant was absent and entirely unrepresented. To all intents and purposes he was unrepresented, for it is clear that Mr. Sivarama Panikkar was only instructed to apply for an adjournment and was in no position to pretend to argue the merits of the appeal. As appears from the order on M. P. No. 378 of 1920 he had not studied the appeal and had been given no papers. The case is precisely similar to that in *Satish Chandra* v. *Ahara Prasad* (1) in which a Full Bench of the Calcutta High Court held that the party must be deemed to be unrepresented.

Our attention was drawn to a case of this Court *Patinhare* v. *Vellur* (2) in which in somewhat similar circumstances a Bench of this Court held that the Court was bound to write a judgment and apparently to dispose of the appeal on its merits. The effect of this case has been discussed at page 414 of the report of the Calcutta case and it has been treated as merely a pronouncement as to the correct course to be adopted where it is found as a fact that there was no default. The judgment starts off by saying that in that case there was no default and lays stress on the fact that the vakil did not withdraw from the case. I think we are justified in declining to treat it as an authority on what constitutes default and I observe that in a later case *Venkatarama Iyer* v. *Nataraja Iyer* (3) another Bench of this Court has held, without reference to it, that where the vakil was not instructed to argue this case but only to apply for an adjournment there was no appearance.

Proceeding then on the footing that appellant was unrepresented was it compe-

1. (1907) 34 Cal. 403 (F. B.).
2. (1903) 26 Mad. 267.
3. (1913) 24 M. L. J. 235.

tent to the Subordinate Judge to go into the merits of the case?

It seems to be clear law that under the Code preceding the present Code an Appellate Court in such circumstances had no power to go into the merits:—Vide *Mohesh Chunder* v. *Thakur Dass* (4) quoted with approval in 34 Cal. 403.

For respondent it is contended that the law is different under the present Code, because the wording of S. 556 of the old Code "shall be dismissed" has been changed in O. XLI, R. 17 into "the Court may make an order that the appeal be dismissed." The question is whether this change of language was intended to throw open the door to a course which the Courts had held under the preceding enactment to be undesirable apart from its legality. *Vide* 20 W. R. 425.

It is quite possible to give effect to the change from "shall" to "may" without going to this length. Under the old Code the Court apparently had no power to adjourn the appeal in order to give the absent appellant a further opportunity to put in an appearance. Under the present Code that course is ordinarily open to it and I can see no reason why this latitude should not have been the object of the change.

The objections to allowing an appeal to be rejected on its merits without hearing the appellant remain the same as when Sir Richard Couch wrote his judgment in 20 W. R. 425 and it seems to me that to allow it might expose an appellant to a prejudice which could hardly have been contemplated. What remedy is open to an appellant who has been unavoidably prevented from appearing at the hearing, but whose appeal has been gone into and decided against him on its merits? If the Court's order is not to be treated as one under O. XLI, R. 17, R. 19 which provides for re-admission can have no application. The only possible remedy for such an appellant that is suggested is an application for review. But it is by no means clear that such an application would lie in view of the provisions of O. XLVII, R. 1, and in any case it could only be entertained by the same Judge as dismissed the appeal. Moreover there would be no appeal against the rejection of the application for review, such as is provided in the case of an application under O. XLI, R. 19.

There is very little authority on this point, probably because it is most unusual for an appellate Court to go into the merits of an appeal liable to be dismissed for default. We have only been referred to two decisions each by a single Judge of the Patna High Court, one on each side. These are *Mangar Singh* v. *Bharat Prasad* (5) and *Daulat Singh* v. *Srinivas Prasad Singh* (6). Neither, if I may say so with respect, contains much discussion of the point.

For the reasons above indicated, I think the Subordinate Judge had no power to go into the merits of the appeal as he has done in this case.

The last point for determination is what order we should pass in the matter. It has been suggested on the authority of the Calcutta cases quoted above, that we must treat the order as one passed under O. XLI, R. 17 and refer the appellant-petitioner to his remedy under R. 19. It is by no means certain that after this lapse of time that remedy would be effective. The time for application under R. 19 (1 month) has of course long expired, and it is doubtful whether, if an application were filed now, either S. 5 or S. 14 of the Limitation Act would enable a Court to excuse the delay. We think we are not precluded from taking another course. The order of the Subordinate Judge is on the face of it an order dictated by a consideration of the merits of the case and as we hold, an illegal order. Such consideration of the merits would be irrelevant to an order under O. XLI, R. 17. We therefore set aside the order of the Subordinate Judge, dated 10th February 1920 as *ultra vires* and direct him to restore the appeal to file and dispose of it according to law. Costs in this Court will be costs in the cause.

ODGERS, J:—The question in this appeal is whether the Subordinate Judge was right in discussing the case on its merits and dismissing it thereon instead of merely passing an order of dismissal of the appeal for default under O. XLI, R. 17. This would entitle the unsuccessful appellant to apply for re-admission of the appeal under

4. (1893) 20 W. R. 425.

5. (1919) 51 I. C. 46.
6. (1921) 57 I. C. 75.

R. 19 of the same order. In this case the appeal was not argued as the appellant had given no instructions to his vakil though the appeal is said to have come on 'in the presence of Mr. V. Sivarama Panikkar, Vakil for the appellant'. The Vakil was therefore certainly present and I must assume that he informed the Judge (as appears from the judgment) that he had no instructions and could not proceed further. In 34 Cal. 403 a Full Bench of the Calcutta High Court held that an application by a pleader who is instructed to apply for an adjournment which is refused is not an appearance within the meaning of the Civil Procedure Code and that a dismissal in such cases is for default. In 24 M. L. J. 235 it was held there was no appearance where pleader only applied for an adjournment. In 26 Mad. 267 the pleader for appellants appeared and asked for an adjournment which was refused. He did not withdraw from the case. It was held by the High Court that the Judge was bound to write a judgment and could not dismiss for default. This appears to me to be an entirely different case and is not applicable to the facts of the case before us as the Court there held there had been an appearance. In 51 I. C. 46 a single Judge of the Patna High Court held that where a pleader intimates he has no instructions, the proper course is to dismiss for default. In 57 I. C. 75 a single Judge of the same High Court held that when appellant fails to appear the Court has power to decide on the merits. The earlier case is not referred to and in neither of these Patna cases are any convincing reasons given for the decisions. With respect I do not think they carry the matter further and I think it must be taken that an appellant represented by a pleader who says he has no instructions and cannot proceed has not appeared. Under S. 556 of the Code of 1882 the Court was bound to dismiss the appeal if the appellant did not attend; the word used in O. XLI, R. 17 is 'may'. Does this mean that the Court may decide the case on the merits? If it does and the decision is against the appellant it is only open to review under O. XLVII, R.1 and the only clause applicable would be 'any other sufficient reason.' I think it very doubtful if the Court would apply this clause in which case the appellant who (or whose pleader) might have some quite legitimate ground for failing to appear at the hearing of the appeal would be left without remedy, there being no appeal from a refusal to review. In my opinion it cannot be said that the word 'may' was inserted in the present Code in order to bring about these serious consequences; but more likely in order that the Court might exercise its discretion whether or not to dismiss the appeal forthwith if the appellant or his pleader for one reason or other were not present when the appeal was called on and therefore does not mean that the Court is entitled to decide the case on the merits under such circumstances. The point is apparently almost a novel one and naturally so as it would only be rarely that a Judge under such circumstances would feel called upon to deal with the case on its merits which under the present circumstances the Subordinate Judge was not entitled to do. I therefore think that the judgment of the Subordinate Judge must be treated as one without jurisdiction.

I agree with the order proposed by my Lord.

1923 Madras. 15.

RAMESAM, J.

K. Murari Naicken ... Petitioner.

v.

Aiyasami Naicken ... Respondent.

Cri. Rev. Case No. 236 of 1922 Cri. Rev. Pet. No. 209 and 248 of 1922, from the Dist. Magt., 6th Jan. 1922, dated 28th April 1922 from Divnl. Magt., Coimbatore, dated 11th Feb. 1922.

Criminal P. C., S. 144—Scope.

Where the Civil Court has passed on order of temporary injunction against one party, implying that, in its opinion, the petitioner had a *prima facie* right, it is the duty of Criminal Courts to repeat the opinions of Civil Courts and in taking steps to preserve peace, to take action only against those who are infringing the rights of others and protect those who wish to exercise their rights and not prohibit the latter's lawful enjoyment of rights. The High Court views with disapproval the use of S. 144 for anything of the nature of a permanent expedient. The word 'alter' in S. 144 (4) Cr. P.C. does not justify the substitution for or addition to the party against whom the original order is directed. Orders under S. 144 are void as mere extensions and can be valid only as fresh orders, 27 M. L. J. 628; 3 Pat. L. J. 130 followed. (P. 16, C. 1, 2).

Bashyam Iyengar—for the Petitioner.

T. M. Krishnaswamy Iyer—for the Respondent.

J. C. Adam—(The Public Prosecutor) for the Crown.

ORDER:—These Revision cases are connected. It appears that there is a dispute about the control of four temples (Aiyasami temple and three others) in Coimbatore, between Murari Naicken (the petitioner before me) and Periakowli Naicken's party who are the counter-petitioners.

The petitioner filed Miscellaneous Case No. 7 of 1921 before the Stationary Sub-Magistrate, Coimbatore, who passed an *ex parte* order on 29th August 1921, under S. 144, Cr. P. C., prohibiting the counter-petitioner from interfering with the celebration of the *Sree Jayanthi* festival and in the conduct of the daily *puja* in the temples. The counter-petitioner appealed to the Sub-Divisional Magistrate who passed an order on 6th October 1921 directing both parties not to interfere with the temples in question. As to this, I agree with the view of my brother Odgers, J. in *Muthukumarswami Nadar* v. *Muhammad Rowther* (1) where he held that the word 'alter' in S. 144 (4) Cr. P. C. does not justify the substitution for or addition to the party against whom the original order is directed.

Before 12th December 1921, the petitioner filed a suit in a Civil Court and obtained a temporary injunction against the counter-petitioner. This order was shown to the Sub-Divisional Magistrate and on 12th December 1921, he passed an order. "It remains for me to see that no disturbance of peace occurs till the disposal of the suit....The order under S. 144 Criminal Procedure Code issued on 6th October 1921, will be re-issued for another term of two months to ensure peace." The District Magistrate refused to interfere with this order on the ground that "the opinion of the Sub-Divisional Magistrate that there is a continuing danger of a breach of peace appears to be well founded" (6th January 1922). On 11th February 1922, the Sub-Divisional Magistrate passed another order, which runs:—"Proceedings under S. 145, will be deferred for some time (*i.e.*,) until the temporary injunction passed *ex parte* by the District Munsif of Coimbatore, is upheld finally or reversed. Meanwhile an order under S. 144, Criminal Procedure Code will be issued substantially on the terms of the order, dated 12th December 1921."

The orders of 12th December 1921 and 11th February 1922, are the subjects of the Revision Petitions before me.

It is conceded that these orders are void as mere extensions and can be valid only as fresh orders under S. 144. It was observed in *Rashbehari Singh* v. *Jagnarain Rai* (2) "We view with disapproval the use of S. 144 for anything of the nature of a permanent expedient.

If the orders of the 12th December 1921 and 11th February 1922, cannot be regarded as proper orders passed afresh under the section, I can interfere with them. (See *Meyyur Ammal and others* (3) and *Govinda Chetty* v. *Emperor* (4)). In the latter case, it was observed: "Neither in the present order itself nor in the records referred to as forming the basis of it, is there any indication of urgency and the order itself does not set forth the material facts of the case as required by law." The observations apply to the orders now before me. I think that the successive orders passed in this case are improper. (See the observations in *Bishessur Chuckerbutty* v. *Emperor* (5) and amount to an 'abuse of the power' of the Court within the meaning of Sadasiva Iyer's J.'s observations in (1914) M. W. N. 169 especially, as, in this case, the Civil Court has passed an order of temporary injunction against one party, implying that, in its opinion, the petitioner had a *prima facie* right. It is the duty of Criminal Courts to repeat the opinions of Civil Courts and in taking steps to preserve peace, to take action only against those who are infringing the rights of others and protect those who wish to exercise their rights and not prohibit the latter's lawful enjoyment of rights (See *In re Guruswamy Nadar*. (6) I set aside both the orders accordingly.

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1. (1922) Mad. 76=15 M. L. W. 423=42 M. L. J. 352=1922 M. W. N. 177.
2. (1918) 3 Pat. L. J. 130.
3. (1914) 28 M. L J. 1?2=(1914) M. W. N. 169.
4. (1914) 27 M.L.J. 628=(1913) M.W.N. 1003.
5. (1916) 20 C. W. N. 758=24 C. L. J. 272.
6. (1912) 22 M. L. J. 251=(1912) M. W. N. 47.

1923 Madras. 17.

COUTTS-TROTTER AND RAMESAM, JJ.

K. M. P. R. Firm, merchants ... Appellants.

v.

The Official Assignee of Madras and as such the Assignee of K. Ponniah Chetty (Insolvent in I. P. No. 119 of 1919). ... Respondent.

O.S.A. No. 21 of 1921, dated 3rd March 1922 from the judgment of Phillips, J. in Ins. Pet. No. 119 of 1919, dated 4th January 1921.

(*a*) *Contract Act, S. 20—Mistake in execution.*

A contract, where there is no mistake as to the formation of the contract but as to the execution, is not void. No such question as to voidability arises in a case where there is a contract good on the face of it for unascertained goods described in a certain way which goods can be procured in the market after the date of the contract. (P. 17, C. 2).

(*b*) *Contract Act, S. 72—Scope.*

Where money is paid or goods delivered to a man by mistake, it can be recovered so long as his *status quo* is maintained, *i.e.*, so long as he can be equitably regarded as still having the benefit of that which was paid or delivered to him. The doctrine involved in the cases is the doctrine of equitable restitution and does not depend on the conduct, whether good or ill, of anybody. It depends upon whether the person whom it is sought to bring to book had his position so affected before the mistake was discovered that it would not be equitable to compel him to meet the plaintiff's claim. S. 72 has to be qualified by the doctrine of equity, in order to render it intelligible. It is so loosely drafted that by virtue of another section of the same Act namely, section 21 the word "mistake" has to be qualified by the addition of the words "of fact"; otherwise it would cover extra goods delivered under a mistake of law. (1900) 1 Q. B. 270; and 15 E. B. N. S. 324 Ref. (P. 18, C. 2; P. 19, C. 1).

V. Varadaraja Mudaliar—for Appellants.

R. N. Iyangar instructed by *K. Kandasami Mudaliar*—for Respondents.

COUTTS-TROTTER J.:—This is a curious and interesting case and has been argued with ability on both sides. It arises in this way. A firm called A. P. Chetti and Co., has sold to K. M. P. R. firm 70 bales of grey mulls at Rs. 15 a piece, each bale to contain 100 pieces. That was on the 7th September 1918 just before the looting. On the same day K. M. P. R. firm entered into an exactly similar contract with K. Ponniah Chetti, an insolvent. The insolvent entered into a contract with other people with which we are not concerned. In due course of time, the goods were delivered to K. M. P. R. firm and delivered by K. M. P. R. firm to the insolvent Ponniah Chetti who delivered them to somebody else. Nearly two years later, on July 20th, it was discovered that one bale contained 20 pieces in excess, another 5 and a third a shortage of 11 pieces so that there had been a delivery under the various contracts of 14 pieces in excess.

Now it does not matter for the purposes of this case whether it was a sale of the bales or sale of the pieces because if it was a sale of the bales, it has been dealt with throughout the evidence that this was not a mere question of an allowance for shortage or excess but that this excess was of such a character on the one hand and the shortage was of such a character on the other that the bales affected cannot be treated as delivered under the contract at all. If it was a sale of the pieces, the matter is even clearer because it comes to this, that the man who contracted for the sale of 7000 pieces had got 14 pieces which were not taken into account in the price which he paid. A question has arisen whether K. M. P. R. firm had taken into account the price of these 14 pieces in their settlement with the Official Assignee as representing Ponniah Chetti's estate. They say "we delivered to you goods which you were not entitled to. We do not care what their subsequent history was. You had our goods and you have got to pay." It was argued at the trial that on the evidence, this was a contract void in part by reason of mutual mistake. From the discussion in this Court, it was made abundantly clear that no such question as to voidability arises in a case like the present where you have got a contract good on the face of it for unascertained goods described in a certain way which goods can be procured in the market after the date of the contract. There was no question of a contract about the subject-matter of which the parties were under a mutual mistake like a contract relating to a ship that was not in existence at the time of the contract or the classical instances in the books. It is a question not of the formation of the contract but a question of the execution of

the contract if it was entered into. There has been excess delivery as regards a part of the contract and a short delivery as regards the rest and setting off the extra pieces delivered in one against the shortage in the other, so far as the net bales go, the transaction is outside the contract. For practical purposes, we can treat the matter as if it was a contract for 7,000 pieces with a delivery of 7,014 and the 14 pieces must be treated as being oustside the provisions of the contract altogether.

The short point is this. I deliver goods to a man by mistake and he under the same mistake passes them on to a third person and I sue him for the goods or their value: it is said by Mr. R.N. Iyengar that the matter is covered by S. 72 of the Contract Act. "A person to whom money has been paid or anything delivered, by mistake or under coercion must repay or return it" and that there is no qualification there as to his having continued to act under the same mistake or altered his position, and therefore however equitable the English law may be which protects men in such a case, it is not in this statute and cannot be imported into it. In the course of the argument, we were refered to the English cases on the subject. They are mostly agency cases where money had been paid to an agent by mistake, and in good faith the agent had or had not paid it over to his principal, and the clear principle laid down in those cases is this—that if he still has the money in his hands, he has got to return it. *Bavins Juar and Lims* v. *London and South Western Bank* (1). If he has paid the money to his principal without notice of the claim, an action will not lie against the agent and must be brought, if brought at all, against the principal. The leading instances of that doctrine are *Shand* v. *Grant* (2), *Holland* v. *Russel* (3), *and Kliuwar Sons & Co.*, v. *Dunlop Rubber Company* (4). In the last named case, Lord Atkinson put it on rather more general terms at p. 265 by adding to the words " or settled such an account with the principal as amounts to payment " " or did something which so prejudiced his position that it would be inequitable to require him to refund." It appears to me that that doctrine of law does not rest on anything peculiar to the relation of principal and agent though it is the most usual instance which presents itself. The general doctrine appears to be this—where money is paid or goods delivered to a man by mistake, it can be recovered so long as his *status quo* is maintained, that is to say, so long as he can be equitably regarded as still having the benefit of that which was paid or delivered to him. That is rendered pretty clear by a case the other way. *Slondish* v. *Ross* (5). There the return of the money was resisted because it was said that the person to whom it had been delivered had in the meanwhile applied the money to a purchase. That may be a practical hardship, for he might not have incurred the expenditure unless he thought the money was his. Still if I have plaintiff's money which enables me to indulge in extravagance, I have already had the benefit of that money and whether I spent it wisely or foolishly, he can get it from me although I have not got it. That principle moreover appears to be the one underlying the decision of the High Court of Bombay in *Gangadas* v. *Haji Ali Jelal* (6), though speaking for myself, I deprecate the use of the term "estoppel" in relation to such a case. I do not think that this has anything to do with estoppel or that it depends upon the conduct of the person against whom the estoppel is sought to be set up. The doctrine involved in the cases is the doctrine of equitable restitution and does not depend on the conduct whether good or ill of anybody. It depends upon whether the person whom it is sought to bring to book had his position so affected before the mistake was discovered that it would not be equitable to compel him to meet the plaintiff's claim. It appears to me that if by reason of mistake, instead of handing over 7,000 pieces a person hands over 7,014 pieces to another and that person hands them to another labouring exactly under the same mistake as the person who delivered them to him, it would be inequitable to compel that person to restore the goods or to pay for them to the person who delivered them to him. I am quite prepared to say that

1. (1900) 1 Q. B. 270.
2. 15 E. B. N. S. 324.
3. 14 Brat and Smith 14.
4. 97 L. T. 263.
5. 3 Etch. 27.
6. (1918) 42 Bom. 54.

S. 72 of the Contract Act which I think has a bearing on this has to be qualified by the doctrine of equity, in order to render it intelligible. It is conceded that it is so loosely drafted that by virtue of another section of the same Act, namely, S. 21, the word *mistake* has to be qualified by the addition of the words "of fact"; otherwise it would cover extra goods delivered under a mistake of law. But I think the simple solution is that propounded by my learned brother in the course of the argument; namely, taking the section literally as suggested by Mr. R. N. Iyengar it will not cover the case because the words are "a person to whom money has been paid (that is not forthcoming) or anything delivered by mistake or coercion must repay or return it." What we should do when the money is simply passed on is not stated in the section. Taking the words literally, he cannot return it when he has not got it. The same result is arrived at by applying the equitable doctrine.

It follows that the appeal fails and the judgment of Phillips, J. which adopted the judgment in a similar case of Kumaraswami Sastri, J. must be upheld.

I should like to say in conclusion that although I think that the learned Judge's attention in I. P. 4 of 1919 was misdirected to the question of void contract, if I may say so with respect, in another part of his judgment, he states the proposition which I have endeavoured to explain quite clearly and in a form which is practically identical with that which I have tried to arrive at in this judgment. The appeal fails and must be dismissed with costs taxed on the original side scale.

RAMESAM, J.:—I agree with my learned brother in thinking that this is not a case of a void contract or series of void contracts. The contract or contracts are perfectly valid. The only mistake is in the performance of the contract or contracts. Either the title to the goods (14 bales) has passed or has not passed on account of the mistake in the performance of the contracts. If the title to the goods has not passed, the remedy of the owner of the goods is to trace his goods and sue for them. It is possible he has other remedies. If the title to the goods has passed, it may be that even the owner has no remedy. But an intermediate dealer in the goods like the plaintiff in the present case has no cause of action against another in the position of the defendant. I think that the plain meaning of S. 72 of the Contract Act is that the person to whom the goods are delivered must return them if he has them. What his duty is, if he has not got them is another point on which the section is silent and consequently I entirely agree with my learned brother in his conclusion, *viz.*, that he would not be liable in circumstances like those of the present case.

(*Appeal dismissed.*)

1923 Madras. 19.

AYLING, OFFG. C. J. AND ODGERS, J.

P. Balaramanaidu and others ... Plaintiffs-Appellants.

v.

P. Sangannaidu and others ... Defendants-Respondents.

Civ. Ref. No. 7 of 1920, dated 15th November 1921 from District Judge, Vizagapatam in A. S. Nos. 106 and 107 of 1919.

Court-Fees Act, Sch. 1, Art. 1,—C.P.C., O. 20 R. 12 (2)—Final decree—Mesne profits—Court-fee.

In case of appeals against a final decree under O. 20, R. 12 (2), C. P. C., an *ad valorem* Court-fee must be charged under Art. 1 of Sch. 1 of the Court-Fees Act, calculated on the amount of mesne profits in dispute.

C. Madhavan Nair—for the Government.

REFERENCE UNDER S. 5 OF THE COURT-FEES ACT:—"Whether an appeal from a final decree passed under O. 20, R. 12 (2), Civil Procedure Code, in respect of subsequent mesne profits is not chargeable with *ad valorem* Court-fee under Sch. 1, Art. 1 of the Court Fees Act?"

JUDGMENT:—These appeals must be treated as appeals against a final decree under O. 20, R. 12 (2), Civil Procedure Code and an *ad valorem* Court fee must be charged under Art. 1, Sch. 1 of the Court-Fees Act, calculated on the amount of mesne profits in dispute.

1923 Madras. 20.

AYLING AND ODGERS, JJ.

Vellaiah Kone ... (Prisoner) Appellant.

v.

King-Emperor ... Opp. Party.

Referred Trial No. 16 of 1922 and Cr. A. No. 133 of 1922, dated 27th April 1922 from Sessions Judge, Tinnevelly, in case No. 4 of 1922.

(*a*) *Evidence Act, S.* 157—*Statement under S.* 164 *and S.* 288, *Cr. P. C.*

Statement made before the committing Magistrate under S. 164, Criminal Procedure Code is admissible in evidence under S. 157 Evidence Act to corroborate or contradict a deposition made at the trial. S. 288, Cr. P. C. places the deposition in the committing enquiry on the same footing as a deposition in the Sessions Court, and it is in the discretion of the Sessions Judge to believe and act on either. (P. 21, C. 1; P. 23, C. 1.)

(*b*) *Penal Code, S.* 302—*Evidence.*

Where the wife of the accused withdrew in Sessions Court her statement made before the committing Magistrate, which statement she had made also at the inquest, so as to save her husband, and where there was corroborating evidence of other witnesses to prove the guilt of the accused, he was convicted under S. 302. (28 All 683 Foll. ; 11 Weir 821 Ref.).

C. Narasimhachary—for the Prisoner.

J. C. Adam—for the Crown.

AYLING, J. :—Accused in this case has been convicted of the murder of an old woman named Pechi and sentenced to death.

The prosecution case is as follows:—Deceased was a relation of accused, and on her husband's death came to live in his house, bringing with her a sum of Rs. 200 which she lent him to pay off a mortgage. Subsequently disputes arose, and she wanted her money back, and moved into a small hut close to accused where she lived by herself. So far there is no dispute.

According to the defence accused managed to pay off the debt to deceased by selling his wife's jewels. According to the prosecution, he did not; and the wrangling continued culminating in a furious quarrel on the night of December 29th. Even after bed time, deceased continued to abuse accused from her hut, and at last the man infuriated beyond endurance, went out and throttled her. He then tied her body in a sack with some heavy stones and at about daybreak carried it to a well about 150 yards away and threw it in. There the body was found four days later, and accused was arrested.

The above facts are practically all contained in two statements recorded by the Sub-Magistrate from accused's wife Subbammal P. W. 2: the first, Ex. D, under S. 164, Criminal Procedure Code on 4th January 1922, and the second Ex. C in the course of the committal enquiry a week later. These statements if accepted leave no possible room for doubt as to the commission of the murder by accused. Subbammal did not actually see the murder; but she deposes to her husband going to deceased's hut, to hearing the latter's cries and the sound of blows, to her husband's returning and fetching a gunny bag, and rope, and threatening her to make her keep quiet. She subsequently fled to her mother's house, and stayed there. In the Sessions Court, she resiled from the most important part of the above story, and swore that her husband did not leave the house, and that her earlier statements were enforced by Police ill-treatment. Her deposition before the committing Magistrate, Ex. C, was therefore treated as evidence under S. 288, Cr. P. C.; and the case turns very largely on whether it can safely be accepted as true.

A preliminary point of some importance has been raised as to whether the first statement, Ex. D, is relevant under S. 157, Indian Evidence Act, to corroborate the deposition, Ex. C. It is not disputed that Ex. D is a statement which would be admissible under the terms of the section to corroborate a statement to the same effect, if made in the witness-box in the Sessions Court; but it is argued for appellant that the deposition before the committing Magistrate is not testimony within the meaning of S. 157, and that the latter section will not apply to the present case.

The authority for this view is the judgment in *Emperor* v. *Akbar Badoo* (1) in which the learned Judges certainly ruled that "previous statements may be used to corroborate or contradict statements made at the trial; not to corroborate statement made prior to the trial." In the latter category they included a statement

(1) [1910] 34 Bom. 599.

made, as in the present case, in the course of the committal enquiry.

No reasons are given, and no other case has been quoted to us in which the same view has been taken.

With all respect it seems to me to be wrong. I know of no reason why the word "testimony" in S. 157, Indian Evidence Act, should be given this artificial limitation: and the object and effect of S. 288, Cr. P. C, seems to me to be to place the deposition in the committal enquiry on exactly the same footing as the deposition in the Sessions Court; of course such a statement would be accepted with great caution like every statement of a person who has changed his story at different stages. But it is evidence in the case: and it is equally in the discretion of the Sessions Judge to believe it and act on it in preference to the deposition in his own Court, as it would be to believe and act on the latter, in preference to a contradictory statement before the committing Magistrate. *Vide* judgment of Akiman J. in *Emperor* v. *Dwarka Kurmi* (2) and also *Queen Empress* v. *Dorasami Iyer* (3). If this is so, then the credibility of the statement in the committing Magistrate's Court must be considered and tested in exactly the same way as one made in the Sessions Court: and it is of the utmost importance to know how it compares with statements made soon after the event, or before a competent authority. No one will deny that apart from any rule of law comparison with a statement recorded in the circumstances in which Ex. D was taken affords a very valuable test of the truth of any later statement.

My view is not unsupported by authority: *vide* a case reported in II Weir 821 in which Collins, C.J., and Benson, J. held that a statement of a witness made at the inquest could be used to corroborate her statement in the committal enquiry, although she entirely resiles from the latter in the Sessions Court.

I therefore hold that Ex. D is admissible under S. 157, Indian Evidence Act, to corroborate Ex. C.

For this purpose it is not without importance. The two statements substantially agree: and a perusal of either leaves in my mind a strong impression of naturalness and truth. I should be prepared to accept Ex. C without Ex. D; but I am confirmed in this view by the fact that the young woman told the same story at the earliest opportunity. Ex. D was of course taken on the day after the inquest: but she herself admits, and it is not disputed, that she gave the same story at the inquest itself.

She now seeks to explain that these statements were enforced and tutored. At one passage she says that the Police took her to the choultry, took off her clothes and ill-treated her. At another she says that they threatened to take off her cloth and disgrace her. I do not wish to emphasize this discrepancy: but there is nothing to support the idea that anything of the kind occurred, and it is impossible to believe that the very detailed and natural story which the witness told was obtained in this way. I may also refer to the evidence of one of the Panchayatdars, P. W. 6, a respectable and disinterested man worth half a lakh of rupees.

I do not believe the story of ill-treatment: and on the other hand the action of the witness in resiling to save her husband is quite natural.

There is also the evidence of another woman, a neighbour P. W. 3. Her earlier statements, Exs. E and F recorded at the same time as Exs. C and D, fully corroborate the latter: but in the Sessions Court she also has resiled, though not quite to the same extent as P. W. 2. She speaks to the quarrel and says that on the night she heard cries, in what she took to be Pechi's (deceased's) voice: but she withdraws her earlier statements that she got up and saw accused entering or leaving deceased's hut, and says they were made through fear of the Police. Here also I can find no foundation for the allegation against the Police and although the motive of affection is absent in the case of this woman, I think it quite probable that sympathy with her neighbours would induce her to keep in line with P. W. 2.

Lastly, there is the evidence of another neighbour, P. W. 4 who besides deposing to the quarrel on Thursday evening says that early next morning he saw accused going from his house in the direction of

(2) (1906) 28 All. 683.
(3) (1901) 24 Mad. 414.

the well with a gunny bag, which the witness thought to contain palmyra nuts. It is suggested that this contained the corpse. The witness says he felt no suspicion till the discovery of the corpse in the well when he gave information of what he had seen. He was examined at the inquest.

This witness appears to be quite disinterested : and I see no reason why he should not be believed. It is urged that it is most improbable that the accused would have postponed the disposal of the body till, as would appear from P. W. 4's evidence, it was getting light. The reason possibly lies in the fact that accused admittedly suffers from some kind of night-blindness, and cannot see as well as most people at night. It may be suggested that this renders the perpetration of the murder by him improbable ; but even a blind man might without much difficulty grope his way across the few yards to deceased's hut, and seize and murder her in that confined space. To carry a body 150 yards to a well is a very different matter.

The above evidence taken together appears to me to fully warrant the conviction. It is not suggested that any one else had a personal motive to murder deceased : and in the circumstances the theory of robbery as a motive may be discarded. It would only be possible, if accused's tale of the repayment of the money were believed : and no attempt has been made to prove this though, if true, it should be easy to adduce some evidence of it.

In his appeal petition accused has indulged in wild allegations that his wife is on intimate terms with P. W. 4 and with P. W. 6, actually committed the murder and cooked up a case against him—allegations unsupported by anything, and which I can only reject as worthless and baseless.

I think the conviction must be confirmed : but I am inclined to reduce the sentence. If the wife's statements in Exs. C and D are accepted (and I believe them to be quite true), the murder was not committed with the deliberate object of making away with an inconvenient creditor, but in fit of sudden fury provoked by the old woman's persistent stream of abuse.

I think in such circumstances, a sentence of transportation for life is sufficient, and I would commute the sentence accordingly.

ODGERS, J. :—I have had the advantage of perusing the judgment just now delivered in which the facts are fully set out. There is no doubt to my mind that the conviction of the accused is right if the statement of Subbammal, the wife of the accused, and Chinnammal in the Magistrate's Court can be accepted in preference to their statements before the Sessions Judge. This is the only point with which I propose to deal. Subbammal in Exs. C and D (1) before the Sub-Magistrate clearly speaks to the abuse of her husband by Pechi and to the fact that he went inside her house ; dealt her two blows and she cried out "He has caught hold of the throat and is killing"; and she also speaks to the fact of the gunny bag in which the corpse was tied up as belonging to her house. Subbammal said exactly the same thing in Ex. D before the Investigating Officer. She adds that her husband actually went towards the west carrying a gunny bag on his head which is corroborated by a witness P. W. 4, against whom nothing has been suggested. The statements of Chinnammal are not quite so consistent. In her statement before the Investigating Officer she says that the deceased went inside the house of Pechi whom she heard crying out at midnight : "He is pressing my throat and killing me." Before the Committing Magistrate she repeats that statement, but there seems to be some doubt as to whether she was in or outside the house when she heard the cry. The question is : Can the statements before the Committing Magistrate be accepted in preference to those before the Sessions Judge, from the fact that the former are corroborated by statements made before the Investigating officer ? S. 288 of the Criminal Procedure Code clearly says that the evidence taken before the Committing Magistrate, may, in the discretion of the Judge, be treated as evidence in the case if such witness is examined, and there is abundant authority, it seems to me, for holding that this evidence once admitted at the discretion of the Judge stands on exactly the same footing as any other evidence in the case. See *Reg* v. *Arjun*

Megha and Mana Jeesa, (4) *Emperor* v. *Dwarka Kurmi* (2) and *Queen-Empress* v. *Dorasami Iyer*. (3) It was not argued before us that the Sessions Judge had exercised his discretion wrongly, or that he should not have admitted in evidence the statements made before the Committing Magistrate. Further, the police were examined to disprove any allegation of pressure by them.

S. 157 of the Evidence Act says that "in order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact, at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved." There is an authority in *Emperor* v. *Akbar Badoo* (1) to the effect that only the statements of witnesses made to the trying Court can be corroborated in the manner as contemplated by S. 157; previous statements might be used to corroborate or contradict the statements made at the trial, not to corroborate statements made prior to the trial. With all respect, it seems to me that under S. 288, Criminal Procedure Code and the authorities quoted above to the effect that once admitted evidence before the Committing Magistrate stands exactly on the same level as any other evidence in the case, it cannot be said that any previous statement taken before the competent Investigating authority cannot be used to corroborate the statements made before the Committing Magistrate which is made by S. 288 part of the evidence at the trial. No authority is quoted for the proposition laid down by the Bombay High Court; and in view of the fact that the object of enacting S. 157 of the Evidence Act proceeded upon the principle that consistency is a ground for belief in the witness's veracity, contrary to the English rule, this statement of the law cannot be supported. The view I venture to take finds support in a case reported in 2 Weir's Criminal Rulings 821 of our own Court, where Collins, C. J. and Benson, J. held that 'a statement made at the inquest could only be used to corroborate or to contradict a subsequent statement of the witness admissible as evidence. They go on: "The only use the prosecution could make of her statement at the inquest would be to partially corroborate her statement to the Magistrate, but when that statement is itself unworthy of credit, it cannot be materially strengthened by showing that the witness had previously made a statement partly in agreement and partly in direct and material disagreement with it." The learned Judges would therefore appear to be clearly of opinion that the statement made at the inquest might be used to corroborate the subsequent statement of the witness admissible as evidence, *i.e.*, such as a deposition before the Committing Magistrate which is admissible under the circumstances detailed in S. 288, Criminal Procedure Code. I therefore think that the statements Exs. C and D (1) and F corroborated as they are by their previous statements before the Investigating Officer, are to be preferred to the evidence given by these witnesses before the Sessions Court, especially when we reflect that one of the witnesses is the accused's own wife. As to the other considerations arising on the facts of this case I have had the advantage of considering the judgment just pronounced, and I agree with the conclusions arrived at with the reduction of the sentence.

Appeal dismissed.

4. 11 Bom. H. C. R. 281.

1923 Madras. 23.

PHILLIPS AND RAMESAM, JJ.

Nadukandee Pakuran and others ... Plaintiffs-Appellants

v.

Kuyattil Kandan Kutty and others ... Defendants-Respondents.

F. A. No. 7 of 1920, dated 24th April 1922 against the decree of Sub-Judge, Tellicherry, in O. S. No. 19 of 1917.

Limitation Act, Art. 120—*Appellate decree confirming first decree—Limitation—Starting point.*

For a suit under Art. 120 the starting point of limitation is the date of the first decree and not the date of the appellate decree confirming the same. 46 Cal. 670 foll. (P. 24, C. 1).

C. V. Ananthakrishna Aiyar—for Appellants.

T. R. Ramachandra Aiyar and B. Poker—for Respondents.

JUDGMENT:—The only question that has been argued is the question of limitation, the contention being that plaintiffs' cause of action arose on the date of the

appellate decree declaring that defendants in that suit had no saleable interest in the land, *i.e.*, 20—2—1911. Whether therefore Art. 97 or Art. 120 applies, the suit filed on 18—10—1917 is out of time, if the starting point is 20—2—1911. The Subordinate Judge has taken the date of the High Court decree affirming the Sub-Court decree as the date of the cause of action, but we think he is wrong by reason of the principle laid down by the Privy Council in *Juscurn Boid* v. *Perthichand Lal Choudhury* (1) where it was held that the starting point for limitation is the date of the first decree and not the date of the appellate decree confirming the same. That principle has been applied by their Lordships to a case under Art. 97, but the principle is equally applicable to suits under Art. 120. In *Venkayya* v. *Sathiraju* (2) an application for a final mortgage decree under Art. 181 was held not to come within the above principle on the ground that it was in nature an application in execution and that therefore the specific provision of Art. 182 should be applied. There is no such reason for not applying the principle of *Juscurn Boid* v. *Pirthichand Lal Choudhury* (1) to the present case, and if it is applied the suit is clearly barred by limitation. We therefore accept appellants' contention, allow the appeal and dismiss plaintiffs' suit with costs throughout.

Appeal Allowed.

1. (1919) 46 Cal. 670 at 678 P. C.
2. (1921) 44 Mad. 714.

1923 Madras. 24.

VENKATASUBBA RAO, J.

Sinnanan Shukulathi Rowther and others ... Petitioners.

v.

Gulam Moideen Rowther alias *Karuppatli Allapichai Rowther* ... Respondent.

Cr. Rev. No. 41 of 1922, dated 5th April 1922 against the order of Sub-Div. M. of Usilampatti, dated 19—11—1921.

(*a*) *Criminal P. C., S.* 145, *Sub-Ss.* (4) *and* (6) —*Finding regarding possession, absence of*— *Effect.—Order without jurisdiction — High Court's revisional powers—Government of India Act, S.* 107.

In a proceeding under S. 145 the Court did not even attempt to deal with the question of possession and made very general observations in regard to the ownership of the property in question. Its order concluded with the statement "I declare the petitioner to be in possession of the house and direct the counter-petitioner not to interfere with it, till eviction in due course of law." He did not record a decision under Sub-S. (4) nor did he issue an order containing a declaration contemplated by Sub-S. (6)—*Held* : this constitutes an obvious infringement of the provisions of Ss. 145 and 146.

If an order is challenged to be without jurisdiction, that is to say, if it be outside the section, the mere fact of the order purporting to be so passed will not bring it within the section so as to debar the exercise of the powers of revision by the High Court to set it aside as null and void and without jurisdiction.

F. S. Vaz, Counsel—for the Petitioners.

S. Ranganadha Iyer—for the Respondent.

ORDER :—The petitioner purchased the house in question at a Court auction and obtained delivery on the 1st March 1918. The counter-petitioners caused disturbance whereupon various proceedings were taken from time to time. Finally the keys of the house were handed over to the Sub-Inspector of Police on the 14th November 1918. The petitioner made several applications for possession of the keys on the ground that they had been taken from him by the Sub-Inspector ; but, on the 15th February 1921 an order was made by the Sub-Divisional Magistrate directing the return of the keys to the counter-petitioners. Within twenty days of this order the petitioner moved the same Magistrate to take action under S. 145. It is contended that in the order passed by the Magistrate there is no finding regarding the possession of the property in question. This contention seems to be well-founded and I find that the Magistrate does not even attempt to deal with the question of possession and that he makes very general observations in regard to the ownership of the property. He concludes the order with the statement. "I declare the petitioner to be in possession of the house and direct the counter-petitioners not to interfere with it till eviction in due course of law." Sub-S. 4 provides that the Magistrate shall, without reference to the merits of the claims of any of the parties to a right to possess the subject of dispute, if possible, decide whether any and which of the parties was at the date of the preliminary order in possession of

the property; and under Sub-S. 6 the Magistrate is required to issue an order declaring such party to be entitled to possession.

The Magistrate in this case does not record a decision under Sub-S. 4; nor does he issue an order containing a declaration contemplated by Sub-S. 6. The Magistrate apparently thinks that the petitioner has a right to possession and passes a decree for possession. This constitutes an obvious infringement of the provisions of Ss. 145 and 146.

The only other point that remains to be decided is whether any question of jurisdiction is involved and whether the exercise of the revisional powers by the High Court is justified. If an order is challenged to be without jurisdiction, that is to say, if it be outside the section, the mere fact of the order purporting to be so passed will not bring it within the section so as to debar the exercise of the powers of revision by the High Court to set it aside as null and void and without jurisdiction. See *Sreeman Kumara Tirumalraja Bahadur Raja of Karvatinagar* v. *Sowcar Lodd Govind Doss Krishna Doss* (1), In re *Dyawappa Basgounda Patil* (2), *Juthan Singh* v. *Ram Narain Singh* (3), *Manindra Chandra Nandi* v. *Barada Kanta Chowdhry* (4) and *Kanal Kutty* v. *Udayavarma Raja Valia Raja of Chirakkal* (5).

The order of the Magistrate is therefore set aside. But in the circumstances of the case I make no order as to costs.

(1) (1906) 29 Mad. 561.
(2) (1915) 17 Bom. L. R. 382.
(3) (1914) 18 C. W. N. 700.
(4) (1902) 30 Cal. 112.
(5) (1913) 36 Mad. 275.

1923 Madras. 25.

OLDFIELD AND VENKATASUBBA RAO, JJ.

Ibrahim Sahib ... Appellant.

v.

Konammal and another ... Respondents.

Appeal against Order No. 18 of 1922, dated 9—2—1922 against the order of District Judge of South Arcot, dated 25th January 1922.

Civil Procedure Code, O. XXI, *R.* 35—*Scope.*

Where on the decree-holder's own showing the person disturbing his possession, has not derived his title from a competent person, no order can be passed under R. 35 or 36. His remedy is either a criminal prosecution or a suit for damages. Where the statement on the return was that delivery was complete, the decree-holder's acceptance of it as such must be taken in its natural meaning, the only meaning which is recognized in the Code, that the delivery was complete absolutely and against the world. It is quite clear that delivery of possession to the decree-holder involves that no person other than the decree-holder remains in possession. That will not be less so, if delivery is symbolical, since the physical possession of the tenants in such cases is of course not in question.

(P. 26, Col. 1 & 2; P. 27, Col. 2.)

T. R. Ramachandra Aiyar, K. V. Krishnaswami Aiyar and M. S. Vaidhyanatha Iyer—for Appellant.

S. Varadachariar—for *A. Krishnswami Aiyar and M. S. Venkatarama Aiyar*—for Respondents.

JUDGMENT:—This appeal arises in proceedings for the execution of a decree in favour of the present 1st respondent. The decree is apparently in the usual form for possession of a Jaghir against the 1st defendant in the suit. There was one application for delivery by the decree-holder, first against the 1st defendant to be referred to as the judgment-debtor. Thereon delivery was ordered. The judgment-debtor applied for stay, but the decree-holder said that the delivery was complete and therefore no stay was possible. An appeal was filed in this Court against the decree and C. M. P. No. 729 of 1921 was presented for stay of execution. The learned Judge, before whom it came, called for a report as to whether execution had taken place; and the District Judge reported that the A schedule property, that is the Jaghir, the property with which we are concerned, had been delivered. The learned Judge, therefore dismissed the application. Against his order of dismissal Letters Patent Appeal No. 11 of 1921 was filed. It ended in a consent order passed on 3—5—1921, maintaining the decree-holder in possession of the Jaghir, A schedule property, so far as the proceedings in this Court were concerned. On 7—10—1921 however, the decree-holder applied again in the lower Court for possession and for removal of obstruction under O. 21, R. 98 or in the alternative for the issue of a fresh warrant for delivery. His affidavit in connection with that particularly referred to certain action by the judgment-debtor in connection with a temple, which it is admitted was part of

the Jaghir. An order was then passed, rather anomalously described as under R. 98, and at the same time notice was issued to the judgment-debtor who however was not served. On the return of the warrant the decree holder apparently accepting the return that possession had been given, the proceedings were closed. On 5—1—1922 an application was made by the decree-holder to the District Judge, the order on which is now under appeal before us. It was at this point that the present appellant, one of two lessees of what may for the present be described as rights in the Jaghir, was impleaded. The prayers were to put the decree-holder in peaceful enjoyment of the forest produce, to direct the appellant to remove his obstruction, if necessary, to issue a warrant for delivery and lastly to declare that the rights decreed should be secured to the party and to obtain for her magisterial protection in the exercise of those rights. These prayers again were anomalous. But the lower Court then made the order, with which we are concerned, granting generally the orders applied for and stating that appropriate notices to secure the decree-holder's entry into the forest, which was the subject of the application, and her enjoyment of the produce, would issue.

The first main objection taken to this order assumes for the sake of argument that the rights of the appellant before us, the lessee, might legitimately be dealt with in execution. It is then said, that, the Court having already on more than one occasion issued execution and the fact that delivery had been made having on more than one occasion been accepted by the decree-holder, no further execution should issue. There is no doubt that the statements involved regarding the course of occurrences are fully justified. There was the report to the learned Judges of this Court, to which no objection was taken by the decree holder; then the compromise, to which the decree-holder consented in this Court based on delivery having been given; lastly there was the decree-holder's acquiescence on 2-1-1921 in the closure of proceedings in the lower Court with reference to the return that delivery had been given. Further however it is argued that he was not aware of the claims of the lessees, that those claims were entirely valueless, resting as they did on a lease given to them *pendente lite*, and that he was entitled to move the lower Court to complete the execution, which he had already mistakenly accepted, when he found that it was incomplete. We cannot accept that statement. The execution seems to us to have been definitely closed and nothing in the nature of fraud is in question. It is not in our opinion open to the decree-holder to urge, as he has done here, that the delivery may be accepted as complete against one person, when further delivery is still necessary against another. As the statement on the return was that delivery was complete, the decree-holder's acceptance of it as such must be taken in its natural meaning, the only meaning which we think is recognized in the Code, that the delivery was complete absolutely and against the world. It is quite clear that delivery of possession to the decree-holder involves that no person other than the decree-holder remains in possession. That will not be the less so, if delivery is symbolical, since the physical possession of the tenants in such cases is of course not in question, Taking this view we cannot accept the decree-holder's answer to the lessee appellant's contentions in this form.

The lessee, however, has objected also to the lower Court's order on another ground. Before the lessees came on the scene, application for delivery had been made in the usual form and had proceeded on the assumption that the delivery of ordinary landed estate was in question. On the execution application, on which the present order was passed and in which the lessees were for the first time referred to, special reference was made to the arboreal products, which form the chief source of income of the estate, and to the fact that those products are usually farmed out to a contractor by the Jaghirdar. The lower Court in its order proceeded to make a distinction between the forests and their products, observing that all that the decree-holder got by the symbolical delivery was the technical possession of the Jaghir, that the respondents, lessees, had obstructed her and after paying the defendant in the suit the lease amount, had put forward his claim in opposition to hers to be the owner of the produce of the forests leased to them by him. The order further

states: "This produce was not a thing which could be reduced to possession at the time of the symbolical delivery. Nor does it appear in the delivery receipts that the forests have been ever symbolically handed over." It has to be observed that the lower Court's reference to the previous delivery as symbolical is not justified by anything in the record before us and that there is no reason for assuming that the delivery of the forests was not an actual delivery. Again its reference to the produce as a thing which could not be reduced to possession at the time of the delivery is not intelligible. It presumably could have been reduced to possession as easily as any other produce on land, which is ordinarily regarded as passing at the time of the delivery, unless it is statedly excluded. Unfortunately there is no reference in the lower Court's order to the real nature of the lessee's rights. We of course are not attempting in proceedings of the present character to decide finally what those rights consisted in. On the materials before us, we find that as is stated in paragraph 4 of the judgment in the suit, the timber and fruit and dye stuffs and other arboreal products are farmed out to contractors who make their own arrangements to collect these valuable commodities from the ryots and the latter are restrained from disposing of them to any but the contractors. We have also been shown what is admitted to be a correct copy of the appellant's lease and find that under it they became entitled to buy the produce at the proper price from the persons who collect it on the spot, to take it to market and to dispose of it there and to give sub-leases of their rights in consideration for the payment of a sum of money to the zemindar-lessor. In fact they might more appropriately be described as contractors than lessees; and if the former term had been used, probably the lower Court would not have fallen into the mistake it did since it is quite clear that there is nothing here resembling any ordinary lease of land or forests. There is simply what may be termed a license conferred on the appellant and his partner, an exclusive right to take over the forest produce and to dispose of it for his own advantage. That being the position of the appellant it is impossible to see how they can be regarded as tenants, against whom there could be an order for delivery under O. XXI, R. 35 or R. 36 at all. They are in fact, if the decree-holder's view of their position is correct, simply persons who are claiming to enter on the forests so far as the jaghir is concerned without having any right legitimately derived from any competent person to do so. The appellant's remedy will be either in criminal prosecution or in a suit for damages.

On this line of argument being taken, the 1st respondent, contended that as the lower Court's order could not have been passed and ought not to be regarded as having been legitimately passed in execution the matter does not arise in execution and the order is not appealable under S. 47. In reply Mr. Ramachandra Aiyar on behalf of the appellant asked us to treat the petition as a revision petition, and, if it were necessary to decide the case with reference to this line of argument, we should be prepared to do so.

The result is that appeal is allowed and the lower Court's order set aside, the application for execution being dismissed with costs throughout as against the 1st respondent.

Appeal allowed.

1923 Madras. 27.

KUMARASWAMI SASTRI, J.

Karuthan Ambalam ... (Defendant) Petitioner.

v.

M. Doraiswamy Iyengar and Brothers ... (Plaintiffs) Respondents.

Civ. Rev. No. 368 of 1921, dated 31st January 1922 from the order of the Court of Small Causes at Madras, dated 15th April 1921.

C.P.C., O. V, Rr. 17 and 19—Summons alleged to be affixed—Denial—Dismissal without inquiry.

Where the Small Cause Court dismissed the application of the defendant to set aside *ex parte* decree without allowing defendant to prove his allegations as to non-service and non-affixture of summons on the outer door of his house. *Held*: the order must be set aside.

R. Kuppuswami Aiyar—for the Petitioner.

T. R. Venkatarama Sastriar and V. S. Govindachariar—for the Respondents.

The affidavit of the petitioner states that the summons was not affixed as stated in the return. His vakil stated that he was, when the matter came on before the Judge of the Small Causes Court, prepared to prove the fact. The allegations in the counter-affidavit do not meet the statements in the petitioner's affidavit. The learned Judge does not deal with this aspect in his order.

I set aside the order and direct that the application be disposed of according to law.

Costs to abide the result.

Order set aside.

1923 Madras. 28.

KUMARASWAMI SASTRI AND DEVADOSS, JJ.

Sistla Subbayya ... (Defendant) Appellant.

v.

Pata Pitchanna alias *Pithayya* ... (Plaintiff) Respondent.

S. A. No. 1286 of 1920, dated 13th December 1921 against the decree of Sub-Judge of Guntur in A. S. No. 133 of 1919.

Limitation Act, Art. 116—*Suit for breach of covenant for title.*

The vendor's son recovered from vendee half of the property by a suit. The sale-deed provided "In respect of the above sale, Rs. 325 has been received in cash and a promissory note for Rs. 275 is executed by you in favour of Subbayya one of us, in all amounting to Rs. 600 and the sale price has been received in this manner. If there is any dispute in respect of this by *gnatis, Samantas* and others, etc., we shall settle them out of our own expense and we shall be bound to carry out this sale without obstruction. *Held*, that the covenant amounted to a covenant for quiet enjoyment and that Art. 116 applied to a breach of such covenant. Even assuming that there is no covenant for quiet enjoyment under the document there is clearly a covenant for title and a breach of that covenant will, under Art. 116 give the plaintiff six years to sue from the date when the covenant is broken.

(P. 28, Col. 2; P. 29, Col. 1).

A. Krishnaswami Aiyar and A. Venkatachalam—for the Appellant.

B. Somayya—for the Respondent.

JUDGMENT:—The only question raised in this second appeal is whether the plaintiff's suit to recover part of the purchase-money paid by him in respect of a property purchased by him is barred by limitation. The purchase by the plaintiff was under a sale-deed, dated the 1st of October 1905, executed by the defendant and another in favour of the plaintiff. The son of the other vendor filed O. S. No. 885 of 1909 to set aside the sale so far as the share of his father was concerned and obtained a decree in 1913 for possession of the half share belonging to the other vendor. This suit was filed in 1917. The lower appellate Court held that the plaintiff was entitled to recover Rs. 300, half the price paid by him, and that the suit was not barred by limitation as the starting point of limitation was the date of dispossession and that the suit was within three years from that date.

The contention for the appellant is that the suit not having been brought within three years from the date of the decree, which declared that the sale-deed in respect of the one-half of the property is invalid, is barred by limitation and that the date of dispossession does not give the starting point of limitation. The question is whether this is to be treated as a claim to recover money on account of failure of consideration owing to the vendor having had no title to convey one-half of the property or whether it is to be treated as a suit for damages for breach of covenant for title or for breach of covenant for quiet enjoyment. If the suit can be brought under the two latter heads, it is clear that Art. 116 of the Limitation Act would apply, the sale-deed having been registered, and the party would have six years and the suit would not, in any event, be barred. The material part of the sale-deed Ex. A runs as follows :—" In respect of the above sale, Rs. 325 has been received in cash and a promissory note for Rs. 275 is executed by you in favour of Subbayya one of us, in all amounting to Rs. 600 and the sale price has been received in this manner. If there is any dispute in respect of this by *gnatis, Samantas* and others, etc., we shall settle them out of our own expense and we shall be bound to carry out this sale without obstruction." In *Mahomed Ali Sheriff* v. *Venkatapathi Raju* (1) it was held that a similar covenant in a sale-deed amounted to a covenant for quiet enjoyment and that

1. (1920) 39 M. L. J. 449.

Art. 116 applied to a breach of such covenant. Even assuming that there is no covenant for quiet enjoyment under the document, there is clearly a covenant for title and a breach of that covenant will, under Art. 116 give the plaintiff six years to sue from the date when the covenant is broken. In the view we take it is unnecessary to consider whether, if the suit is to be treated as one to recover money on account of failure of consideration, limitation would run from the date of the decree declaring that one of the plaintiff's vendors had no title or from the date of dispossession, a question on which there is a conflict of authority.

The second appeal fails and is dismissed with costs.

The memorandum of objections as regards mesne profits is allowed and appellant will pay respondent Rs. 140.

Appeal dismissed.

1923 Madras. 29.

COUTTS-TROTTER AND RAMESAM, JJ.

Kuppuswami Iyer and others...(Plaintiffs) Appellants.

v.

Venkataswami and others ...(Defendants) Respondents.

S. A. No. 2032 of 1920, dated 2nd February 1922 against the decree of Sub-Judge, Vellore, in A. S. No. 330 of 1919.

Madras Surveys and Boundaries Act, S. 13—Survey Officer's decision, finality of.

The Survey Officer's finding shall be conclusive between the parties, unless the party aggrieved brings a suit to displace it within 12 months.

(P. 29, Col. 2).

A. Krishnaswami Aiyar and B. C. Seshachala Aiyar—for the Appellants.

K. V. Ramachandra Aiyar and N. K. Mohanarangam Pillai—for the Respondent.

Coutts-Trotter, J.—This is an appeal by the plaintiffs against a decision which dismissed their suit on the ground that a possessory title had been established to the property in dispute by the defendants. What is relied on by the plaintiffs is an order made by the Survey Officer under the provisions of Act IV of 1897 and the decision of the Survey Officer is this :—

"As it appears that the Survey of the land, S. No. 241 has been made in accordance with the Revenue accounts and as this land is in the enjoyment of the defendants, the order has been made accordingly."

That is an order adjudicating the land to be the property of the present Appellants who were defendants in the proceedings before the Survey Officer. It appears to me that that is a finding by the Survey Officer which is based *inter alia* on the finding of fact that the land was in the enjoyment, actually at the time, of the present Appellants. That finding was probably made without any adequate enquiry and was almost certainly wrong, because for the purposes of this suit it appears to have been admitted, if we can trust the judgment of the learned Subordinate Judge, that the present respondents had been in possession for over the statutory period of 12 years. But there is a Full Bench* decision of this Court which makes it quite clear that, if a finding on such questions of possession is made the ground or one of the grounds of the decision, the finding is final, and the legislature itself has laid down that the Survey Officer's finding shall be conclusive between the parties unless the party aggrieved brings a suit to displace it within 12 months. As in this case the present respondents had not taken the trouble of bringing a suit, I think that the Survey Officer's finding is binding upon them.

Speaking for myself, I have no doubt that the Subordinate Judge's view is a right one on the true facts and that the Survey Officer's was a wrong one. But the statute itself states in plain terms that, unless the party aggrieved takes steps within 12 months, he will be concluded by that finding,

The Second Appeal must be allowed with costs throughout.

Ramesam, J.—As to the title of the plaintiff Exs. A, B and C are conclusive in his favour. (See Sec. 13 of Madras Act IV of 1897).

It is then contended for the appellant that defendants cannot rely on adverse possession for 12 years part of which is before the Survey Officer's decision and the rest, after. In support of this he relies

* See (1919) 42 Mad. 425 F. B.

on *Muthirulandi Poosari* v. *Sethurama Aiyar* (1) I observe, from the issues in that case, that the plaintiff (who was the unsuccessful party before the Survey authorities) did not rely on a title by adverse possession. Nor was the question touched upon in the reference to the Full Bench or in the judgment of the Full Bench though Phillips J. touches on this point in the Order of Reference. This contention must be disallowed. (*Vide* S. A. No. 1102 of 1909).

The next point is whether we should assume that the present plaintiff was in possession in 1915 (Ex. B.) For this purpose the appellant relies on the finding of the Survey Officer in Ex. A and the case in *Muthammal* v. *The Secretary of State for India* (2) and argues that the finding of the Survey Officer is binding. On this point I agree with my learned brother's judgment. It follows that the Second Appeal must be allowed with costs throughout.

Appeal allowed.

1. (1918) 42 Mad., 425 (F. B.)
2 (1916) 39 Mad., 1202.

1923 Madras. 30.

SPENCER AND KRISHNAN, JJ.

Vadivel Ammal alias *D. B. Vedavalli Ammal* ... (Plaintiff) Petitioner.

v.

Rajaratnam Mudaliar and others ... (Defendants) Respondents.

Civ. Mis. Pet. No. 2968 of 1921, dated 19th January 1922 against the judgment of High Court in A. No. 186 of 1919 the decree of Sub-Judge, Trichinopoly, in Suit No. 78 of 1916.

(a) *C. P. C., S.* 110—*Clause* 3—*Variation, meaning of.*

Variation made on the merits in petitioner's favour is an affirming one; variation as to costs not touching the merits of the case cannot make the decree in appeal any the less an affirming one.

(P. 30, Col. 2).

(b) *C. P. C., S.* 110—*Clause* 1—*Consolidation for valuation.*

Where the cause of action against one defendant though joined with the causes of action against the other defendants is quite distinct and different from them, the fact that a joint suit is brought cannot make the value of the subject-matter of the appeal against him to the Privy Council higher than what is decreed against him.

T. V. Gopalaswami Mudaliar—for the Petitioner.

T. Ramaswami Aiyar for K. Rajah Aiyar and S. Muthiah Mudaliar—for the Respondents.

JUDGMENT :—This is an application by the plaintiff for leave to appeal to the Privy Council against the decree of this Court in Appeal No. 186 of 1919.

So far as the subject-matter of the appeal is concerned the decree of this Court is, in our opinion, an affirming decree under Cl. 3 of S. 110 of the Code of Civil Procedure for the only variation made by this Court on the merits was in petitioner's favour. It is true that the order as to costs passed by the lower Court with reference to the 5th defendant was varied by this Court on his memorandum of objections in his favour and against the plaintiff. But we do not consider such a variation, not touching the merits of the case, makes the decree in appeal any the less an affirming one. The plaintiff must therefore show that her appeal involves some substantial question of law.

It is further contended by the respondents that the plaintiff's proposed appeal does not fulfil the condition as to valuation laid down in Cl. 1 of S. 110, Civil Procedure Code. This suit is for mesne profits for 6 years of the plaintiff's estate from which she claims she was wrongfully kept out of possession by defendants, and it has been valued at Rs. 10 500 in the first Court. Though the claim was made jointly against all the defendants it is clear that so far as the 5th defendant is concerned against whom this application is mainly pressed, he can be liable at the very utmost only to the mesne profits for about 2 years from November 1913 to November 1915 when he was in possession as the temporary custodian under the orders of the District Court and as the Receiver appointed by the Subordinate Court. The claim against him is thus clearly much less than Rs. 10,000. The cause of action against him though joined with the causes of action against the other defendants is quite distinct and different from them and the fact that a joint suit is brought cannot make the

value of the subject-matter of the appeal against him to the Privy Council higher than Rs. 4,000 or so. See *Vaithlinga Mudaliar* v. *Somasundaram Chettiar.* (1) In the case of the other defendants also as decrees have been given against them for various sums, the value of the subject-matter of the appeal to the Privy Council as against each will be the remainder after deducting those sums from the total value. It follows then that the condition as to the value of the subject-matter of the Privy Council appeal being over Rs 10,000 is not fulfilled either.

Unless therefore we are satisfied that there is a substantial question of law and that the case is otherwise a fit one for appeal to His Majesty in Council no leave can be properly granted. Though the memorandum of appeal may be said to raise some questions of law, we are not prepared to say that any of them are of a substantial character in this case. It was not held that the expenses incurred for the 1st defendant were binding on the plaintiff but only that the 5th defendant acting under the orders of Court was not bound to make good the amount to the plaintiff. Against the other defendants various decrees were given by the Subordinate Judge and in those cases no serious attempt was made before this Court to get the amounts altered (*vide* the judgment in Appeal).

The petition therefore fails and must be dismissed with costs (one set).

1. (1919) 42 Mad., 228.

1923 Madras. 31.

PHILIPPS AND DEVADOSS, JJ.

T. Kathissabi and others ... (Defendants) Appellants.

v.

The Revenue Divisional Officer, Calicut and others... (Plaintiffs) Respondents.

F. A. No. 262 of 1921, dated 15th March 1922 from Sub-Judge of South Malabar at Calicut, dated 6th April 1921.

Land Acquisition Act, S. 23—Building and its appurtenant land—Separate valuation not possible—Market value, how to determine.

When a building and its appurtenant land cannot be valued separately, the market value must be determined on the net rental value and when that is done the building cannot be separated from the land, for it is impossible to say what proportion of the rent is fixed on the building and what on the land. Any private agreement to purchase at a certain price cannot determine the real and precise market value of the land and can only be useful in furnishing an approximate figure. The question of the amount to be deducted for repairs, taxes, etc., is one of fact. 33 Bom. 325; 2 Cal. 103 Foll.; 25 Ind. Cas. 393 Dist.

(P. 31, Col. 2; P. 32, Col. 1).

T. R. Ramachandra Iyer and T. S. Narayana Iyer—for the Appellants.

C. Madhavan Nair The Government Pleader—for the Respondents.

JUDGMENT :—This appeal relates to the compensation awarded under the Land Acquisition Act, for the bungalow and compound (27 64 acres in extent) occupied by the Collector of Malabar. The Deputy Collector awarded Rs. 36,302-7-9, but the Subordinate Judge awarded Rs.35,234 and odd, finding an arithmetical mistake in the award of Rs. 1,457-14-0. The latter's award was really in other respects a slight enhancement. In both cases the valuation has been based on the net annual rental value of the property, the bungalow with furniture and compound having been leased for the last 30 or 40 years at Rs 150 per mensem.

The first objection taken in this appeal is that the value of the land should have been ascertained separately and compensation awarded separately, but in the present case there is no evidence worthy of the name, of the value of the land or of similar land in the vicinity, and it would be impossible for this Court to assess such value. Apart from this we think that when a building and its appurtenant land cannot be valued separately—and no attempt has been made to do so in these proceedings—the market value must be determined on the net rental value and when that is done the building cannot be separated from the land, for it is impossible to say what proportion of the rent is fixed on the building and what on the land. This is in accordance with the view taken *in re Land Acquisition Act (I of* 1894) *cause. In the matter of Government of Bombay* v. *Karim Tar Mahomed* (1), and *In the matter of the Land Acquisition Act (X of* 1870): *Premchand Burral* v. *The Collector of Calcut a* (2). No doubt this Court in the case reported in *Rajammal* v.

1. (1909) 33 Bom. 325.
2. (1876) 2 Cal. 103.

The Head-Quarters Deputy Collector, Vellore (3) did allow compensation for the land also but that had been allowed by the lower Court and the question of the principle was not discussed. As regards the argument that rents have increased in Calicut and therefore a higher figure than Rs. 150 should be fixed, we need only say that there is no evidence that rents in the neighbourhood of the Collector's bungalow have gone up prior to the date of notification, nor is there any evidence of any offer of enhanced rent. The evidence of rise in other parts of the town is of no value here.

It is then further contended that the original award was based on claimant's tenure being jenmabhogam and not jenmam, as it was subsequently found to be. The Subordinate Judge has, however, increased the net rental value by Rs. 21-1-10 being the amount payable to Government for jenmabhogam. There is no evidence that jenman tenure increases the market value to any greater extent than this.

The argument that Government was prepared to pay Rs. 40,000 for purchase of the land by private sale is untenable as any such agreement cannot determine the real and precise market value of the land, and can only be useful in furnishing an approximate figure. As the Rs. 40,000 appears to have included furniture said to have been worth from Rs. 3,000 to 5,000 the two figures practically tally.

It is also argued that in calculating the net rental only one month's rental should be deducted for repairs, taxes, etc., and not two month's rental as adopted by the Subordinate Judge. The question of the amount to be deducted is one of fact and both the Deputy Collector and Subordinate Judge have found that two months' rental is the proper amount, and we have no data whereby to correct the figure. Had the claimants produced the accounts kept by them the exact figure could have been ascertained, but they failed to do so, and we cannot say that the Subordinate Judge is wrong. In *Rajammal* v. *The Head-Quarters Deputy Collector, Vellore* (3) the learned Judges say that the ordinary allowance is one month's rent, but give no reasons for the same and we may remark that 1/6th of the annual rent is allowed to be deducted for purposes of income-tax. In these circumstances we decline to interfere.

The last contention that the Subordinate Judge could not reduce the amount of compensation must, we think, prevail, for although he might have justified the reduction on the ground that the furniture which was acquired by the Deputy Collector was ordered to be given back to the claimant, he has not put it on that ground but solely on a mistake in calculation. We must therefore restore the figure of the Deputy Collector, *i.e.*, Rs. 39,302-7-9 (Vide *Gangadhara Sastri* v. *Deputy Collector of Madras* (4) and *Chundulal Shaw* v. *The Collector of Bareilly*. (5)

The parties will pay and receive proportionate costs.

3. (1917) 25 Ind. Cas. 393.

4. (1912) 22 M. L. J. 379.
5. (1921) 19 A. L. J. 871.

1923 Madras. 32.

OLDFIELD AND RAMESAM, JJ.

Kottamma Kalathingal Ummar Haji and others, in re ... Appellants—Petitioners.

Cr. A. No. 581 of 1922, dated 5th September 1922 (against the order of Special Judge, Malabar, in S. J. Case No. 25-A of 1922), Referred Trial No. 64 of 1922, (by Special Judge Malabar, Calicut in case No. 26 of 1922 and Cr. A. No. 769 of 1922.—(Appeals against the sentence of transportation for life by Special Judge, Malabar, Calicut in case No. 26 of 1922).

Criminal Trial—Trial de novo—*Witnesses not examined* de novo—*Depositions at the previous trial filed—Effect—Consent of the accused —Effect.*

Where in a trial *de novo* the depositions of witnesses examined at the previous trial were exhibited without the witnesses being examined *de novo*. *Held*, there has been a deviation from the normal course of procedure which would ordinarily vitiate the proceeding and the consent of the accused will not cure the irregularity. (P. 33, Col. 2).

V. L. Ethiraj, T Krishna Kurup and M. C. Sridharan—for the Appellants.

J. C. Adam—for the Crown.

OLDFIELD, J. :—These two appeals can be decided on the same preliminary point. To take First Appeal No. 581 of 1922, the accused (appellant) has been convicted of various offences in connection with the Moplah rebellion. In the first instance

he and his father were placed on trial together before the Special Judge, Mr. Edgington. But after the trial had proceeded for some time, it was decided to hold two separate trials. Mr. Edgington then began the trial of the present accused and, rather unnecessarily, so far as we can see, exhibited the evidence already given at the joint trial, instead of treating it as given for the purpose of the trial of accused, whether alone or jointly. That however is not the point, with which we are concerned. What we are concerned with is that Mr. Edgington ceased to be the Judge, before the trial of the accused was concluded, being succeeded by Mr. Jackson. Mr. Jackson apparently on his own initiative, decided to hold the trial *de novo*. He did not apparently notice that the course he adopted, the exhibition of the witnesses' depositions in the previous trial without actually examining them *de novo*, deprived the accused and himself of any advantage which the *de novo* proceedings would have secured. We however have to decide whether there was an irregularity, which makes it our duty to order a new trial.

The general rule, as stated in 2 Hawkins's Pleas of The Crown, chapter 46, is that " in cases of life no evidence is to be given against a prisoner, but in his presence." That rule is followed in this country and has been extended under our Code to all criminal trials. It is assumed in the directions regarding different kinds of trials in the Criminal Procedure Code that the witnesses are examined *viva voce*, in the course of the trial ; and this has been recognized frequently in judicial decisions, for instance in *The Queen* v. *Boshonath Pai* (1) and more recent cases to be referred to. No doubt departures from it are permitted, but only (so far as we have been shown) under some explicit provision of law, for instance, in cases in which it is difficult or impossible to secure the presence of a witness or under S. 145 to contradict the witness's evidence at the trial or under S. 157 to corroborate it ; and there is also the class of cases covered by S. 288, Criminal Procedure Code. But none of these provisions has any application to what happened in the case before us, in which, to anticipate the reference to a statement of the accused's vakil to be found in the record, one witness's previous deposition was filed "in order to save cross-examination." We must therefore hold that there has been a deviation from the normal course of procedure which would ordinarily vitiate the proceedings.

The question is however whether that deviation is cured by the consent of the accused. There is no doubt nothing in the record to show that the accused or the three vakils, by whom he was represented, consented explicitly to it. We find however in the record of the short examination of the 3rd prosecution witness at the conclusion of Ex. D, his previous statement, that a copy of that previous statement was filed " at the request of the vakil for the accused to save cross-examination again." There is further the omission to take any objection to the procedure at the trial or as a ground of appeal in this Court ; and such omission, although we do not allow it to stand in the way of the accused raising the point, is significant with reference to his attitude and the attitude of his advisers in the lower Court. We therefore hold that there was an implied consent by the accused to the admission of the copies of the previous depositions of the prosecution witnesses, instead of their being examined in full at the trial.

Next we have to consider whether the accused's consent cures this irregularity. It has lately been held in *Jainab Bibi Saheba* v. *Hyderally Sahib* (2) that such a consent would cure a similar irregularity in a civil suit. But that is not the rule in criminal matters. As regards them we have a clear decision of the Privy Council in *Reg* v. *Butrand* (3) in which, " the common understanding in the profession that a prisoner can consent to nothing " is referred to in connection with consent to an irregularity very similar to that now under consideration ; and it may be added that very comprehensive reasons are given by the Judical Committee in support of its insistence on the evidence in criminal trials being taken *viva voce*. This decision was followed, the principle in it being fully adopted, in *The Queen* v. *Bishonath Pai* (1)

1. 12 W. R. (Cr.) 3.

2. (1920) 43 Mad. 609 (F. B.).

3. L. R. 1 P. C. 520.

already referred to, in *The Deputy Legal Remembrancer* v. *Upendra Kumar Choh* (4) and *In re Annavi Muthoriyan* (5). It may therefore be taken that although the Indian law of evidence was enacted in 1872, the judgment of the Privy Council has been accepted as stating the law applicable in this country, although it was pronounced in 1867. In *In re Annavi Muthiriyan* (5) Seshagiri Iyer J. no doubt held that there was nothing in *Reg* v. *Bertrand* (3) or in the principle therein enunciated precluding the Judge hearing the case on appeal from deciding whether, notwithstanding the consent of the accused, his case has been prejudiced by the irregularity. We can say only that the Privy Council restricted the discretion of the appellate Court in such circumstances within very narrow limits, since their Lordships said that they would (if necessary) have interferred in the case before them although they were not able to affirm or deny the inconveniences apprehended to have in fact happened in the trial then in question, "because it was one of the evils incident to the cause that made such affirmation and denial equally impossible," and excluded only from their decision cases in which part of the previous deposition accepted in lieu of oral evidence was so unequivocably formal or very short, as to make their remarks inapplicable. With all respect it is therefore impossible to recognize the existence of any such general discretion as was contemplated by Seshagiri Iyer, J.

Reference has also been made before us to S. 167 of the Indian Evidence Act. But that section cannot affect the considerations, on which the Privy Council proceeded. The application of the provision could be only to leave with us the decisions whether, if all the depositions in the previous trial, which were irregularly admitted, were expunged from the record, there would remain independently of those depositions sufficient evidence to justify the conviction. We have considered whether we can come to any such conclusion; and we find that we cannot, because the exclusion of those previous depositions, consisting as they do both in cross-examination and in examination-in-chief, would leave us with a record, which represents no enquiry conducted fairly or with full appreciation at the time on the part of either side of what had been, or remained to be, proved. We cannot deal judicially with a record compiled after such a process of elimination, when it is clear that we have no security for accused having foreseen this effect of his consent on the trial as a whole.

In these circumstances the only course is to set aside the conviction of the accused appellant and direct that he be retried, the evidence of all the witnesses being taken *viva voce* and their previous depositions being admitted, only if their admission is justified by law.

In R. T. No. 64 of 1922 corresponding with Crl. Appeals Nos. 585 and 769 of 1922 the same objection has been taken, and our order must be the same.

4. (1907) 12 C. W. N. 140.
5. (1915) 39 Mad. 449.

1923 Madras. 34.

(Full Bench).

SCHWABE, C. J., OLDFIELD AND COUTTS-TROTTER, JJ.

Secretary to the Board of Revenue (Income-tax) Madras ... Referring Officer.

v.

Messrs. Mohamed Sheriff Hussain Mean Sahib and Co., Madras. Assessee.

Referred C. No. 1 of 1922, dated 12th April 1922 by the Secretary to the Board of Revenue (Income-tax) Madras in S.T.A. No. 10 of 1921-22

(a) *Income Tax Act, S. 12 (a)—Adjustment during the financial year—Collector's certificate of registration in force in respect of the income for the previous year in which the firm was not registered.*

An adjustment can be made during a financial year in which the Collector's certificate of registration under S. 12 (A) is in force in respect of the income of a firm for the previous year in which the firm was not registered. The whole scheme of Income-tax and Super-tax in this country is based on the principle that the tax is assessed at the beginning of the year on an anticipated income and is paid in anticipation of the assessment; but, when the year is over and the actual earnings have been discovered, there is not a fresh assessment but an adjustment. As far as super-tax is concerned, a registered firm is exempt from super-tax as a firm, although the partners are personally liable for super-tax, if their separate incomes are large enough to bring the provisions of the super-tax into operation against them.

(P. 35, Col. 1).

(b) *Income-Tax Act, S. 19—Scope.*

S. 19 simply means that if at the end of the year it is found that the amount at which income was assessed has been either exceeded or reduced, there is a right and a duty to deal with the matter accordingly.

(P. 35, Col. 2).

(c) *Madras High Court Rules—Appellate Side Fee Rules, R. 38—Fees of Government Pleader.*

It cannot be right that there should be a fixed amount payable to the Government Pleader as fee in respect of a case which may last a week and may take days for preparation and that the same fixed amount should be payable in respect of a case which cannot take very long to read and prepare for argument and it cannot be right that the assessee who has a small case is to pay an unnecessarily large fee required to the relief of an assessee who has a large case.

(P. 35, Col. 2).

C. Madhavan Nair—for the Referring Officer.

D. Chamier—for the Assessee.

SCHWABE, C. J.—This reference under S. 51 of the Income-Tax Act and S. 6 of the Super-Tax Act now in force is as to "whether an adjustment can be made during a financial year in which the Collector's certificate of registration under S. 12 (A) is in force in respect of the income of a firm for the previous year in which firm was not registered." In my judgment it clearly can. The whole scheme of Income-Tax and Super-tax in this country is based on the principle that the tax is assessed at the beginning of the year on an anticipated income and is paid in anticipation on the assessment; but when the year is over and the actual earnings have been discovered, there is not a fresh assessment but an adjustment. As far as super-tax is concerned, a registered firm is exempt from super-tax as a firm, although the partners are personally liable for super-tax, if their separate incomes are large enough to bring the provisions of the Super-Tax Act into operation against them.

In the year 1920-21 this firm of Messrs. Muhammad Sheriff Hussain Mean Sahib & Co., through carelessness or for some other reason which I am not able to appreciate, having made its return for the assessment purposes at Rs. 90,000/ omitted to get registered in time to take advantage of the exemption granted to registered firms. At the end of the year or at the beginning of the next year in due course there was an adjustment, because it turned out that the profits were Rs. 1,37,000 instead of Rs. 90,000. It is contended that adjustment cannot be made because under S. 19 of the Income-Tax Act VII, of 1918, "when the Collector has, in any year after the commencement of this Act for which Income-tax is leviable, ascertained the total income actually received" is said to mean, in any year in which super-tax is leviable, and it is argued that, as this firm was registered in the following year, *i.e.*, 1921-22 and therefore escaped from super-tax that year, the Collector has no power to call for an adjustment for the preceding year. In my judgment, that is an entire misinterpretation of the section. The section simply means that if at the end of the year it is found that the amount at which income was assessed has been either exceeded or reduced, there is a right and duty to deal with the matter accordingly. For the year in question this firm was not registered, and not being registered they must be dealt with on an adjustment in the same way in which they were dealt with on assessment, and the amount on which they have to pay is the amount actually earned in 1920-21 and not the anticipated earnings for that year.

It follows that the answer to the question is in the affirmative.

The costs of the reference shall be paid by the assessee and such costs shall include the Government Pleader's fee. The Taxing Officer will fix a reasonable fee under the terms of R. 38 of the Appellate Side Fee Rules which is in these words: "In cases in which the subject-matter of the claim does not admit of valuation, the Court, or in the case of the High Court, the Taxing Officer, shall fix a reasonable fee, regard being had to the time occupied in the preparation and hearing of the case and the nature of the questions raised therein as also to the minima fees prescribed by R. 31." It cannot be right that there should be a fixed amount payable to the Government Pleader as fee in respect of a case which may last a week and may take days for preparation and that the same fixed amount should be payable in respect of a case like this which cannot take very long to read and prepare for argument and it cannot be right that the assessee who has a small case is to pay

an unnecessarily large fee required to the relief of an assessee who has a large case.

OLDFIELD, J.:—I agree.

COUTTS-TROTTER, J.:—I agree.

1923 Madras. 36.

SPENCER AND DAVADOSS, JJ.

Kurukundi Sama Rao ... Appellant in both.

v.

The Firm of Marwadi Vannapi Vajinji by partner Lalchand and others ... Respondents.

F. A. Nos. 176 and 177 of 1920, dated 14th September 1922 against the decree of the District Judge, Bellary, in O. S. Nos. 40 of 1916 and 40 of 1918.

(a) *Hindu Law—Joint family—Debts incurred by father—Creditors's right to proceed against sons's shares.*

Per Spencer, J. :—It has always been held in this Presidency since the Full Bench decision of *Ponnappa Pillai* v. *Pappuvayyangar*, 4 Mad. 1 that so long as a Hindu family remains undivided, a creditor can proceed against the interest of the sons of the ancestral property for the debts of their father which have not been contracted for illegal or immoral purposes. (P. 37, Col. 1).

Per Devadoss, J.:—As the law stands at present a creditor can proceed against the shares of the sons in the family property in execution of a decree obtained against the father without proving either family necessity or that the debt was incurred to discharge an antecedent debt. Their Lordships did not intend to alter the law as it stood as regards the right of an execution creditor to proceed against the son's share in execution of a money-decree obtained against the father in *Sahu Ramchandra* v. *Bhoop Singh*. The law has been settled for over a generation as regards this point. 39 All. 437 Dist. ; 12 Mad. 142 ; 20 Cal. 328 at 337 Foll.
(P. 39, Col. 2).

(b) *Civil Procedure Code*, S. 100—*Mortgage deed—Attesting witnesses denying that the execution was witnessed by them—High Court's power to find that it was executed in their presence.*

It is quite open to High Court to find that the execution was witnessed by the attesting witnesses even though they may not speak to the fact, if there is other and satisfactory evidence on record to show that the attesting witnesses did witness the execution. 20 C. W. N. 192 Foll. (P. 38, Col. 1).

P. Narayanamurti and D. Srinivasa Rao—for the Appellant.

L. A. Govindaraghava Aiyer, W. Kothandaramayya and V. S. Narasimhachari—for the Respondents.

SPENCER, J.:—These are two suits upon mortgage documents executed by 1st defendant, whose sons are defendants 2 to 5. The appellant is a transferee from the 1st mortgagee the plaintiff in O S. No. 40 of 1918 and the 6th defendant in O. S. No. 40 of 1915, which is the 2nd mortgagee's suit. The 3rd mortgagee is the 7th defendant in both suits.

The District Judge dismissed O. S. No. 40 of 1918, holding that the mortgage deeds were not properly attested and therefore invalid. I think he was right in preferring the evidence of the two witnesses whose names appear on the documents as attestors when they say that the executant did not sign in their presence to the evidence of the executant and the sister and the daughter of one mortgagee, the daughter being herself a mortgagee under one of the deeds, as the latter are likely to be interested in keeping the property in the hands of relations rather than allowing it to pass into the possession of the 2nd and 3rd mortgagees who are strangers.

No doubt the 5th plaintiff's witness who is a pleader practising at Bellary is related to the executant and Parikshita Rao the other signatory who is now dead was a friend of the executant and lived in his village, but they seem nevertheless to have spoken the truth on a matter which was necessarily within their knowledge, and the appearance of the document suggests that their signatures were affixed at a different time, as indeed they say they were.

Though the suit documents are not valid as mortgages they can be enforced as bonds against the 1st defendant personally and the family property in the hands of defendants 1 to 5.

It is argued by the vakil for respondents 2 to 5 that their shares should not be made liable during the lifetime of their father the 1st respondent, for the reason that sons are not bound by any pious obligation to pay off their father's debts so long as he is alive. He relies on the Privy Council decisions in *Sahu Ram Chandra* v. *Bhup Singh* (1) and *Chit Ram* v. *Ram Singh* (2) as establishing this principle.

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1. (1917) 39 All. 437=44 I. A. 126 (P. C.)
2. (1922) P. C. 247=44 I. A. 368

I do not think it is necessary for the plaintiff to invoke the doctrine of "pious obligation" here. It has always been held in this Presidency since the Full Bench decision of *Ponnappa Pillai* v. *Pappuvayyangar* (3) in which Girdharee Lall's case was considered; that so long as a Hindu family remains undivided a creditor can proceed against the interest of the sons in the ancestral property for the debts of their father which have not been contracted for illegal or immoral purposes. As has been pointed out by the learned Chief Justice in *Peda Venkanna* v. *Sreenivasa Deekshatulu* (4) the prevailing judgment of Sir Charles Turner, C.J. in this Full Bench case received the approval of the Privy Council in *Muttayan* v. *Zemindar of Sivagiri* (5). This principle was again confirmed by another Full Bench of this Court in *Ramasami Nadan* v. *Ulaganatha Goundan* (6) and two Benches of this Court have taken the same view in *Subramania Iyer* v. *Shaw Wallace and Co., Madras.* (7) and *Kandasami Goundan* v. *Kuppu Mooppan* (8) after considering *Sahu Ram Chandra* v. *Bhup Singh* (1) and deciding that the Privy Council did not intend to alter the existing law in this respect. The Bombay High Court has come to the same conclusion in *Hanmant Kashinath* v. *Ganesh Annaji* (9). In Mayne's Hindu Law in paragraph 307 the passage occurs.

"This limitation of the son's liability (the learned author is referring to a son's want of obligation to liquidate his father's debts during the father's lifetime) has however ceased to be of any importance in view of the recent decisions which enable a creditor during the life of the father to enforce his claims by decree and execution against the entire family property" and reference is made in the footnote to *Khalilul Rahman* v. *Gobind Pershad* (10) *Ramasami Nadan* v. *Ulaganatha Goundan*(11) *and Govind* v. *Sukharam*(12).

The principle is explained in *Hanmant Kashinath* v. *Ganesh Annaji* (9) as due to a decree-holder's right being co-extensive with the power of a debtor-father to alienate ancestral immoveable property for the satisfaction of his antecedent debts, not being tainted with illegality or immorality. In the present case it is clear from Exhibit A that there was an antecedent debt of Rs. 2,000 incurred by the father for cultivation expenses.

If the sons effect a *bona fide* partition at a time anterior to the date when the debt is contracted their responsibility is different and the father's creditor cannot then proceed against their divided shares. See *Krishnaswami Konan* v. *Ramasami Iyer* (13), *Peda Venkanna* v. *Sreenivasa Deekshetulu* (14) and *Kani Venkatareddi* v. *Chelluri Sathyanarayana Moorthi* (15) but the present condition of the family of these respondents is joint. They are therefore all liable, the father personally and the sons in respect of the ancestral properties in their possession and the suit is in time.

In modification of the lower Court's decree in O. S. No. 40 of 1918 a decree will be given accordingly with interest at 6 per cent. from date of plaint to date of realization against the 1st respondent personally and against his share of the family properties and against the shares of respondents 2 to 5 to the extent that the decree remains unsatisfied by the father, with costs throughout.

In other respects appeal No. 177 of 1920 is dismissed. Appellant to pay the costs of 6th and 7th respondents in A. S. No. 177 (1 set). Appeal No. 176 is dismissed. No separate costs.

DEVADOSS, J:—Original suit No. 40 of 1915 was brought by the plaintiff on a mortgage-deed executed in his favour by the 1st defendant, making the 6th defendant, a prior mortgagee, and the 7th defendant, a subsequent mortgagee, parties to the action. The defendants 2 to 5 are the sons of the 1st defendant. The District Judge of Bellary dismissed the suit and the plaintiff preferred A. S. No. 102 of 1918. The High Court allowed the appeal and set aside the decree of the District Judge, and remanded the suit to the lower Court with directions to pass a

3. (1882) 4 Mad. 1 (F. B.)
4. (1918) 41 Mad. 136 at 140.
5. (1883) 6 Mad. 1.
6. (1899) 22 Mad. 49.
7. (1920) 38 M. L. J. 402.
8. (1920) 43 Mad. 421.
9. (1919) 43 Bom. 612.
10. (1893) 20 Cal. 328 at 338.
11. (1899) 22 Mad 49.
12. (1904) 28 Bom. 383.
13. (1899) 22 Mad. 519.
14. (1918) 41 Mad 136.
15. (1921) 40 M. L. J. 473.

proper decree after raising necessary issues on the claims of the 6th and 7th defendants. The District Judge of Bellary has allowed the claim of the 7th defendant and dismissed that of the 6th defendant on the ground that the mortgage-deeds relied on by him were not proved to have been properly executed as required by law.

The 6th defendant has appealed against that decree in A. S. No. 176 of 1920. During the pendency of the said A. S. No. 102 of 1918 the 6th defendant brought O.S. No. 40 of 1918 impleading his mortgagor as 1st defendant and his undivided sons, as defendants 2 to 5, and the plaintiff in O. S. No. 40 of 1915 as 6th defendant and the third mortgagee as 7th defendant. The suit was dismissed on the ground that the execution of the mortgage deeds was not proved according to law and the plaintiff has preferred A. S. No. 177 of 1920. In both the appeals the same person Swami Rao is the appellant, and the questions involved are the same.

The appellant's case is that of the two mortgage deeds relied on by him, one was executed to his adoptive father Venkoba Rao on 10th August 1912 by the 1st defendant and the other was executed in favour of Gundamma the daughter of the said Venkoba Rao on the same date by the 1st defendant and that he is the transferee of both mortgages. He contends that the execution of the documents was witnessed by two persons, and that the District Judge erred in disbelieving the evidence of the two witnesses who speak to the execution. Of the two attesting witnesses one is Mr. Gundu Rao, a pleader practising in the Bellary District. His evidence is that the documents after execution by the 1st defendant were taken to him and he attested them and that he did not see executant sign the documents. It is urged that the pleader's evidence that he did not see the actual execution of the documents cannot be relied upon inasmuch as two witnesses, Gundamma and Tolasamma, speak to the execution of the document in the presence of the pleader and the other attesting witness. It is quite open to this Court to find that the execution was witnessed by the attesting witnesses even though they may not speak to the fact, if there is other and satisfactory evidence on record to show that the attesting witnesses did witness the execution Vide *Brahmadat Tervari* v. *Chandan Bibi*, (16) But there is no reason why the pleader who appears to have no interest hostile to the appellant should swear falsely that he did not see the actual execution but put his signature to the documents on the assurance that they had been signed by the 1st defendant. It must be remembered that before the date of the Privy Council decision which laid down that the execution of mortgage deeds in the absence of attesting witnesses would not be fulfilling the requirements of the law, it was a common practice to take documents round after execution in order to get the attestation of a number of witnesses, and that this practice must have been resorted to in this case as well is clear from the way in which both Gundu Rao and the other attesting witness Parikshitha Rao were examined at the Original Trial in O. S. No. 40 of 1915. They were examined-in-chief by the appellant's pleader who evidently asked them whether they attested the documents and when they replied that they were not present when the executant signed them, he contented himself by eliciting that the execution was admitted to them by the mortgagor. It is significant that the examination-in-chief stopped with the answer. "I asked if he had signed them and he said he had." Much reliance cannot be placed upon the evidence of Tolasamma, P. W. 6 who is a sister of Venkoba the mortgagee, and it is not likely that she would have carefully noticed whether the mortgagor signed the documents after they were engrossed even though she might have been aware that documents were being written in the hall of the house of her brother Venkoba Rao. The next witness, P. W. 7, is Gundamma, who is said to be 23 years of age in 1918, when she was examined as witness. She must have been a young girl of about 16 years of age on the date of the execution of the documents. She was then said to be a widow, and it is most unlikely that a young Brahmin widow would have been present at the place where the documents were being written and where a number of men were present. I do not think that the evidence of these two women, can, in any way outweigh the evidence of Gundu Rao, a pleader, and Parikshitha Rao, a

16. (1915) 20 C. W. N. 192.

stranger. It has been urged that Parikshitha Rao was a man belonging to the same village as the 1st defendant and therefore interested in not speaking the truth. He is dead, and his evidence is marked Ex. III and there is no reason why he should have said something which was not true. No doubt the 1st defendant swears that he signed the two mortgage deeds Exs. A and B in O. S. No. 40 of 1915 in the presence of the two attesting witnesses. It is urged on behalf of the appellant that it is most unlikely that the 1st defendant would support the mortgagee against the interests of his sons, defendants 2 to 5, who hotly contest the validity of the appellant's mortgages. It is suggested by Mr. Govindaraghava Iyer, that the 1st defendant was anxious that the appellant who is his relation should get the benefit of the mortgages as he feared that there would be nothing left after satisfying the mortgages in favour of the plaintiff and the 7th defendant in O. S. No. 40 of 1915. The appellant's mortgages, are prior in date to those of the other two mortgages. In these circumstances it cannot be said that the learned District Judge has not correctly appreciated the evidence in the case. The mortgage documents not having been proved to have been validly executed the appeals fail and must be dismissed.

Mr. Narayanamurthi, who appears for the appellant asks for a personal decree against the 1st defendant and against the shares of the defendants 2 to 5 in the family property. The personal remedy against the 1st defendant is not barred.

On behalf of the sons it has been urged that such a decree could not be passed. The vakil for the sons puts forward these propositions. (1) The father in a joint Hindu family has no power to alienate the son's share unless there is family necessity. (2) The father's power to alienate is confined only to cases where there is an antecedent debt to be discharged. (3) A creditor cannot proceed against the shares of the sons in execution of a decree against the father. (4) In no case can the son's shares be made liable during the lifetime of the father if the debt was neither antecedent nor for necessity. It has been very vehemently urged that the three decisions of the Privy Council reported in *Sahu Ram Chandar* v. *Bhup Singh*, (1) *Jogi Das* v. *Ganga Ram*, (17) and *Chetram* v. *Ram Singh*, (2) support the contention, that, as long as the father is alive, no decree can be passed against the son's share for a debt incurred by the father, and no execution can be levied against the son's share for a decree passed against the father. As the law stands at present a creditor can proceed against the shares of the sons in the family property in execution of a decree obtained against the father without proving either family necessity or that the debt was incurred to discharge an antecedent debt. We have to see whether the three Privy Council decisions relied on by the vakil have really altered the law on this point. In *Sahu Ram Chandra* v. *Bhup Singh*, (1) the facts were one Bhup Singh, the 1st defendant, father of defendants 2, 3 and 4, and the grandfather of defendants 5 and 6, on the 21st February 1882, mortgaged the family property to Sahu Ramachandra. The suit which gave rise to the appeal to the Privy Council was brought by Ram Chandra in July 1910 making Bhup Singh, his sons and grandsons, defendants. The question was whether Bhup Singh was justified in executing the mortgage-deeds so as to bind the sons. Their Lordships held that a loan made to the father on the occasion of a grant by him of mortgage on the family estate was not an antecedent debt. In the course of their judgment they quote the following passage from the judgment in *Suraj Bunsi Koer's case*. (18) "That where joint ancestral property has passed out of a joint family either under a conveyance executed by a father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for the father's debt, his sons, by reason of their duty to pay their father's debts cannot recover that property unless they show that the debts were contracted for immoral purposes, and that purchasers had notice that they were so contracted. Secondly that the purchasers at an execution sale, being strangers to the suit, if they have not noticed that the debts were so contracted, are not bound to make inquiry beyond what appears on the face of the proceedings" and observe: "Their Lordships

17. (1917) 21 C. W. N. 957 (P.C.)
18. (1880) 5 Cal. 148.

desire to record their adhesion to the following comment made on this pronouncement by Sir John Stanley in the case of *Chandradeo Singh* v. *Mata Prasad* (19). The learned Chief Justice stated :—" The first of these propositions, it will be observed, deals with cases where joint ancestral property has passed out of a joint family, either under a conveyance executed by a father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for the father's debt. It deals with cases in which ancestral property has passed out of the family, and with no other cases, and the words " antecedent debt " seem to have been used advisedly. Likewise the second proposition deals with the case of a purchase at an execution sale. Neither proposition touches a case in which a mortgagee of a Hindu father seeks to enforce his mortgage as against the sons." It is quite clear from this passage that their Lordships did not intend to alter the law as it stood as regards the right of an execution creditor to proceed against the son's share in execution of money-decree obtained against the father. At p. 444 their Lordships further observe " Although the correct and general principle be that if the debt was not for the benefit of an estate then the manager should have no power either of mortgage or sale of that estate in order to meet such a debt, yet an exception has been made to cover the case of mortgage or sale by the father in consideration of an antecedent debt. This being an exception from a general and sound principle, their Lordships are of opinion that the exception should not be extended and should be very carefully guarded." In order to justify an alienation by the father there should be an antecedent debt. But the contention of the sons is that, so long as the father is alive, the share of the sons cannot be proceeded against in execution of a decree obtained against the father and that the Court cannot pass a decree against the sons' shares also in a suit brought against the father and sons on a debt contracted by the father, and the learned vakil relies very strongly upon the following passage of their Lordships in the case cited above: " While the father, however, remains in life, the attempt to affect the sons' and grandsons' shares in the property in respect merely of their pious obligation to pay off their father's debts, and not in respect of the debt having been truly incurred for the interest of the estate itself, which they with their father jointly own, that attempt must fail ; and the simplest of all reasons may be assigned for this, namely, that before the father's death he may pay off the debt, or after his death there may be ample personal estate belonging to the father himself out of which the debt may be discharged. In short, the responsibility to meet the father's debts is one thing, and the validity of a mortgage over the joint estate is quite another thing. Accordingly, the case founded merely upon pious obligation and so strenuously argued before the Board, fails in the present instance by reason of the fact that Bhup Singh who contracted the debt, is still alive and that there is a concurrent finding by both the Courts below to the effect that the plaintiffs have failed to prove that the debt of Rs. 200 for which the mortgage was granted, was incurred for any legal necessity or benefit to the estate." This case was followed in *Jogi Das* v. *Ganga Ram* (17). Lord Haldane delivering the judgment of their Lordships of the Privy Council referred to the case of *Sahu Ram Chandra* v. *Bhup Singh* (1) in the following terms : "in that case it was laid down in effect that the joint property could not be alienated as against co-sharers by way of mortgage, or otherwise, except for interest or for payment of actual antecedent debt, quite distinct from the debt incurred in the mortgage itself, and that in execution the transaction could not stand, and it was added that the mere circumstance of a pious obligation does not validate the mortgage." In the recent case of *Chet Ram* v. *Ram Singh*. (2) Lord Shaw in delivering the judgment of their Lordships quotes with approval the third passage in Sahu Ram's case extracted above. There was no contention in that case that the sons were not liable during their father's lifetime for debts contracted by him. The only question in controversy was whether an alienation by a father could be supported on the ground that there was an antecedent debt when the debt was

19. (1909) 31 All. 176 at 196.

not really antecedent but only antecedent in point of time. Their Lordships held that in order to constitute an antecedent debt to justify an alienation the debt should not be merely antecedent in point of time but that it should be antecedent in fact.

A careful examination of these cases shows that there is no warrant for saying that their Lordships intended to alter the law as regards the liability of the son's share for the father's debt. The law has been settled for over a generation as regards this point. In *Meenakshi Naidu* v. *Immudi Ramayya Kovundan* (21) it was laid down by the Privy Council that a father's debt could be impeached only on the ground that the debt was illegal or immoral, and the sons could not set aside a sale by the Court in execution of a decree obtained against the father. In *Khalilul Raman* v. *Gobind Pershad* (10) the learned Judges of the Calcutta High Court stated the law thus:—

"In this case the mortgage-creditor sues first a mortgagor and his sons, and second, the son of a deceased mortgagor, and seeks his remedy against the ancestral property of all members of a joint family. It is certain that he is entitled to a decree against the mortgagor in respect of his own share. It is also clear that the mortgage, so far as it was contracted to pay a debt not illegal or immoral, existing when the mortgage-debt was contracted, is good against the shares of the sons of each mortgagor. No authority need be cited for this. It is also now established that a decree for the personal debt of the father, not illegal or immoral, may be enforced by sale in execution in his lifetime of the entire joint family estate. *Meenakshi Naidu* v. *Immudi Ramayya Kovundan* (21). This is one of the advances lately made on the older law which made the son's shares liable in respect of the pious duty to pay the father's debts, after his natural or civil death." They quote the following passage from Mayne's Hindu Law, para. 283, page 309 of the 4th Edition: "But I imagine that no suit could be brought directly against sons, based solely on their liability to pay the debt of their father, until he was either actually or civilly dead, so that the estate had legally vested in the sons," and remark, "Recent decisions in this Court are not quite in accordance with this opinion?" So it may be taken to be settled law that the son's share could be proceeded against in execution of a decree obtained against the father. It follows from that that a Court could pass a decree against the son's share of the family property. "It is now settled that the sons may be bound by proper proceedings taken by the creditor against the father to enforce mere money debt due to him although the sons are not made parties to the suit." Mayne's Hindu Law page 413, 8th Edition. The case of *Sahu Ram* has been considered in three recent cases by the Madras High Court. In *Peda Venkanna* v. *Sreenivasa Deekshatulu* (4) the learned Chief Justice and Kumaraswamy Sastri, J. distinctly overruled the contention that the sons are not bound to pay the father's debt as long as he is alive. The learned Chief Justice (Sir John Wallis) observes at page 141. "As it appears to me that the creditor's right to bring the son's shares to sale for an antecedent debt and the long line of decisions which support it were not considered by their Lordships in the recent case, I think it should not be treated as overruling them, and that, if we are to depart from what has been the settled law of this and other High Courts for so many years, it should be in deference to a clear expression of their Lordship's opinion with reference to this particular question and not on any inference from the reasons given by their Lordships in settling a conflict in the Indian Courts on another point". Kumaraswami Sastri, J. observes at page 142: "The second appeal should be allowed not on the broad question raised by Mr. Parthasarathi Iyengar as to the non-liability of a son to pay his father's debts during the father's life-time, a conclusion which according to appellant's Counsel is the logical result of the recent decision of their Lordships of the Privy Council in *Sahu Ramchandra* v. *Bhup Singh* (1) but on the narrower one that a son is not after partition liable to be proceeded against in respect of a simple personal debt incurred by the father before a partition whatever his rights may have been if they had continued joint". Sahu Ram's case was considered by the Full Bench in a case reported in *Arumu-*

(20) (1889) 12 Mad. 142.

gam Chetty v. *Muthu Kovundan* (22) and by a Division Bench in the case reported in *Kandasami Goundan* v. *Kuppa Moopan* (8). In the latter case the learned Judges observe at 423, "We are bound by these views and must hold that the observation in Sahu Ram's case (1) does not alter the law on the point we are considering and we must follow the rule in the earlier cases. In fact such a point was not raised at all before the Privy Council: the point that their Lordships were considering was whether the mortgage was as such binding on the sons and whether a mortgage decree could be passed against them," Sahu Ram's case was considered by the Bombay High Court in *Hanumant Kashinath* v. *Ganesh Annaji.* (13) After discussing it and the case in *Peda Venkanna* v. *Srinivasa Deekshatulu* (4) the learned Judges observe: "The judgment thus so far from throwing doubt on the well established remedies of the creditor in execution impliedly recognizes them." In that case a money-decree was obtained against a Hindu father for his failure to account as a trustee and in execution the ancestral property was attached. The sons having applied to raise the attachment on the ground that the money-debt in the decree against their father was tainted with illegality and immorality and that their shares could not be made liable in execution during the lifetime of their father. It was held that the decretal debt of the father for breach of civil duty as trustee was not *Avyavaharika* and held further that the shares of the sons in the ancestral property could be attached and sold during the lifetime of the father for the satisfaction of his personal debt not tainted with illegality or immorality." In *Madhusudan Das Mohant* v. *Iswari Dayo Debi* (23) Richardson, J. observes at page 349: "As it appears to me, the language of their Lordships in Sahu Ramchandra's case shows that they did not intend to alter the law applicable to such a case as the present. Their Lordships' purpose was to dissipate the uncertainties which had gathered round the term "antecedent debt" in connection with voluntary alienations by the father of immoveable family property. The case before their Lordships was that of a mortgage." Both the learned Judges held that the judgment in that case did not alter the law and that a decree passed against the father personally could be executed against the family property including the shares of the sons. So it is quite clear from all these cases that a creditor who obtains a personal decree against the father could execute the decree against the shares of the sons and that the Court could pass a decree for a personal debt of the father against the son's shares as well. In *Kandasami Goundan* v. *Kuppu Mooppa* (8) Oldfield, J. and Krishnan, J. indicate how this is to be done. At page 424 they observe:— "In the present case though the plaintiff prayed expressly for a decree under O. XXXIV, R. 6, against the ancestral property the sons did not plead or prove that the debt was illegal or immoral. They cannot be given a fresh opportunity for the purpose. The plaintiff is therefore entitled to a decree as he asks for under R. 6 against the 1st defendant personally and against the ancestral property of himself and his sons." It is urged by the appellant that in the case of one document there was an antecedent debt in the case of the other the debt was incurred to pay off some other debts. Ex. A does mention that a debt of Rs. 2 000 had been previously incurred. But Ex. B. does not clearly make out that there was a previous debt. It is unnecessary to decide the question whether there were antecedent debts or not as no mortgage decree is to be given.

The appellant will have a personal decree against the 1st defendant and for any unsatisfied portion thereof after selling the 1st defendant's share against the shares of the defendants 2 to 5. With this modification of the lower Court's decree the appeals are dismissed.

In the result appeal No 176 is dismissed without costs, as the appellant has failed on a technical point. The plaintiff in O. S. No. 40 of 1915 made the appellant a party to the suit. The subsequent mortgagees, that is, the plaintiff and the 7th defendant in O. S. No. 40 of 1915 did not contest the validity of the mortgages. In the circumstances the respondents 6 and 7 are not entitled to their costs in appeal.

A. S. No. 177 of 1920 is allowed only as regards the personal remedy against 1st defendant and the liability of the sons'

22. (1919) 42 Mad. 711.
23. (1921) 48 Cal. 341.

shares in the family property. 1st defendant will pay the suit amount with interest at 6 per cent. from date of plaint to date of realization together with costs throughout and defendants 2 to 5 will pay out of the family assets the portion of the amount of the decree not satisfied out of the 1st defendant's share. Appellant will pay the costs of this appeal. One set to respondents 6 and 7.

1923 Madras. 43.

SPENCER, J.

Hussain Sahib ... Petitioner.

v.

Hammad Saheb and others. Respondents.

Civil Revision No. 861 of 1920, dated 27th March 1922 against the order of District Judge, South Canara, dated 23rd July 1920 in I. A. No. 12 of 1920 in O. S. No. 6 of 1910.

(a) *Civil P. C O., 20, R. 12—Mesne profits—No direction in the preliminary decree either for settling or ordering an enquiry into mesne profits—Whether can be awarded in final decree.*

If the plaintiff's right to mesne profits is negatived in the preliminary decree and no appeal is preferred against the order disallowing them, it is obvious that he cannot raise the question again at the stage of passing the final decree but if there is a prayer in the plaint for mesne profits and the omission to provide for them in the preliminary decree is due to inadvertence, there is no reason why up till the passing of the final decree, the matter of mesne profits should be deemed to be finally concluded.

(P. 43.)

(b) *Civil P. C., O 20, R. 12—S. 115—No direction for mesne profits in preliminary decree.*

Where no direction as to mesne profits was given in the preliminary decree and the High Court on Appeal directed the taking of accounts *held*: There is no reason for High Court to interfere in revision with the lower Court's order directing the commissioner to ascertain mesne profit also before the final decree is passed, as the final decree (if it is found to include a sum for mesne profits apart from the sum due upon taking of accounts) will be open to regular appeal and that will be the appropriate method of challenging the correctness of an interlocutory order made in the course of trial.

(P. 43 Col. 2.)

B. Sitarama Rao—for the Petitioner.

K. Yegnanarayana Adiga—for the Respondents.

JUDGMENT:—The appellant relies on *Ghulusam Bivi* v. *Ahamadsa Rowther* (1) as an authority for saying that mesne profits cannot be awarded in a final decree if there has been no direction in the preliminary decree either settling mesne profits or ordering an enquiry into mesne profits.

If the plaintiff's right to mesne profits is negatived in the preliminary decree and no appeal is preferred against the order disallowing them it is obvious that he cannot raise the question again at the stage of passing the final decree; but if there is a prayer in the plaint (as here) for mesne profits and the omission to provide for them in the preliminary decree is due to inadvertence (as appears to be the case here) I cannot see why up till the passing of the final decree the matter of mesne profits should be deemed to be finally concluded. There is a decision in Civil Miscellaneous Second Appeal No. 40 of 1919 of another Bench which seems to hold differently from *Ghulusam Bivi* v. *Ahamadsa Rowther* (1); and if that was the only point before me I should feel inclined to refer this Civil Revision Petition to a Bench with a view to the correctness of the decision in *Ghulusam Bivi* v. *Ahamadsa Rowther* (1) being considered by a Full Bench.

In this case the decree as amended by the High Court in appeal directed the taking of accounts and respondent's vakil states that the accounts will show the profits arising from immoveable properties belonging to the joint family as well as the profits derived from the family trade, and that if it turns out that the profits on the lands are kept apart and are not ascertainable from an examination of the accounts he will be content with what is found to be due to him on the basis of the accounts.

Be this as it may. I can find no reason to interfere at this stage in revision with the lower Court's order directing the commissioner to ascertain mesne profits also, as the final decree (if it is found to include a sum for mesne profits apart from the sum due upon taking of accounts) will be open to regular appeal, and that will be the appropriate method of challenging the correctness of an interlocutory order made in the course of trial. The Civil Revision Petition is dismissed with costs.

1. (1919) 42 Mad. 296.

1923 Madras. 44.

SCHWABE, C.J., AND COUTTS-TROTTER, J.

Kanlal Bhoya ... Plaintiff.

v.

Balaram Paramasukdoss ... Defendant.

O. S. A. Nos. 102 to 106 of 1921, dated 27—4—1922 against orders of Phillips, J., in C. S. Nos. 355 to 359 of 1921, dated 6—9—1921.

(a) *Letters Patent (Madras) Cl. 15—"Judgment"*

A decision is a judgment given in an action. Where there is an issue directly to be tried and there is decision of a Judge upon matters in issue in the action between the parties, one cannot but call what he did, a judgment.

(P. 44 Col. 1.)

(b) *Promote—Deed—Construction.*

Even if there is evidence that a certain instrument is treated as a promissory note, if its language is such that by no conceivable acceptance of the words in their ordinary significance, it could be so construed, the Court might have to say that, in spite of the proof of the existence of the custom the custom, was so entirely at variance with the tenor of the instrument as to be unreasonable.

(P. 46 Col. 1.)

(c) *Neg. Ins. Act S. 13—High Court Rules S. 63-A.*

Rule 63-A covers all negotiable instruments including Shah Jog Hundi notwithstanding any restrictions on negotiability. Acknowledgment with promise to pay may be negotiable.

(P. 46 Col. 1.)

(d) *Madras High Court original side Rules O. VI A.*

Unappealed order of predecessor could not be effectually reversed by framing a preliminary issue.

G. Krishnaswamy Iyer—for Appellant.

S. G. Sadagopa Mudaliar—for Respondent.

SCHWABE, C. J.:—In this case the matter comes before us on appeal from an order of Phillips, J. It arose in this way. An issue or issues were framed and he directed that a particular issue should be tried before the trial of the rest of the suit. He tried that issue and he gave a decision upon the hearing of that trial and he gave it in what is called a judgment. Speaking for myself, I do not see how it could be called anything else. There was an issue directly to be tried, we have got a decision of a Judge upon matters in issue in the action between the parties; and I have tried to find some other mode of expressing what he did and I could find none—he gave his judgment. The English cases are quite clear as far as the distinction between a "judgment" and an "order" is concerned, and the guiding principle is that a decision is a judgment which is given in an action. See *Ex parte Chinery* (1) and *Onslow* v. *Commissioners of Inland Revenue* (2). The matter here is to be decided under Cl. 15 of the Letters Patent where the right of appeal is from a judgment of the Original Side. There have been a considerable number of cases on that point here and attempts have been made to give an exhaustive definition of the meaning of the word "judgment" in that section, particularly in *Tuljaram Rao* v. *Alagappa Chettiar* (3) and *Kulasekhara Naicker* v. *Jagadambal Ammal* (4), the attempted definitions not having been identical. But I think they are all of them wide enough to cover the facts of this case, and I do not propose to attempt to add a further definition to those which have already been given in other cases. The preliminary objection fails.

COUTTS-TROTTER, J.:—I am of the same opinion. I have never been very clear either in English Courts or in these as to the precise differentia between a "judgment" and an "order". I will remember that Scrutton, L.J. and the present Chief Justice of Allahabad carefully considered *Austin Friars Steamship Company* v. *Strack* (5) and were held by the Court of Appeal to have come to the wrong conclusion.

On the whole the balance of my mind is to regard them as resulting in something which is properly called a judgment, because otherwise it might result in shutting out the defendant from the Court altogether.

(This appeal coming on for final hearing this day the Court delivered the following judgment.)

SCHWABE, C.J.:—In these five suits orders were made under O. VI (a) of the Original Side Rules that the defendants should find security for the amount claimed. There is no appeal from that order. Four of the suits were on docu-

1. 12 Q. B. D. 342.
2. 25 Q. B. D. 465.
3. (1910) 35 Mad. 1.
4. (1919) 42 Mad. 352.
5. (1906) 21 Q. B. 499.

ment known as Shah Jog hundies, and the fifth O. S. No. 356 of 1921, was on another different document, which, on the face of it, purports to be an acknowledgments of indebtedness and a promise to pay interest. Security was furnished and the case was proceeded with. Then, on the application of a defendant, certain issues were set down for trial, one of the issues being whether or not these documents were negotiable instruments. It has been held by the learned Judge who heard the matter, without hearing any evidence and without giving any opportunity which was asked for adducing evidence that they were not negotiable instruments and he accordingly ordered all the security to be repaid to the defendant with costs up to date to be paid by the plaintiff and that the action should proceed as though they had never been lodged under the terms of that order as ordinary suits.

As regards four of these documents, in my judgment, the documents in question were negotiable instruments. I think they come directly within the definition in S. 13 (2) of the Negotiable Instruments Act of 1881 as amended by Negotiable Instruments Act, 1914 as being payable in the alternative to one of several payees. But, whether this is right or not they are, in my judgment, still covered by S. 63 (a) of the Original Side Rules for although those rules are titled "Procedure on Negotiable Instruments" and S. 62 refers to suits on negotiable instruments, it is clear from the wording of S. 63 (a) that it was intended that all documents in the nature of negotiable instruments specifically described in R. 63 (a) as "Bills of Exchange", "Hundis or Promissory notes" should be included and that the framers of that rule were not considering the question of how far a particular bill of exchange might be negotiable, or what the restrictions might be on its negotiability provided it came under the description of Promissory-note, Bill of Exchange or Hundi which were all intended to be included within the very useful powers given by that order. To take the extreme instance of a cheque or other bill of exchange payable "to A. B. only" and marked "not negotiable", in my view this procedure would apply as the document is a bill of exchange, though the particular bill of exchange is not negotiable. On these grounds I think that the decision of the learned Judge in respect of the four actions is wrong.

As regards the fifth action the position is rather curious. The learned Judge did not consider it separately, but it is included in the decision that the documents are not negotiable instruments; but this has been decided in the absence of evidence which may well be available at a proper trial of the matter to the effect that the form of document is recognised among these people as being a negotiable instrument passing by delivery from hand to hand. If a man writes to another a definite statement in this formal way that he owes a certain amount and that he agrees to pay interest on it, it is quite conceivable, though I am expressing no opinion upon it, that it is intended that it should be a document, that he can transfer by delivery. How that may be it is impossible to say without evidence on the point. That being so, I think that the judgment in respect of that document too is wrong, and the learned Judge was wrong to find as he did find without evidence, that this was not a negotiable instrument.

I think the right view is that the position must be the same as it was before the orders under appeal. Security was ordered for the whole amount of the five actions. The defendant, who knows perfectly well what document No. 2 is, did not choose to appeal from that order. He cannot have that order reversed or varied by a judgment on a preliminary point, which judgment I think, should be reversed. It therefore follows that the proper order to make is to allow all these appeals with costs and to direct that the money or security taken out of Court by the respondent be forthwith replaced.

I think that the best course in respect of these cases is that all the five cases should be tried together as though they were ordinary suits. We have expressed our decision that four of the documents are negotiable instruments. As regards the fifth it should be open to discussion whether it is a negotiable instrument. It may be by custom negotiable. Further the plaintiff may have a cause of action on it even if not negotiable. It is better that all the five should be tried together as ordinary suits and disposed of.

The costs of the preliminary hearing before Phillips, J., must be repaid, and they must be costs in the cause. The defendant must put back into Court within fourteen days the Government promissory notes of the face value of Rs. 24,000 or pay into Court that amount in rupees even if the time falls within the vacation and in default of such payment the appellant would be entitled to a decree for the full amount and he will be at liberty to apply to the vacation Judge to give him such a decree. The defendant also will have liberty to apply to him.

COURTS-TROTTER, J.:—I am of the same opinion. I do not up to this moment understand how it was that Philipps, J., persuaded himself that, by framing a preliminary issue of this nature, he could overrule an unappealed order of Kumaraswami Sastri, J. That is my first view.

In the next place I am unable to follow the order and judgment which appear to hold that a Shah Jog Hundi of this form is not a negotiable instrument. It seems to me that there are many reasons for supposing that it is. I am perfectly content to take it that the words payable to any "Shah" (which was translated into a respectable person) are so vague and indefinite as to be incapable of enforcement in a Court of law and, therefore, the instrument stands as payable to Khanya Lalji, the drawee. With regard to the instrument in suit No. 356 I wish to guard myself against saying that I am convinced that, even there were evidence produced to show that it was treated as a negotiable instrument, that would be conclusive. I only desire to say that an opportunity should be given to call for such evidence, if it is available, and the Court should consider, having heard the evidence, if it is produced, whether in law it would be sufficient to confer negotiability upon such instruments, I take it that, even if you have evidence, that a certain instrument is treated as a promissory note, if its language is such that by no conceivable acceptance of the words in their ordinary significance, it could be so construed, the Court might have to say that, in spite of the proof of the existence of the custom, the custom was so entirely at variance with the tenor of the instrument as to be unreasonable. For the rest I agree with my Lord.

1923 Madras. 46.

AYLING AND ODGERS, JJ.

Hariharamangalth Kizhoor Variyath Sankara Variyar...Defendant (Appellant.)

v.

Kaiparambil Kalathil Ummar and others ... Plaintiffs (Respondents.)

S. A. No. 2062 of 1920, dated 31st March 1922 against the decree of Temporary Sub-Judge at Ottapalam in A. S. No. 80 of 1919.

Limitation Act, Art. 97—Actual possession given—Limitation, starting point of.

In cases where actual possession of the property had been given and been enjoyed for a number of years, the starting point of limitation must be (at all events in the case of a sale not *ab initio* void but only voidable the date of dispossession and not the date of the decree. 46 Cal. 670 Dist.

(P. 48 Col. 2.)

K. P. M. Menon and P. Govinda Menon—for the Appellants.

C. Madhavan Nair—for the Respondents.

ODGERS J:—In this case the only point argued is that of limitation. The Respondents' vendor in 1903 obtained a *theetu* deed Ex. A which was assigned to the respondents in April 1904 by Ex. B for a period of 12 years and for a consideration of Rs. 1,000. Exhibit A was granted by the then female manager of that Kovilagam styled Valia Thamburatty. It is not only a mortgage but also a conveyance of the trees on the land. The respondent obtained possession and enjoyed the property till February 1906. when he conveyed it to others who were subsequently evicted as the consequence of a suit brought by a subsequent Thamburatty to set aside the *theetu* deed Ex. A on the ground that the vendor had no title to sell. This decree is dated 10—2—'14 Ex. F in the case and by it the defendant (appellant here) is ordered to deliver up all documents relating to the suit property and re-transfer the same to plaintiff free from the mortgage and all other encumbrances created by the defendants or any person claiming under them. This decree was confirmed on appeal on 22—12—'14 and on 3—7—'15 the plaintiffs were dispossessed in execution thereof. The plaintiffs brought the present suit on

18—12—'17 to enforce payment of the consideration which plaintiffs had paid for Ex. B. It was, I think, admitted by both sides at the appeal before us that Art. 97 of the Limitation Act applies and although at the end of the case the learned Counsel for the respondents contended in the alternative that Art. 116 would in any case apply, by virtue of the covenant for 12 years' quiet enjoyment contained in Ex. B. I think he must be held to have admitted that the matter is governed by Art. 97. The short point arising from these facts is —Does limitation run from the date of the original decree (10—2—'14) in which case the plaintiffs' suit is barred under Art. 97 or does it run from the date of actual dispossession of the plaintiffs which occurred in July 1915 in which case the suit is within time? Mr. K. P. M. Menon for the appellant who was unsuccessful in both the lower Courts relied exclusively on the ruling of the Privy Council reported in *Juscurn Boid* v. *Prithichand Lal Chowdhury*. (1) Had their Lordships laid down a general principle which would govern all cases of this nature, we should of course be bound by it. They however say that the plea that the period of limitation began to run when possession was lost was 'belated' and proceed to hold that the decree of the first Court is the starting point of limitation, qualifying this however by this passage. "There may be circumstances in which a failure to get or retain possession can justly be regarded as the time from which the limitation period should run, but that is not the case here. The quality of the possession acquired by the present purchaser excludes the idea that the starting point is to be sought in a disturbance of possession or in any event other than the challenge to the sale and the negation of the purchaser's title to the entirety of what he bought involved in the decree of the 24th August 1905. If further support of this view be required, it may be found in the express provision of S. 14 of the Regulation which directed that in the suit for reversal itself the purchaser is to be indemnified against all loss. What was the quality of the possession in the case before them? Apparently the purchaser received an amaldastak or order for possession under S. 15 of Bengal Regulation VIII of 1819. This does not seem to have put him in actual physical possession of the property but to have been an order to the ryots to attorn to him as the purchaser." I think the possession was different in the case before us and that actual possession was delivered to the respondent under Exhibit B. Further the deed Exhibit B would appear to be not void *ab initio* but only voidable. It would have been open to the succeeding Thamburatty to have confirmed the transaction *Ananda Chandra Bhuttacharjee* v. *Carro Stephen* (2) and it seems reasonable to hold that the consideration did not fail till respondent was deprived of the possession of the property which he had acquired under Exhibit B. He had possession either personally or through his transferees from 1904 to 1915. See per Miller, J. in *Ramanatha Iyer* v *Ozhapoor Pathuriseri Raman Nambudripad*. (3) The Privy Council case has further been distinguished by a Bench of this Court in *Mahomed Ali Sheriff* v. *Venkatapathi Raju*. (4) True that was a case under Art. 116 and the cause of action which was the breach of the covenant for quiet enjoyment was treated as arising from the date of disturbance of plaintiff's possession. The learned Judges say at page 455:—"But they (the P.C) held that the quality of possession acquired by the purchaser in that case (it was apparently merely formal and not actual possession) was such as to exclude the idea that the starting point was to be sought in the disturbance of possession. But that could not be predicated of the possession of the present plaintiffs who were in actual possession and enjoyment of the property until dispossessed in execution of the decree obtained by the reversioners", thus clearly distinguishing the Privy Council case from a case where the purchaser was put in actual possession and enjoyment of the property. There are other decisions which take this view. *Narasing Shivabakas Marvadi* v. *Pachu Rambakas Marvadi* (5) which the Privy Council says does not call for serious consideration though it is very doubtful if they meant to say that it was bad law. Their Lordships do not say so directly. In

1. (1919) 46 Cal. 670=46 I. A. 52.

2. (1892) 19 Cal. 127.
3. (1904) 14 M. L. J. 524 at 526.
4. (1920) 39 M. L. J. 449 at 455.
5. (1913) 37 Bom. 538.

the Bombay case the learned Judges dealing with *Hanuman Kamat* v. *Hanuman Mandur* (6) say at page 541:—"But their Lordships, we think, were not considering a case in which possession had actually been given, although the contract subsequently turned out to have been void *ab initio*. In such a case the promisee has received the only consideration he has stipulated for. In all cases of that kind it appears to us that it is only when the promisee is deprived of that consideration and the true character of that contract becomes revealed that he has any ground for complaint. And that is the proper time from which to compute the period of limitation. This is the principle distinctly underlying the provisions of Art. 97. We think that both in terms and in spirit it does and was intended to cover cases of this kind." The Calcutta High Court in *Sukmony Sankar* v. *Shashi Bhushan* (7) held that under Art. 97 time runs from the date when the plaintiff was actually evicted from the land and that the question of limitation must depend upon the special facts of each case. In *Subbaraya* v. *Rajagopala* (8) Seshagiri Iyer. J. said with reference to cases where the sale is only voidable on the objection of third parties and possession is taken under the voidable sale that "the cause of action can only arise when it is found that there is no good title. The party is in possession and that is what at the outset under a contract of sale a purchaser is entitled to, and so long as his possession is not disturbed, he is not damnified. The cause of action will therefore arise when his right to continue in possession is disturbed."

In *Meenakshi* v. *Krishna Iyer* (9) Philipps, J. held that as possession had been given under a contract of sale, the sale was not void *ab initio*, and plaintiff was entitled to recover his purchase-money under Art. 97, Limitation Act. He held that the starting point for limitation was not the date of the sale-deed in 1893 but the date of dispossession in 1910.

In Ramchandra Singh v. *Tohfah Bharti* (10) in a suit brought on a sale-deed whereby the vendor contracted to recoup the vendees in the event of disturbance of possession it was held that the cause of action did not arise till possession was in fact disturbed.

Under these circumstances it appears to me that the Privy Council decision qualified as it is, must be taken to be applicable to the facts of the particular case before their Lordships and that we are not justified in extending it generally to cases in which actual possession of the property had been given and been enjoyed for a number of years. In such a case on the authorities quoted above the starting point of limitation must be (at all events in the case of a sale not *ab initio* void but only voidable) the date of dispossession. I am therefore of opinion that this second appeal should be dismissed with costs.

AYLING J.—I agree.

1923 Madras. 48.

SPENCER AND RAMESAM, JJ.

Varanakkot Illath Subramanyan Nambudri Karnavan and Manager of the Illom ... Petitioner. (Appellant).

v.

V. K. Vykunda Kammathi and others ... Respondents.

Appeal from Order No. 272 of 1921 dated 16th March 1922 against the order of D. J, North Malabar dated 8th March 1921 in E. A. No. 531 of 1920.

(a) *Civil P.C.*, O. 21, R. 85—*Deposit by auction purchaser—Extension of time—Deposit made beyond time—No consent of parties concerned—Sale a nullity.*

A Court ought not to extend the time for deposit by the purchaser or accept a deposit paid beyond time without the consent of all the parties concerned. If the Court does so extend the time or accept the deposit without the consent of all parties interested probably it is an irregularity only and does not render the sale a nullity. It is open to all the parties concerned in a sale, decree-holder, auction purchaser and judgment-debtor, if there are three, or decree-holder (who is also auction purchaser) and judgment debtor, if there are two only, not to insist on a re-sale on account of the delay in the deposit and to remain content with the sale actually held. In such a case there is no breach of the provisions of the Code and the old sale taken with the waiver is equivalent to a re-sale. 14 Mad. 227 Foll.

(b) *Civil P. C.*, *O.* 21, *r.* 94—*Sale-certificate—Issue of.*

6. (1892) 19 Cal. 123=18 I. A. 158 (P. C.).
7. (1911) 10 I. C. 486.
8. (1914) 38 Mad. 887.
9. (1916) 19 M. L. T. 163.
10. (1904) 26 All. 519.

The fact of the issue of a sale certificate is conclusive, if it is not set aside, sale certificates not being documents which can be "lightly regarded or loosely construed".

K. P. M. Menon and V. P. Karunakara Nambiar—for Appellant.

C. Madhavan Nair and T. S. Viswanatha Aiyar—for Respondents.

JUDGMENT:—A decree was obtained in Original Suit No. 4 of 1913 by the respondent before us against a junior member of the illom of the appellant. In execution of the decree, there was a sale on 26—8—1915. At the time of the sale, the judgment-debtor died and was represented by the karnavan of the illom. The decree-holder was the purchaser in execution. He was allowed to set off the decree amount against the sale price and pay the balance. But as he stated that he could not deposit it within 15 days, the District Judge allowed him 6 days more time, that is, up to 16th September. The balance was actually deposited on 17th September, and afterwards, it was disposed of for the benefit of the illom and with the consent of the karnavan (M. P. No. 787 of 1915). The sale was confirmed and a sale certificate was issued to the purchaser in September 1915. The present petition is filed in December 1920 under Ss. 47 and 151 praying the District Judge to hold that the sale was a nullity. The District Judge dismissed the petition as barred.

We agree with the contention of Mr. Menon (the learned Counsel for the appellant) to this extent, *i.e.*, that a Court ought not to extend the time for deposit by the purchaser (O. XXI, R. 85, Civil Procedure Code) or accept a deposit paid beyond time without the consent of all the parties concerned. If the Court does so extend the time or accept the deposit without the consent of all parties interested, probably it is an irregularity only and does not render the sale a nullity. On a similar section (O. XXI R. 84) it was held that it is a case of mere irregularity; *Venkata* v. *Sama* (1) and *Ahmad Baksh* v. *Lalta Prasad* (2).

Though the terms of O. XXI, R. 68, C. P. C., are mandatory the words being 'no sale shall take place' it was held that the sale was not a nullity. *Tasadok Rusulkhan* v. *Ahmed Husain* (3). A sale contrary to the provisions of S. 99, Transfer of Property Act was held not to be a nullity *Mayan Pathuth* v. *Pakuran* (4) and *Dharanikota Venkayya* v. *Budha Razu Sivayya Garu* (5). Apart from this, in this case we think the fact that the appellant's Karnavan drew the amount deposited on 17—9—1915 and did not object to the confirmation of the sale shows that he waived any objection to the sale on the ground that the extension of time was made without his consent. We think it is open to all the parties concerned in a sale—decree-holder, auction-purchaser and judgment-debtor if there are three—or decree-holder (who is also auction-purchaser) and judgment-debtor if there are two only—not to insist on a re-sale on account of the delay in the deposit and to remain content with the sale actually held. In such a case, there is no breach of the provisions of the Code and the old sale taken with the waiver is equivalent to a re-sale. *See* Freeman on Execution, S. 44, page 201; Freeman on Void Judicial Sales, S. 50, pages 171 and 173, and Klebar on Void Judicial Sales, page 23.

The fact of the issue of a sale certificate is conclusive if it is not set aside—sale certificates not being documents which can be "lightly regarded or loosely construed." *Balakrishna* v. *Masumma Bibi* (6) and *Ramabhadra Naidu* v. *Kadirizasami Naicker*. (7) The contentions that the deposit was wrongly accepted and that the time was wrongly extended could have and ought to have been raised prior to the confirmation; *Ganapathy Mudaliar* v. *Krishnamachariar* (8) We are therefore of opinion that the sale in this case was not a nullity. The sale being found not to be a nullity any application to set it aside must be filed within thirty days under Art. 166 of the Indian Limitation Act and the present application is thus barred.

The Appeal is dismissed with costs.

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1. (1891) 14 Mad. 227.
2. (1906) 28 All. 238.
3. (1894) 21 Cal. 66=20 I. A. 176 (P. C.).
4. (1899) 22 Mad. 347.
5. (1907) 30 Mad. 362 at 365.
6. (1883) 5 All. 142 at 157=9 I. A. 182.
7. (1921) 44 Mad. 483 at page 489=48 I. A. 155.
8. (1918) 41 Mad. 403 at 411=45 I. A. 54.

1923 Madras. 50 (1).

KRISHNAN, J.

Jayaramulu Naidu and another ... Petitioners—Accused.

v.

Emperor ... Opp. Party.

Cr. Rev. Case No. 104 of 1922 Cr. Rev. Pet. No. 95 of 1922, dated 10th August 1922 against the judgment of Sub-Divisional Magistrate of Chingleput in Cr. A. No. 33 of 1921.

Madras Abkari Act (I of 1886), S. 55, Cl. (a) —"Possession," meaning of.

In S. 55 (a) the word 'possession' does not mean constructive possession but actual possession. It is only peopl who are actually in possession of co traband liquor without licence that can be punished under the section.

E. Vinayaka Rao—for the Petitioner.

J. C. Adam—for the Crown.

ORDER:—This Revision case is filed by accused 2 and 3 only in C. C. No. 152 of 1921 on the file of the Third Class Magistrate of Uttaramerur. They have been convicted under S. 55, Cl. (a) of Act I of 1886—the Madras Abkari Act—for being in possession of liquor without a proper licence obtained for the purpose. The first accused has not come up here at all. It is argued on behalf of accused 2 and 3 that there is no evidence on record to show that they were in possession of the liquor. The finding of the lower Court is that the liquor was found in a cattle shed which belonged to accused 2 and 3 in which the first accused was selling the liquor. When the authorities came up on the scene the first accused seems to have locked up this shed and bolted and the door of the shed had to be broken open to get access into it. The lower Court no doubt holds that the 2nd and 3rd accused should also be considered to have been in possession of the liquor because they were the owners of the shed but I think this finding cannot be accepted; for in S. 55 (a) the word 'possession', I think, does not mean constructive possession but actual possession. It is only people who are actually in possession of contraband liquor without licence that can be punished under the section. In the circumstances of the case there is no clear evidence that accused 2 and 3 had anything to do with the liquor, and the only point against them is that they were the owners of the cattle shed which, I think, is not sufficient to justify a conviction as regards them.

The conviction will therefore be set aside as regards accused 2 and 3 and the fines, if paid, will be refunded.

1923 Madras. 50 (2).

OLDFIELD AND RAMESAM, JJ.

Mohidin Pakkiri Marakayar ... Petitioner—Accused.

Cr. Rev. No. 12 of 1922, dated 17th July 1922 against the order, dated 5—12—1922 of Sub-Divisional 1st Class Magistrate of Devakottah Division in Calendar Case No. 79 of 1921.

Penal Code, S. 177—Income-tax Act (VII of 1918) S. 40—False verification—Place of trial.

A charge under S. 177, Penal Code within the meaning of S. 40 of the Income-tax Act can be legally tried only at the place where the verification is made.

(P. 51, Col. 1).

C. S. Venkatachariar and M. S. Ramanuja Iyengar—for the Petitioner.

J. C. Adam—for the Crown.

ORDER:—We are asked in this Revision case to interfere with an order passed by the 1st Class Sub-Divisional Magistrate of Devakottah Division disallowing the objections of the petitioner in a criminal case.

The case was instituted on a complaint by the Income-tax Assistant Tahsildar of Devakottah. In that complaint the accused was charged under S. 177, Indian Penal Code within the meaning of S. 40 of the Income-tax Act VII of 1918. The facts set out are that the accused verified a petition, which he afterwards presented to the Revenue Divisional Officer under S. 21 of the Income-tax Act. That verification was made at Kottaipatanam in the Tanjore District. But the last sentence of the complaint states that the offence was committed at the place where the return was received by the Revenue Divisional Officer, Devakottah within the lower Court's jurisdiction.

It must be borne in mind that the complaint is statedly of an offence, punishable under S. 177, Indian Penal Code within the meaning of S. 40 of the Income-tax Act. We are therefore concerned with the wordings of the latter section and have to deal

with it as it stands. S. 40 of the Income-tax Act says: that, "if a person makes a statement in a verification mentioned in S. 17 or S. 21 (3), which is false and which he either knows or believes to be false or does not believe to be true, he shall be deemed to have committed the offence described in S. 177 of the Indian Penal Code." Where then did the petitioner make the statement in his verification? According to the complaint he made it in Devakottah. The learned Public Prosecutor however has argued that with reference to S. 179, Criminal Procedure Code, the offence constituted by the verification will be triable, not only where the verification was effected, but also where any consequence thereof ensued, and that some sort of consequence must be held to have ensued where the verified petition was received by the authorities. We have not been able to understand from the learned Public Prosecutor what is the exact consequence to which he refers for the receipt of the petition would in no sense be the consequence of its verification, since the verification would go no way towards putting the petition in transit from one place to the other. *In Re Rambilas* (1) it was held in effect that the consequence contemplated in S. 179 must be an essential part of the offence charged. That requirement is not fulfilled in the case before us. It has been suggested that an absurdity will be entailed by the petitioner's construction of S. 40. For on that construction any person who verified a petition would be punishable, even though no use of the petition were made and it never left his possession. We think that any such anomaly is sufficiently excluded by the reference to Ss. 17 and 21 (3) in S. 40. Taking this view we must hold that the charge can legally be tried only by the Court having jurisdiction over Kottapatnam, Tanjore District, the place where the verification of the petition took place.

We therefore direct the lower Court to return the complaint to the complainant for presentation to the Court having jurisdiction.

1. (1914) 38 Mad. 639.

1923 Madras. 51.

OLDFIELD AND RAMESAM, JJ.

The Sessions Judge of Bellary ... Petitioner—Referring Officer.

v.

Kottur Hampanna and others ... Accused.

Cr. Mis. P. No. 220 of 1922, dated 6th September 1922, with reference to Reference Letter, dated 3rd April 1922, Petition to quash the commitment made in P. R. No. 6 of 1921 of Sub-Magistrate of Adoni.

Criminal P. C., S 346—Reference by a Sub-Magistrate—Duty of Sub-Divisional Magistrate.

The duty of a Sub-Divisional Magistrate under S. 346 is "either if so empowered to try the case referred to him himself or to refer it to any Magistrate subordinate to him having jurisdiction or to commit the accused for trial." And where he refers the case to a Sub-Magistrate the reference should be made explicitly and with some distinct indication of what action the Sub-Magistrate is to take, not with an obscure injunction which could afford no real guidance. Further a superior Magistrate cannot simply return a case to the Subordinate Magistrate from whom it comes but must refer to some other Magistrate or dispose of it himself.

(P. 52, Col. 1).

J. C. Adam—for the Referring Officer.

The accused was not represented.

ORDER:—The Sessions Judge, Bellary, has referred a committal by the Sub-Magistrate, Adoni, in P. R. No. 6 of 1921 as illegal in the following circumstances:—The case apparently was charged in the first instance before the Sub-Magistrate under S. 395, I. P. C. When the evidence was taken the Sub-Magistrate entertained some doubt as to whether that section applied or whether the proper sections were not Ss. 148 and 427, I. P. C. He therefore submitted the case to the First Class Sub-Divisional Magistrate under S. 346, Cr. P. C., he apparently not being a Magistrate of the First Class competent to try an offence under S. 148, I. P. C. The Sub-Divisional Magistrate returned the records to him with an order, of which we may at once and quite apart from the legal objection to it, express our strong disapproval: The order runs as follows:—"The Sub-Divisional Magistrate declines to transfer the case to the file of another Sub-Magistrate." This is a distinct point into which we need not enter. He then however says, "As

regards the section under which the offence, if proved, is likely to fall, the Sub-Magistrate is requested to study the commentary carefully under S. 379 of the Indian Penal Code." This sort of elusive advice to a Sub-Magistrate from a superior is worse than useless: and moreover, by returning the case for disposal to him, the Sub-Divisional Magistrate failed n his own plain duty. For, under S 346, Cr. P. C., the duty of the Sub-Divisional Magistrate is clearly stated as being "either, if so empowered, to try the case referred to him himself or to refer it to any Magistrate subordinate to him having jurisdiction, or to commit the accused for trial." It may be urged that the Sub-Magistrate, who sent up the case, was subordinate to the Sub-Divisional Magistrate and that this order was in effect a reference to him. If so the reference should have been made explicitly and with some distinct indication of what action the Sub-Magistrate was to take, not with an obscure injunction, which could afford no real guidance. But further there is authority, with which we respectfully agree, in the cases in Ratanlal's Unreported Criminal Cases at pages 499 and 554 that a superior Magistrate cannot simply return a case to the Subordinate Magistrate, from whom it comes, but must refer it to some other Magistrate or dispose of it himself.

In these circumstances, the committal by the Sub-Magistrate must be held illegal, inasmuch as his jurisdiction was determined when he submitted the case under S. 346, Cr. P. C, and was not revived by the subsequent order of return to him.

The record is returned. The case must go to the First Class Sub-Divisional Magistrate in order that he may deal with it in any one of the ways permitted by S. 346, Cr. P. C., either by trying it himself or committing the accused for trial or, if he thinks fit, by referring it to any Magistrate subordinate to him having jurisdiction, that is, as we understand it, jurisdiction to try the offence, which in the opinion of the Magistrate making a reference under S. 346, Cr. P. C., appears to have been committed.

1923 Madras. 52.

SCHWABE, C. J. AND WALLACE, J.

Fatima Bibi ... Defendant—Appellant.

v.

Khairum Bibi and others ... Plaintiffs—Respondents.

City Civ. Court A. No. 18 of 1921, dated 17th July 1922 against the decree of the Court of City Civ. J., Madras, in O. S. No. 376 of 1919.

Mohammedan Law—Gift, Deed of—Present possession.

A deed executed by a Mohammedan lady purported to transfer certain property to her daughter in consideration of her promise to maintain the mother during her lifetime and pay her funeral expenses after her death. The possession of the properties was in fact handed over to the daughter. The rents payable by the tenants were collected by the daughter from the date of the document and all the ground-rent and taxes in respect of the property were paid by her. *Held*: the deed was a deed of gift *in presenti*, as the daughter was given the immediate possession of the property. That being the condition in one of the two kinds of gifts under Mohammedan Law, namely, *Hiba* and *Hiba bil iwaz*.

C. Venkatasubbaramiah and K. P. Ramakrishna Iyer—for the Appellant.

Md. Ibrahim and G. Ramakrishna Iyer—for the Respondents.

SCHWABE, C.J. :— The case turns mainly on the interpretation of a deed of gift Exhibit I. In my judgment the proper interpretation of the document is that it is a gift *in presenti* or a transfer *in presenti* of the property in question in consideration of the defendant agreeing to maintain her mother the donor during her lifetime and to pay the necessary monies for the funeral expenses of the mother on her death, and I do not agree with the learned Judge who speaks of it as a testamentary document, by which he meant that it was not to come into operation until after the death of the mother. On that view the obligation to maintain would not arise until the death of the mother. That, in my view, would be a most improbable document for the mother to have executed under the circumstances. The daughter was herself entitled to 7/8 of ½, that is 7/16 of the whole, and in all human probability she would also receive on the death of the mother what the mother would convey to her or leave to her by will, and there would be no point

in providing under a document that the daughter was not to get the property at once although she, a younger woman, should be obliged to look after the property, pay all expenditure in respect thereof and maintain the old lady during the rest of her lifetime in the future.

It is said that under the Muhammadan Law in respect of such document, in order that it should be effectual and in order that it cannot be revoked at the will of the donor, there must be one of two things—either the actual handing over of possession to the donee or actual payment of the consideration by the donee to the donor. The Privy Council in *Chaudhri Mehdi Hasan* v. *Muhammad Hasan* (1) referred to two classes of cases, (1) a gift properly so called, that is to say, a present without consideration at all, in which cases there must, according to every system of law, be delivery of possession and (2) a gift coupled with consideration, and their Lordships pointed out in the latter case that delivery is not necessary, but the actual payment of consideration must be proved as also the *bona fide* intention of the donor to divest himself *in presenti* of the property and confer it on the donee. Their Lordships were not dealing with a case where the consideration is not actual payment but something to be done in the future. Mr. Ameer Ali states that in the kind of gift which is called *heba-ba-shart-ul-ewaz* the deed is revokable as long as the condition on which it is granted is unfulfilled. It may well be that there is a distinction between a gift which is conditional and a gift which is for good consideration to be performed in the future. But I wish to guard myself by pointing out that it is possible that the latter stands on a different footing but for the purpose of this judgment I am prepared to assume that the promise to maintain and the promise to pay the funeral expenses in future are such conditions that if any part thereof is not fulfilled the gift is liable to be revoked. But, in the view that I take of this case it is unnecessary to consider that, because possession was in fact handed over by the donor to the daughter, the donee. This is one of those cases in which the donee was in physicial possession of part of the property at the time of the grant, and excepting the part in the possession of the donor, the rest of the house was in the possession of tenants, and one finds that immediately after the deed all the ground-rent is paid and all the taxes in respect of the property are paid by the donee and that from that day forward the rent payable by the tenants is collected by her and the tenants with the consent of the donor, the mother, attorned to the daughter. That they attorned is clear because they entered into leases with the daughter. The mother stood by and took no steps when the daughter sued for the recovery of the rent and the mother also took no steps in any way to prevent the tenants from paying the rent to the daughter. I am therefore quite clear in this case that sufficient possession was given by the donor to the donee to make the gift an effective one.

The other matter is the question of some words appearing in the original deed to the effect that the property had been left in the possession of the daughter and that she was to be free from that date, that is, 17th April 1918, to enjoy it. These words were added after the original deed was signed and attested. But there is evidence that they were there when the document was taken to the Registrar by the donor and the donee together and was presented between 1 and 2 P. M. on the 18th April. The donor being an illiterate woman, it was the duty of the Registrar under R. 59 of the Rules framed under the Registration Act to read over and see generally, though not necessarily in detail, that the old lady knew what she was doing. I have no doubt that he did so. Speaking for myself I can see no reason at all why these words should have been fraudulently interpolated between the 17th and the 18th April. At that time it is common ground that the whole of the family were on good terms with each other—and why the son-in-law and the daughter should fraudulently put in some words saying that they were in immediate possession and take the risk of this matter being discovered before the Registrar I cannot understand. The intelligible solution of the matter is this. The deed speaks of something to be done, namely, delivery of possession. The gift is made and the next thing after that is to give possession. I see nothing unusual in

1. (1905) 28 All. 439=33 I. A. 68 (P. C.).

having a deed of gift first and then just before the document is registered an endorsement upon it that possession has been given. In these circumstances I cannot agree with the judgment of the Court below. This appeal will be allowed and the costs of the appeal will be paid by the respondents.

WALLACE, J.:—I agree. I am satisfied that the plaintiff signed the so-called interpolation in Exhibit I. In consequence the onus of proof that she did not give up possession rested on herself. That onus she has not in my view discharged. Since present possession was given, the document cannot be a testamentary disposition, and as possession has been delivered, it constitutes a valid gift under the Muhammadan Law. I am satisfied that there was a clear intention by the plaintiff to divest herself on the date of Exhibit I of her right over this property, that she did so divest herself, that she delivered possession and that therefore the transfer under Exhibit I was irrevocable.

1923 Madras. 54.

SCHWABE, C.J. AND WALLACE, J.

Abdur Salam Sahib and another ... Plaintiffs—Appellants.

v.

M. Kandasami Chettiar ... Defendant—Respondent.

City Civ. Court A. No. 26 of 1921, dated 19th July 1922 against the decree of the City Civ. Court, Madras, in O.S. No. 15 of 1920.

Landlord and tenant—Permanent and temporary tenancies.

Although the origin of a tenancy may not be known yet, if there is proved the fact of long possession of the tenure by the tenants and their ancestors, the fact of the landlord having permitted them to build a *pucca* house upon it, the fact of the house having been there for a very considerable time, of its having been added to by successive tenants and of the tenure having from time to time been transferred by succession and purchase in which the landlord acquiesced or of which he had knowledge, a Court is justified in presuming that the tenure is of a permanent nature. There is no reason at all to distinguish in this matter between Madras and other towns in this country, when there are the facts from which the proper inference to be drawn is that there is a permanent tenancy. Those facts result in that inference whether it is in Madras or elsewhere.

(P. 55, Col. 1).

K. Narasimha Aiyer—for the Appellants.

N. Ramachandra Aiyer—for the Respondent.

SCHWABE, C.J.:—I am very loath to disagree with the Judge who heard the evidence on questions of fact but in this case I do not think that the view I am about to express really differs at all on the question of fact, because I take the facts as found by the learned Judge. On those facts, whether the proper inference is that the tenancy in question is a permanent or temporary one is a question of law and not a question of fact.

The facts of this case as found are that a superstructure described as a *pucca* house was erected on those premises at least fifty years ago—according to the evidence the period is nearly 100 years. From that date forwards there has always been fixed and paid a monthly ground-rent of 14 annas. The tenant from time to time had disposed of his interest. The last tenant sold his interest to the present plaintiff for Rs. 350. During that period the value of the land in Madras has arisen and we are told that the present proper ground value of this land is not 14 annas but Rs. 2.

Now the question under those circumstances, there being no direct evidence as to what the original tenancy was, is "Is the proper inference that it is a permanent tenancy or a tenancy of some shorter period." It is put as monthly because the rent was payable monthly. On this matter we are not without authority. A similar case came before their Lordships of the Privy Council in *Affazal-un-nissa* v. *Abdul Karim.* (1) In that case which was in reference to some land in a suburb of Delhi covered by buildings, the facts were that from 1859 onwards a uniform rent had been fixed and paid and substantial buildings had been erected without the landlord's objection and they had been dealt with by assignment or mortgage. So far, that case is very like the present. There was one additional fact in that case, namely, that the landlords had in some receipts applied the term 'permanent' to the rent. I do not think that that fact alone would suffice to differentiate this case. But, however that

1. (1919) 47 Cal. 1=46 I. A. 1.

might be, in that case their Lordships of the Privy Council quoted with approval the case of *Caspersz* v. *Kader Nath Sarbadhikari* (2) and the part that they quoted with approval is this : "Although the origin of a tenancy may not be known, yet if there is proved the fact of long possession of the tenure by the tenants and their ancestors, the fact of the landlord having permitted them to build a *pucca* house upon it, the fact of the house having been there for a very considerable time, of its having been added to by successive tenants, and of the tenure having from time to time been transferred by succession and purchase, in which the landlord acquiesced or of which he had knowledge, a Court is justified in presuming that the tenure is of a permanent nature." Every word in that applies to this case and that has the approval of their Lordships of the Privy Council and it seems to me that the only proper inference that could be drawn on the facts of this case is that the tenancy was a permanent tenancy.

It is suggested in argument that there is something peculiar about Madras in this matter and that in the city of Madras for some reason permanent tenancy is unknown and can never be. I see no reason for accepting that statement, for one asks oneself 'why should there be any difference in this matter between Madras and Delhi and Calcutta'. Human nature is much the same in differrent provinces. People do not build valuable houses on other people's land with the knowledge that they may be turned out at a month's notice and with the knowledge that they may only remove their bricks and mortar. Landlords do not go on accepting the same rent year after year when the value of the land is increasing. I see no reason at all to distinguish in this matter between Madras and other towns in this country, when we have got the facts from which the proper inference to be drawn is that there is a permanent tenancy. Those facts in my judgment result in that inference whether it is in Madras or elsewhere. On these grounds in my judgment this judgment is wrong and must be reversed with costs here and in the Court below ; and the declaration prayed for in the plaint must be granted.

2 (1901) 28 Cal. 738.

WALLACE, J. :—I entirely agree and I have nothing to add.

1923 Madras. 55

SCHWABE, C.J. AND COUTTS-TROTTER, J.

The Official Assignee of Madras ... Appellant.

v.

Allu N. Ramachandra Iyer and others ... Respondents.

O. S. A. No. 49 of 1921, dated 1st August 1922 from the order of Kumaraswami Sastri, J., dated 23rd February 1922 passed in the exercise of the Original Insolvency Jurisdiction of this Court in I. P. No. 201 of 1919.

Presidency Towns Insolvency Act, S. 52—Official Assignee—Joint Hindu family property—Managing member adjudicated insolvent.

The Official Assignee on the insolvency of the managing member of a joint Hindu family succeeds to two things, (1) the undivided interest of the insolvent in the joint property and (2) his rights as managing member so far as they can be exercised for his own benefit. He is not entitled to have vested in him the shares of the other members, although he can deal with them, if the insolvent could lawfully have done so, if there had been no insolvency. It follows that the Official Assignee, standing for this purpose in the shoes of the insolvent, can alienate the minor sons' interests in the joint property for the purpose of paying the insolvent's debts, unless the debts in question were incurred for an illegal or immoral purpose, the presumption being that they were not. He is joint owner of the property and he must be entitled to joint possession thereof. It is no doubt true that a stranger cannot by reason of having purchased a share in the joint property insist on having joint possession. But the Official Assignee is not an alienee but the representative of the insolvent. There are certain rights of a managing member which the Official Assignee cannot exercise by reason of the personal nature of the rights, such as the right to live in the family house or to share in the family meals. But he is entitled to all the rights of the insolvent, including the right to possession except such rights as are in their nature personal to a member of the family as such.

(P. 56, Col. 1 & 2.)

M. A. Thirunarayana Chariar—for the Appellant.

C. P. Ramaswami Aiyer and T. L. Venkatarama Aiyer—for the Respondents.

JUDGMENT :—The Official Assignee in the insolvency of N. B. Baluswamy Iyer and Narasimha Iyer brought this suit against the minor sons of N. B. Balusami Iyer to set aside a deed of partition executed by that insolvent in favour of his

minor sons. The learned Judge Kumaraswami Sastri held that the deed was fraudulent and void as against the Official Assignee. The Official Assignee asked for declarations that the interests of the minors in the property should be vested in him and that the possession of all the properties included in the deed should be delivered to him. These declarations were refused and hence this appeal. It has, however, been admitted before us that the declaration that the shares of the sons had vested was rightly refused and the only question remaining for our decision is whether possession ought to have been ordered to be delivered to the Official Assignee.

This involves a consideration of the rights of the Official Assignee to joint family property, when the managing member is adjudicated insolvent; for N. B. Baluswami Iyer was the managing member of a joint Hindu family consisting of himself and his sons and, as such managing member had control over the properties in question. This insolvent's interest in the partnership business belonging to the two insolvents was not an ancestral property. The minor sons had no interest in it and the debts of N. B. Baluswami Iyer are in the main business debts incurred in the partnership business.

It can be taken as established law that the Official Assignee on the insolvency of the managing member of a joint Hindu family succeeds to two things, (1) the undivided interest of the insolvent in the joint property and (2) his rights as managing member so far as they can be exercised for his own benefit. It is also established that he is not entitled to have vested in him the shares of the other members, although he can deal with them if the insolvent could lawfully have done so if there had been no insolvency. These propositions are to be found clearly stated in the judgment of Latham, J. in *Fakirchand Motichand* v. *Motichand Harruckchand* (1) which has been followed in many subsequent cases. This is the combined effect of Ss. 7, 30 and 52 of the Presidency Towns' Insolvency Act and of the Hindu Law as to the rights of a managing member—See *Nunna Setti* v. *Chindra Boyina* (2). It follows that the Official Assignee, standing for this purpose in the shoes of the insolvent, can alienate the minor sons' interests in the joint property for the purpose of paying the insolvent's debts unless the debts in question were incurred for an illegal or immoral purpose, the presumption being that they were not.

The question remains whether the Official Assignee is entitled to possession of the joint property. He is joint owner of the property and, in my judgment, he must be entitled to joint possession thereof. It is no doubt true that a stranger cannot by reason of having purchased a share in the joint property insist on having joint possession. But the Official Assignee is not an alienee but the representative of the insolvent.

There are certain rights of a managing member which the Official Assignee cannot exercise by reason of the personal nature of the rights, such as the right to live in the family house or to share in the family meals. But in my judgment he is entitled to all the rights of the insolvent including the right to possession except such rights as are in their nature personal to a member of the family as such.

I expressly refrain from deciding anything as to what the respective rights of the parties will be hereafter. It is for the Official Assignee to decide after examining the nature of the debts whether he can exercise the insolvent's right as managing member, of selling the assets for the benefit of the creditors; and if there are separate assets of the insolvent in which his coparceners have no interest, to what extent they are to be used in paying the debts, in relief of the joint family property, and so on, and it may be open to the minor sons, if so advised, to object to any proposed sale on the ground that the debts that it is proposed to discharge were incurred for an immoral or illegal purpose; though it is right to point out that it has in this case already been argued that the business was of an illegal or immoral character by reason of its alleged speculative nature and this point has been decided adversely to the contention of the minor sons by the learned Judge who heard the case. In *Sanyasi*

1. (1883) 7 Bom. 438.

2. (1903) 26 Mad. 214.

Charan Mandal v. *Asutosh Ghose* (3) where persons entitled to 4/5 of the undivided joint family property were adjudicated insolvents but the member of the family entitled to the other 1/5 was not, the Court directed that the Receiver who was in the position of the Official Assignee should take possession of 4/5 share of the property. In this case the Official Assignee as representing the managing member is entitled to joint possession of the whole and the order in this case must be varied accordingly.

The case is one of general importance and there will be no order as to costs except that the Official Assignee will take his taxed costs of this appeal on the Original Side scale out of the estate.

3. (1915) 42 Cal. 225.

1923 Madras. 57.

OLDFIELD AND RAMESAM, JJ.

P. S. Narayana Iyer Defendant—Appellant.

v.

Biyari Bivi alias *Kathun Bibi and others* Plaintiffs—Respondents.

F. A. No. 184 of 1920, dated 1st August 1922 against the decree of Temp. Sub-J., Madura, in O. S. No. 14 of 1918.

(*a*) *Civil P. C., S.* 152—*Scope.*

The exercise of the power to amend under S. 152 is discretionary and necessarily so when no period of limitation is provided for application for its exercise and therefore no investigation of title can insure those, who acquire rights in property dealt with in a previous decree, against the effect of a subsequent amendment thereof. As a consequence, an application for amendment should be rejected as too late, if the rights of third parties acting in good faith have intervened. *Hatton* v. *Harris*, (1892) A. C. 547 Foll.

(P. 57, Col. 2.)

(*b*) *Civil P. C., S.* 109—*Order granting a review.*

An order granting a review is not a final order, and no leave to appeal to His Majesty can be granted from such an order.

(P. 57, Col. 2.)

C. P. Ramaswami Aiyar instructed by Brightwell and Morsely—for the Appellant.

K. Rajah Aiyar and M. Krishna Bharati—for the Respondents.

JUDGMENT :—At the last hearing of this appeal* we held, disagreeing with the lower Court, that plaintiff was not entitled to the charge she claimed, because *inter alia* it was not conferred on her by her decree, Exhibit J 3. That decree was passed on an award, Exhibit J 1 but did not in our opinion reproduce the term thereof, by which such a charge as plaintiff set up was created. Plaintiff after our decision induced the Court, which passed Exhibit J 3, to amend it under S. 152, C. P. C. by removal of what in the affidavit filed there is described as a clerical error and to insert words making the provision her case here required. She then moved for a re-hearing of the appeal on review and we allowed it.

The Advocate-General on behalf of 3rd defendant the appellant, first asked us to postpone the re-hearing, until he had appealed to the Privy Council against our order granting a review. But we pointed out that such an order could not be regarded as final for the purpose of S. 109, C.P.C. and that his application for leave in connection with it would be unsustainable. The re-hearing accordingly proceeded.

It may for the present purpose be at once conceded that, if Ex. J 3 had stood on 8—12—'17 the date of 3rd defendant's purchase in Court-sale, as it does now, plaintiff would be entitled to relief. The question however is whether she is so entitled, when Ex. J 3 as it was passed on 5—1—'17 and as it was expressed on the date of the sale, conferred no charge and recognized one only by the amendment, made over four years later, on 25—11—'21, in proceedings, to which 3rd defendant was not a party.

The exercise of the power to amend under S. 152 is discretionary and necessarily so, when no period of limitation is provided for application for its exercise and therefore no investigation of title can insure those, who acquire rights in property dealt with in a previous decree, against the effect of a subsequent amendment thereof. This and the consequence, that an application for amendment should be rejected as too late, if the rights of third parties acting in good faith have intervened, is recognized in *Hatton* v. *Harris* (1) and *Langat Singh* v. *Janki Koer* (2). It is clear that, if the amending Court, the District Court of Madura, had had the full facts before it, its duty would have been to refuse to use its powers for

*[Reported as *Narayana Ayyar* v. *Biyari Bivi*, 1922 Mad. 221=45 Mad. 103—ED.].

1. (1892) A. C. 547.
2. (1912) 39 Cal. 265.

plaintiff's benefit. In fact, as the copies filed here of the affidavits on which it acted show, it was told nothing of those facts or of the present proceedings, from which the necessity for plaintiff's obtaining an amendment had arisen, the construction which had actually been adopted by us being represented in one affidavit merely as "likely." If the District Court had been aware of the real state of the case, it cannot be doubted that it would have refused to consider the application, until at least 3rd defendant had had notice of it.

Plaintiff here has not succeeded in showing that the principle above referred to is for any reason inapplicable to this case and has argued only that, under the C. P. C. she could not have proceeded otherwise than she did and could not have made 3rd defendant a party to the amendment proceedings. It is not necessary for us to express a final opinion as to the applicability of Order XXII, Rule 10 or on the question whether the reference in that provision to "the pendency of the suit" covers the period between an original and an amended decree, for plaintiff could and should have made 3rd defendant a party in compliance with the general principle that persons, whom it is desired to bind by proceedings, can and must be impleaded in them. Third defendant having had no previous opportunity to object to amendment, is entitled to object to it now; and as it was delayed until long after he acquired his rights at the sale, of the imminence of which plaintiff admittedly knew, his objection must prevail.

Holding that the amended decree cannot in the circumstances be pleaded against 3rd defendant, we again allow the appeal, dismissing plaintiff's suit with costs (including those of the review petition) throughout.

1923 Madras. 58.

SPENCER AND RAMESAM, JJ.

Subbaraya Mudaliar ... (Petitioner) Appellant.

v.

Kandasamy Mudaly and another ... Respondents.

Civ. Rev. No. 562 of 1921, dated 15th March 1922 against the order of Sub-J., Chingleput, dated 28th July 1921.

(*a*) *Civil P. C.*, O. 41, *r.* 4—*Court's power to reverse a judgment in favour of a deceased defendant—Extent of.*

Under O. 41, r. 4, an appellate Court has power to reverse a judgment in favour of a deceased defendant as regards the whole of the plaintiff's claim and not only as regards that part of it which the surviving defendant or defendants were particularly interested in 40 Mad. 846 and 25 M. L. J. 248 Foll.

(P. 58, Col. 2.)

(*b*) *Practice—Decree or order of a Court a nullity—Application to vacate it—Interested party's power to apply.*

When the order or decree of a Court is a nullity, a party interested in showing it to be a nullity may apply to the Court to vacate it and if the Court is satisfied about the facts, it ought to do so. Such an application need not be filed under any particular section of the Code and the absence of a section does not render the application incompetent.

(P. 59, Col. 2.)

(*c*) *Civil P. C.*, *O* 1, *r.* 3—*Claimant's suit—Decree-holder whether a necessary party.*

To a claimant's suit the decree-holder may be made a party but is not a necessary party.

(P. 59.)

M. S. Venkatarama Aiyar—for the Petitioner.

K. Rajah Aiyar—for the Respondents.

SPENCER, J. :—Besides the decree that the plaintiff should recover the suit property from the purchaser, there was a common decree for costs in O. S. No. 430 of 1917 against two defendants, *viz.*, the decree-holder in O. S. No. 402 of 1916 and the auction-purchaser at the sale which took place in execution of that decree.

The decree-holder and the auction-purchaser filed a common appeal and the first Court's judgment was reversed although one of the appellants (the auction-purchaser) was at the time of the appellate judgment dead and his legal representatives had not been brought on record.

It is contended that the appeal had abated, that the Court had no power to pass any decree in favour of the deceased appellant, and that the judgment and the decree were nullities.

In *Somasundaram Chettiar* v. *Vaithilinga Mudaliar* (1) and in *Artharama Babu* v. *Arthapadhi* (2) it has been held that under O. 41, R. 4 of the Code of Civil Procedure, 1908, an appellate Court has power to reverse a judgment in favour of a deceased defendant as regards the whole of the plaintiff's claim and not only as

1. (1917) 40 Mad. 846 at 848.
2. (1913) 25 M. L. J. 248.

regards that part of it in which the surviving defendant or defendants were particularly interested.

Following these decisions the lower Court was right in dismissing the petition to treat the appeal as abated, apart from the incompetency of the petitioner to make the application under O. XXII, R. 3.

The Civil Revision Petition is dismissed with costs.

RAMESAM, J.:—Mr. K. Rajah Iyer, who appears for the respondent contends, firstly, that a petition like the one filed in the lower Court by the petitioner before us does not lie. He argues that there is no section in the Code authorising the filing of such a petition. I do not accede to this contention. When the order or decree of a Court is a nullity, a party interested in showing it to be a nullity may apply to the Court to vacate it and if the Court is satisfied about the facts, it ought to do so. I do not think that such an application need be filed under any particular section of the Code and the absence of a section does not render the application incompetent. (See *Chidambaram Chetty* v. *Ramanathan Chetty*) (3).

Mr. Raja Iyer next contended that the decree-holder is a necessary party to the claimant's suit though the property has passed to the auction-purchaser and that a suit without the decree-holder as a party would not be maintainable. I do not agree with this contention either: *Shiboo Narain Singh* v. *Mudden Ally* (4). In my opinion the decree-holder may be made a party but is not a necessary party.

Mr. Rajah Iyer next contends that the decree-holder being made a party to the claimant's suit which ended in a joint decree for costs against him and the auction-purchaser, the decree-holder had some interest in prosecuting the appeal. The grounds in the memorandum of appeal were common to him and the auction-purchaser. That being so, I agree with my learned brother in thinking that the principle of the cases in *Chintaman* v. *Gangabai*, (5) *Artharama Babu* v. *Arthapadhi* (2) and *Somasundaram Chettiar* v. *Vaithilinga Mudaliar* (1) applies. The appellate Court could dismiss the plaintiff's suit *in toto* under O. XLI, R. 4. In this case it is true that the decree-holder had no other interest than the interest he had by reason of the decree for costs, for the decree-holder could not be called upon to refund the purchase-money if the claimant succeeded either by petition (Art. 166 of the Indian Limitation Act, 1908) or by a regular suit (*Thirumalaisami Naidu* v. *Subramanian Chettiar*. (6) But for this result, the petitioner was himself responsible. The result is, the petition fails and is dismissed with costs.

3. (1917) 32 M. L. J. 487.
4. (1881) 7 Cal. 608.
5. (1903) 27 Bom. 284.
6. (1917) 40 Mad. 1009.

1923 Madras. 59.

KRISHNAN, J.

Arumuga Mudaliar and another ... Petitioners.

Cr. Rev. No. 144 of 1922 and Cr. Rev. Pet. No. 133 of 1922, dated 11th August 1922 revising the judgment of D. M. of Chingleput in Cr. Rev. No. 17 of 1921.

(*a*) *Criminal P. C., S.* 199—"*Complaint.*"

Under S. 199 "complaint" must be made to a Magistrate and not to the Police.

(P. 59, Col. 1.)

(*b*) *Criminal P. C., S.* 437—'*Further enquiry*'—*New charge.*

Further enquiry cannot be ordered on the bare possibility of an offence being disclosed on further evidence being taken. There must be something on record to indicate that such an offence was committed or there must be something to show that further evidence is available which has not been taken and which would support a charge for that offence.

(P. 60, Col. 1.)

F. S. Vaz—for the Petitioners.

The Public Prosecutor—for the Crown.

ORDER :—The order of the District Magistrate cannot be supported. His view that a "complaint" to the Police is sufficient under S. 199 of the Code of Criminal Procedure is erroneous. He has evidently overlooked the definition of the word "complaint" in S. 4, Cl. (*h*). It must be made to a Magistrate. There being no such complaint in this case the 1st Magistrate was right in rejecting the case sought to be made under S. 498 of the Indian Penal Code.

The District Magistrate also suggests that on further enquiry an offence under S. 366 of the Indian Penal Code may be made out. But no such charge was brought forward and there is no evidence

on record to show that an offence under that section was committed. Further enquiry cannot be ordered on the bare possibility of an offence being disclosed on further evidence being taken. There must be something on record to indicate that such an offence was committed or there must be something to show that further evidence is available, which has not been taken and which would support a charge for that offence. In this case neither position is made out.

The order of the District Magistrate is set aside.

1923 Madras. 60.

RAMESAM, J.

Thyalyee Ammal ... Petitioner.

v.

Srirangaroya Goundan and another ... Respondents.

Cr. Rev. No. 51 of 1922 and Cr. Rev. Pet. No. 51 of 1922 dated 5th May 1922 revising the order of Sub-Div. Magistrate of Erode, dated 8th May 1921 in Mis. C. No. 38 of 1920.

(*a*) *Criminal P. C., Ss.* 145 *and* 439—*Revision —Want of jurisdiction—Serious irregularity--Government of India Act* (1915) *S.* 107.

When there is initial want of jurisdiction it is clear that the proceedings though they may purport to be under S. 145 are not really proceedings under it and the High Court can interfere under S. 439, Cr. P. C. but if the proceedings were properly started, all interference on the ground of serious irregularity amounting to improper exercise of jurisdiction or improper refusal to exercise it can be only under S. 107 of the Charter Act. 31 Mad. 318 Foll. ; 26 M.L.J. 280 Ref.

(P. 62.)

(*b*) *Criminal P. C., S.* 145—*Possession by servant.*

S. 145 is not meant to be used to protect the possession of a servant against the master.

(P. 63.)

K. V. Krishnaswami Aiyar and N. Swaminatha Aiyar—for the Petitioner.

L. A. Govindaraghava Aiyar—for the Respondents.

ORDER:—This revision petition is against an order of the Sub-Divisional Magistrate of Erode, dated 8th December, 1921. An objection has been taken by Mr. Govindaraghava Aiyar, the learned vakil for the respondents, that I have no power to interfere. He relied on *Kamal Kutty* v. *Raja of Chirakkal,* (1) (Ayling and Napier, JJ.) and *Emperor* v. *Sakkamat Ali,* (2) (Knox, J.). A sentence in *Kamal Kutty* v. *Udayavarma Raja Valia Raja of Chirakal.* (1) "Once he is so satisfied his jurisdiction is complete and his subsequent action must be considered in relation to procedure and not jurisdiction"; quoted with approval and followed in *Vellanki Srinivasa Jagannatha Rao* v. *Venkata Gopalakrishna Rao,* (3) (Ayling, J.), produces the first impression that it decided that, once the proceedings are properly started under S. 145, there can be no challenge of those proceedings before the High Court. But the words "must be considered in relation to procedure" do not support such a view of the case. They rather show that no point of jurisdiction can be made after the initial stage but only a question of serious irregularity in procedure. For if no such power of interference exists, there is nothing to consider. The point argued in *Kamal Kutty* v. *Udayavarma Raja Valia Raja of Chirakkal* (1) was only a question of jurisdiction and the observations in the judgment refer to the only contention raised before the learned Judges. In *Vellanki Srinivasa Jagannatha Rao* v. *Venkata Gopalakrishna Rao,* (3) the irregularity complained of was that some of the evidence was taken by another Magistrate to whom part of the enquiry was delegated and I must take it that in the opinion of his Lordship (Ayling, J.,) it was not such an irregularity as to justify an interference with the orders. In Criminal Revision Case No. 407 of 1920, Napier, J., who was the other learned Judge who took part in *Kamal Kutty* v. *Udayavarma Raja Valia Raja of Chirakkal* (1) said. "It would have been better if he had referred to their evidence in his order but I cannot treat the absence of such a reference as a *serious irregularity* far less, a want of jurisdiction"—showing a serious irregularity may be a ground for interference (otherwise these words are unnecessary). I will show later on that where serious irregularity is a ground for interference the interference can be only under the Charter Act (S. 107) and not under S. 439 of the Criminal Procedure Code.

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1. (1913) 36 Mad., 275.
2. (1919) 41 All., 302.
3. 10 L. W., 447.

Anyhow Mr Govindaraghava Aiyar had to concede in the course of the argument, with reference to other decisions to which I shall presently refer that there may be cases in which the High Court can interfere on account of serious irregularity in the proceedings of the Magistrate amounting to improper exercise of jurisdiction or improper refusal to exercise his jurisdiction. In *Mahamed Koolayappa Rowther* v. *Sheik Abdul Kadir Rowthen* (4) (to which Ayling, J. was a party) it was held that, where the finding of the Magistrate was that the parties had joint possession S. 145 does not apply and the order was set aside. I agree with this decision and the cases in *Nritta Gopal Singh* v. *Chandi Charan Singh* (5) *Makhan Lal Roy* v. *Barada Kanta Roy* (6) and *Manik Chandra Chakravarti* v. *Preo Nath Kuar* (7) on which it was founded (see also *Basanta Kumari Dasi* v. *Mahesh Chandra Laha* (8). I wish to point out that the High Court could not interfere in such a case if the sentence in *Kamal Kutty* v. *Udayavarma Raja Valia Raja of Chirakkal* (1) quoted above is understood as if it meant to lay down that the High Court can never interfere if it were satisfied that the proceedings started properly. In *Tarunjan Bibee* v. *Asamuddi Bepari* (9); *Dharni Kanta Lahiry Chowdhury* v. *Girija Kanta Lahiry Chowdhury* (10) and *Radha Raman Ghose* v. *Baliram Ram* (11) it was held that the possession of a partner or a trustee or an agent is the possession of all the partners, co-trustees or principal and S. 145 should not be used to protect such possession and orders under S. 145 were set aside. It is true that the first of these cases was dissented from in *Narayana Asari* v. *Kandasami Asari* (12) reversing the decision of Sadasiva Aiyar, J. in *Kandasami Asari* v. *Narayana Asari* (13). But the dissent is on the merits as to the proper scope of S. 145 and the nature of the possession governed by it. All these cases are authorities for the proposition that when S. 145 is seemingly misapplied, the High Court can interfere. If the correct view is that an agent's possession or sole partner's possession will not be protected under S. 145 (as these Calcutta cases hold) but the Magistrate issued an order under S. 145 the High Court will interfere to set aside the order. If the correct view is that such possession must be protected under S. 145 (which is the view in *Narayana Asari* v. *Kandasami Asari* (12), the High Court will interfere to set aside an order refusing to give such protection. The case in *Narayana Asari* v. *Kandasami Asari* (12), cannot be explained away on the ground that the Magistrate in that case gave the order, that it was a single Judge of the High Court (Sadasiva Aiyar, J.,) that vacated it and the Judges who decided *Narayana Asari* v. *Kandasami Asari* (12), sitting in Letters Patent Appeal restored the Magistrate's order. I imagine that if the Magistrate himself refused to pass an order under S. 145 in that case, the High Court would be equally empowered to interfere, for, I do not think anybody would contend for the absurd anomaly that the High Court can interfere in Letters Patent Appeal with a wrong order of a single Judge of this Court but not with a wrong order of the Magistrate. Such a view will involve the further anomaly that the High Court can interfere where the Magistrate refused an order under S. 145 and a single Judge confirmed it; but the single Judge himself cannot set aside the order of the Magistrate even if he knew it to be wrong.

Now I come to other instances of interference. In *Vaithianatha Aiyar* v. *Suppalu Ammal* (14) (to which Ayling, J. was a party) it was held that there was no finding and the case was sent back. In *Velu Malavarayan* v. *Kuppuswami Pillai*, (15) Ayling and Coutts-Trotter, JJ. interfered in a case where there were several items, on the ground that all the claimants of the various items were not made parties. I am clear, therefore that neither Ayling, J. nor Napier, J. meant what is sought to be attributed to the decision in *Kamal Kutti* v. *Udayavarma Raja Valia Raja of Chirakkal*. (1) In *Srimanavedan Raja* v. *Parapravan Moi-*

4. (1914) 27 M. L. J. 199.
5. (1906) 10 C. W. N. 1088.
6. (1906) 11 C. W. N. 512.
7. (1912) 17 C. W. N. 205.
8. (1913) 40 Cal. 982.
9. (1899) 4 C. W. N. 426.
10. (1903) 8 C. W N. 485.
11. (1905) 32 Cal. 249.
12. (1916) 3 L. W. 164.
13. (1915) 2 L. W. 107.
14. (1914) 1 L. W. 939.
15. (1920) 12 L. W. 315.

du, (16) no oral evidence was taken and the case was sent back by two Judges of this Court. In *Marudanayakam Pillai* v. *Mohammad Rowthen*, (17) Seshagiri Aiyar, J. interfered on the ground that the Magistrate refused to take the evidence of witnesses tendered. He distinguished *Kamal Kutti* v. *Udayavarma Raja Valia Raja of Chirakkal*. (1) In *Panaganti Parthasarathy Nayanim Garu* v. *Pallikapu Venkatasami Reddy*, (18) Miller, J. set aside the Magistrate's order on the ground that it dealt with the right to possession and not to the actual possession. In *Kailash Behari Lal* v. *Jai Narain Rai* (19) the whole oral evidence was not considered and the High Court interfered. In *Atul Hazrah* v. *Uma Charan* (20) the High Court (Chitty and Walmsley, JJ.) interfered on the ground that a judgment-debtor should not be protected under S. 145.

In *Lal Behari Saha* v. *Bejoy Sankar Sikdar* (21) the High Court set aside the order on the ground that the order was based on what the Magistrate saw and heard and inferred at the local enquiry and which is not on the record. This case comes nearest to the case before me. In *Arumuga Govindan* v. *Venkatasubbier* (22), Wallis, J. set aside the order of the Magistrate on the ground that the Magistrate himself ought to take the evidence and the order was based solely and substantially on evidence recorded by a Subordinate Magistrate. I would here point out that the decision in *Vellanki Srinivasa Jagannatha Rao* v. *Venkata Gopalakrishna Rao* (3) is inconsistent with this and as between the two, I would prefer to agree with the view of Wallis, J. in *Arumuga Govindan* v. *Venkatasubbier*. (22)

When there is initial want of jurisdiction it is clear that the proceedings, though they may purport to be under S 145, Criminal Procedure Code are not really proceedings under it and the High Court can interfere under S. 439, Criminal Procedure Code, but if the proceedings were properly started, all interference on the ground of serious irregularity amounting to improper exercise of jurisdiction or improper refusal to exercise it can be only under S. 107 of the Charter Act. In *Bhaskari Kesavarayudu* v. *Bhaskaram Chalapatirayudu* (23), the petition was filed under S. 439, Criminal Procedure Code and there was no question of jurisdiction. This was pointed out by Sadasiva Aiyar, J. in *Palany Chetty* v. *Rathina Chetty*, (24) where he held that the High Court had power to interfere under the Charter Act in an appropriate case. I may add that the High Court in *Bhaskari Kesavarayudu* v. *Bhaskaram Chalapatirayudu* (23), considered the arguments on the merits and held that S. 145 may be used to protect the possession of a manager of a joint family following *Sri Mohan Thakur* v. *Narasing Mohan Thakur* (25) and distinguishing *Tarujan Bibee* v. *Asamuddi Bepari*, (26), *Dharani Kanta Lahiry Chowdhury* v. *Girija Kanta Lahiry Chowdhury* (27) and *Radha Raman Ghose* v. *Baliram Ram*, (28) (which were cited before them—though the report does not give the references) as "cases of co-trustees or ordinary partners in which the rights of each trustee or partner are equal." In *Sundar Nath* v. *Barana Nath* (29), the opinion of Walsh, J. seems to be that, though the High Court cannot call for records under S. 439 of the Charter Act the party can invoke the superintending power of the Court, if the record had been sent for and the application had been admitted.

I would observe that I have not considered, as it is irrelevant, the particular irregularity which was the ground of interference in each of the cases cited by me. It is possible that different Judges may take different views on the question whether a particular irregularity is grave enough to justify interference. I have cited them only to show that the power exists provided that there is irregularity serious enough to vitiate the order in the opinion of the Court.

In the present case, the plea of the counter-petitioner was that Sellappa Goundan helped the petitioner (who was a

16. (1920) 38 M. L J. 73.
17. (1916) 34 I. C. 329.
18. (1910) 34 Mad. 138.
19. (1920) Pat. 288.
20. (1916) 20 C. W. N. 796.
21. (1905) 10 C. W. N. 181.
22. (1908) 31 Mad. 82.
23. (1908) 31 Mad. 318.
24. (1914) 26 M. L. J. 203.
25. (1900) 27 Cal. 259.
26. (1899) 4 C. W. N. 426.
27. (1903) 8 C. W. N. 485.
28. (1905) 32 Cal. 249.
29. (1918) 40 All. 364.

young widow of 20) in all her litigation with her mother-in-law. In paragraph (6) the counter-petitioner says "Sellappa Goundan prosecuted the suit with Thyalyi Ammal as the plaintiff and carried on litigation in three Courts, all of which ended in favour of Sellappa Goundan", as if Sellappa Goundan was then the real owner and plaintiff was merely a benamidar. In view of the fact that the title at that time was in the plaintiff and is still in her and all that the counter-petitioner could plead (in paragraph 5) is a bare agreement without any conveyance, the suggestion that the title was in Sellappa Goundan is so absurd that it only shows the extravagant position taken up by the counter-petitioner. All the documentary evidence from the termination of the litigation up to the present dispute was in favour of the petitioner. The Magistrate says :

"The counter-petitioners readily admit that the pattas and kist receipts are also in the name of petitioner. There is therefore no doubt as to the legal right of petitioner to the lands. But the question is whether petitioner was actually enjoying the lands."

There is a good deal of fallacy in these statements. The Magistrate seems to think that a person must deal with the tenants personally or collect the rents from them personally or periodically visit or walk on the land if the dealings are to constitute possession in law. He later on says that Sellappa Goundan "must have enjoyed the lands keeping the petitioner under his protection." According to the learned Magistrate, if *A* (a female who is the owner of certain lands) and *B* a friendly male who helps her, live together and enjoy the income of the lands and *B* has all the dealings with the tenants such as negotiating the lease with a tenant, getting him to execute the Muchilika in *A's* name and collects the produce and brings it to the house to be enjoyed by both, *A* has no possession, whereas the correct view is that, in such cases, A is the person in actual enjoyment and legal possession, and *B* is merely a servant. *B* has not even an agent's possession. On the view of the Magistrate, no Zemindar who has a large estate consisting of several divisions and who manages each division through a Samuddar and a Tanadar and no big landholder who, being at a distance, manages his lands through his clerk, is in possession of his lands. It is the Tanadar of the Zemindar or the clerk of the landholder that is in possession and if the Tanadar or the clerk chooses to rebel against the master, his possession must be protected under S. 145. It is far better that S. 145 does not exist than that such use should be made of it or such use should not be interfered with by a High Court. If the Magistrate has clearly recorded his findings as to the facts, I would have at once interfered in favour of the petitioner. But there is no finding beyond the sentence, "In the nature of things, he must have enjoyed the lands keeping petitioner under his protection"—a statement based on some speculative consideration which does not commend itself to me as probable or even plausible. He first thinks that Sellappa Goundan must have helped the petitioner. The next step is he would not have allowed the petitioner to enjoy all the lands and keep quiet. If this meant that he would have claimed some remuneration for the help rendered, one would not quarrel with it. The next step is that he (Sellappa) must have enjoyed all the lands keeping the petitioner in his protection—a conclusion so perverse that I cannot accept it as a finding. When we find that this conclusion is arrived at after getting rid of the documentary evidence by saying that it relates to the legal right only (which is not correct) and by getting rid of the oral evidence by saying that it is unnecessary to enter into it—why we are not told,—I am of opinion there is no judgment or finding that any Court can accept.

I therefore send back the case for a proper finding on the evidence on record and in the light of my remarks as to possession. Costs to abide the result.

Order set aside : Case remanded.

1923 Madras. 63.

SCHWABE, C.J. AND WALLACE, J.

R. A. Arunachala Iyer ... Appellant.

v.

C. Subbaramiah ... Respondent.

O. S. A. No. 116 of 1921, dated 2nd August 1922 from the judgment and order of Phillipps, J., dated 19th October 1921.

C. P. C., O. 9, R. 13—Sufficient cause.

On an application to set aside *ex parte* decree, the question to be considered by the Court is not whether by some human possibility, being wise after the event, he could not have got there in time or whether a man who studied his railway guide a little better would not have got in another train or taken another route, but whether the man honestly intended to be in Court and did his best, though in his own stupid way, to get there in time; and once the Court is satisfied that the man did try to get there and that he would have got there in time but for the intervention of an inevitable accident for which he was in no way responsible, it is the duty of the Court to set aside the judgment mulcting in proper cases the delinquent man in costs. It should never be the intention of the Court that a man should be deprived of a hearing unless there has been something equivalent to misconduct or gross negligence on his part or something which cannot be put right so far as the other side is concerned by making the man to blame, pay for it.

C. P. Ramaswami Aiyar and K. Jagannatha Aiyar—for the Appellant.

K. Bhashyam Aiyangar and V. V. Devanathan—for the Respondents.

SCHWABE, C.J. :—I have expressed myself on this subject in fairly strong language before and I propose to do so again.

When for some reason a man has not attended a case in Court and there is no sufficient explanation of his absence, the case, by reason of his absence, is allowed to go *ex parte*. If he comes to Court afterwards and asks that his case may be restored to file, the question to be considered by the Court is not whether by some human possibility, being wise after the event, he could not have got there in time or whether a man who studied his railway guide a little better would not have got in another train or taken another route, but whether the man honestly intended to be in Court and did his best, though in his own stupid way, to get there in time; and once the Court is satisfied, as was the fact in this case, that the man did try to get there and that he would have got there in time but for the intervention of an inevitable accident for which he was in no way responsible, it is the duty of the Court, in my judgment, to set aside the judgment, mulcting, in proper cases, the delinquent man in costs. In all those cases this universal panacea for healing all wounds, as it has been called in England, will properly be applied. It is not right in cases of this kind that the man should have his case disposed of without being heard. These Courts are here so that people who have cases can have those cases heard and determined, and it should never be the intention of the Court that a man should be deprived of a hearing unless there has been something equivalent to misconduct or gross negligence on his part or something which cannot be put right, so far as the other side is concerned, by making the man to blame pay for it.

The proper order in this case should have been that the case should be restored to the list and the judgment set aside on payment of all costs thrown away by the defendant, and that is the order that I propose to make. The costs of this appeal will be paid by the respondent. The costs of the application to set aside the judgment before Phillips, J. will be the costs in the cause.

WALLACE, J. :—I agree. Whether there was negligence precedent or not does not affect the case. Under ordinary conditions if the appellant had started from Trichinopoly by the evening train on the 12th, he would have been in time for the hearing of this case on the 13th, and the breach on the railway line is obviously a sufficient cause for his not appearing, and that is the question which the Court had to decide. I am quite clear that there is sufficient cause for his not appearing and I therefore agree with the judgment of the learned Chief Justice.

1923 Madras. 64.

ODGERS AND DEVADOSS, JJ.

T. M. Sundara Aiyar and another ... Plaintiffs—Appellants.

v.

T. M. Ananthapadmanabha Aiyar and others ... Defendants—Respondents.

S. A. No. 1313 of 1920, dated 27th April 1922 against the decree of Sub-Judge of North Arcot in A. S. No. 89 of 1918.

(a) *Contract Act, S. 70—Acceptance of benefit—Doing an act for another.*

Where it is proved that defendant co-sharer was asked to join in the suit and pay his quota of the expenses and was warned that he would be responsible for the loss that might accrue by his not joining the plaintiffs in filing a suit on the mortgage; it cannot be said that he has not had

the option. But it is not necessary that he should have had the option of joining in the suit when he gladly availed himself of the benefit of the plaintiff's action. Where a person does an act which is greatly beneficial to himself and which is sure to benefit another, the former cannot claim contribution from the latter; in other words where a person is bound to do an act or would do an act, whether another consents to it or not, the former cannot claim contribution even though the latter derives benefit in consequence of the act. In short, where the benefit to himself is great, a person cannot be said to do the thing for another within the meaning of S. 70 but where defendant applied to be and became co-plaintiff he is liable to contribute. 45 I. C. 786, 21 Cal. 496, 33 Mad. 15, 16 M. L. T. 375 Foll.

(b) *Limitation Act, Arts.*62, 120—*Applicability —Starting point.*

Article 120, and not 62 or 59, applies to a suit for contribution for expenses incurred by plaintiff from his co-plaintiff and limitation begins from the time when co-plaintiff got his share of the decretal amount. 45 I. C. 786; 25 C. W. N. 813; 34 I. C., 54 Foll.

T. Ethiraja Mudaliar—for the Appellants.

C. Padmanabha Aiyangar—for the Respondents.

ODGERS, J.:—I have had the advantage of reading the judgment about to be delivered by my learned brother which sets out the facts. The matter arises under S. 70 of the Indian Contract Act. The respondent in this case does not dispute that he has had the benefit of the 1st plaintiff's action but he says all the expenses would have been incurred even if 1st defendant had not joined as plaintiff. It is true that the District Munsif found generally that some of the items incurred would have had to be paid whether or not 1st defendant was a plaintiff in the suit but the appeal to the lower appellate Court was dismissed on two points of law: (1) that the party sought to be made liable must not only have benefited but must have had the opportunity of accepting or rejecting the benefit, and that in this case there is no proof of such option. This is laid down in *Raja of Pittapuram* v. *Secretary of State* (1). The second point of law is that when a person paying, is himself interested in making the payment he cannot be presumed to have intended to act for the other. That he accepted and intended to accept the benefit is, I think, shown by the facts that he himself successfully applied to be joined in the suit as a plaintiff and by his having drawn out of Court his share of the decree amount. It cannot in my view be said that plaintiff intended to do the act gratuitously as regards 1st defendant in face of the notices plaintiff served upon him, Exs. B and B-1, the effect of which has not been considered by the lower Appellate Court. The notices go to show that plaintiff intended to act for 1st defendant in the suit as well as for himself. I therefore think that respondent has not only been benefited by his actions but has adopted the benefit.

As to limitation, it is quite clear that Art. 61 as applied by the lower Appellate Court cannot apply. It refers only to money paid for the defendants and as stated by Oldfield, J., in *Viswanatha Vijia Kumar Bangaroo* v. *G. R. Orr*, (2) that article is inapplicable to a case such as this where there was at the time of payment no question of any immediate benefit being conferred on defendant by it. It was there held that Art. 120 applied. I am of opinion that this is the proper article to apply and if so, the suit is in time, as limitation will begin to run from the time 1st defendant derived benefit from the suit *i.e.*, when he first received a cheque for his share of the money decreed.

I therefore think that a case is made out for appellants under S. 70 of the Indian Contract Act. There must be a finding as to which, if any, of the items incurred by the plaintiffs were reasonably necessary for the conduct of the suit and the lower Appellate Court is requested to find accordingly. Finding will be submitted in 6 weeks, 7 days are allowed for filing objections. Fresh evidence may be taken. If it is found any items were reasonably necessary, appellant will have a decree for one-fourth of the amount so found.

DEVADOSS, J.—The facts of the case are.—In 1891 when plaintiffs and 1st defendant were members of a joint family a mortgage was taken with the family funds. The plaintiffs got a half share and the 1st defendant one-fourth share of the mortgage. Before a suit on the mortgage could be barred the plaintiffs called upon the 1st defendant to join them in filing a suit on it. The 1st defendant did not care to reply to the notices of the

1. (1914) 16 M. L. T. 375.

2. (1918) 45 I. C. 786 (793).

plaintiffs who thereupon filed O. S. No. 31 of 1909, on 30th August, 1909 on the mortgage, making the 1st defendant a *pro forma* defendant. The 1st defendant made an application to the Court on 13th October, 1909, to be made a co-plaintiff which was granted. A mortgage decree was passed on 11th December, 1912. The 1st defendant received his quota of the money in Court by cheques, dated 21st December, 1914 and 22nd December, 1914. The suit out of which this second appeal arises was filed on 18th December, 1917. The plaintiffs seek contribution from the denfendants in respect of the expenses incurred by them in conducting the suit. The defendants plead that the expenses were not necessary for the conduct of the suit and the claim is barred by limitation. The District Munsif dismissed the suit holding that Art. 59 of the Limitation Act applied. The learned Subordinate Judge dismissed plaintiffs' appeal on the ground that S. 70 of the Contract Act did not apply, that defendant had no option of refusing the benefit, that the plaintiffs acted for their own benefit and did not intend to benefit the 1st defendant and that in any event the suit was barred by reason of Art. 61 of the Limitation Act.

The question whether the 1st defendant had the option of refusing the benefit could be disposed of easily. Exs. B and B-1 show that defendant was asked to join in the suit and pay his quota of the expenses and was warned that he would be responsible for the loss that might accrue by his not joining the plaintiffs in filing a suit on the mortgage. The 1st defendant chose not to reply. It cannot be said in the circumstances he has not had the option. But it is not necessary that he should have had the option of joining in the suit when he gladly availed himself of the benefit of the plaintiffs' action.

The question whether the plaintiffs did intend to benefit the 1st defendant is one of difficulty. The suit brought by the plaintiffs is for the benefit of both. Without making the 1st defendant a party, the plaintiffs could not sue, as the law requires that all persons interested in the mortgage should be parties to the suit. In this case the plaintiffs did not intend to do the thing they did gratuitously, for they clearly demanded that the 1st defendant should pay his share of the expenses and join in the suit (*vide* Ex. B). The respondents' vakil contended that where the plaintiff is interested in doing a thing which benefits himself and the defendant, plaintiff is not entitled to ask for contribution even though the defendant gets the benefit of the plaintiff's act. This contention deserves consideration. Of the 4 conditions required by S. 70 of the Indian Contract Act, two are fulfilled in this case, *viz.*:—the legality of the act and the enjoyment of the resulting benefit. The other conditions are.—(1) Plaintiff doing the act for the 1st defendant and (2) the plaintiff not intending to do the thing gratuitously. I have already held that plaintiffs did not intend to do the act gratuitously. The remaining question:—did the plaintiff file and conduct the suit for the 1st defendant—must be answered in the negative. It may be taken as settled law that where a person does an act which is greatly beneficial to himself and which is sure to benefit another, the former cannot claim contribution from the latter; in other words, where a person is bound to do an act or would do an act whether another consents to it or not, the former cannot claim contribution even though the latter derives benefit in consequence of the act. In short, where the benefit to himself is great, a person cannot be said to do the thing for another within the meaning of S. 70 of the Contract Act (Vide *Viswanadha Vijia Kumara Bangaroo* v. *G. R. Orr* (2) *Abdul Wahid Khan* v. *Shaluka Bibi* (3) *Yogambal Boyee Ammani Ammal* v. *Naina Pillai Marakayar* (4) and *Rajah of Pittapuram* v. *Secretary of State* (1).

In this case the 1st defendant applied to the Court to be made a plaintiff and continued in that capacity throughout the proceedings. An application was made for amendment of the plaint and to this application the 1st defendant was also a party and the amendment asked for was ordered on terms and the 1st defendant cannot now be heard to say that he did not give his tacit consent to the application for amendment. If he had remained *ex parte* and had taken no interest in the proceedings the matter might have been different; but in the light of the evidence and taking all the circumstances into con-

3. (1894) 21 Cal. 496.
4. (1910) 33 Mad. 15.

sideration I hold that 1st defendant is liable to contribution to the plaintiffs in respect of all legitimate expenses of the suit.

The next question is one of limitation. The District Munsif held that Art. 59 of Sch. I of the Limitation Act applied to the facts of the case. The lower Appellate Court thought that Art. 61 applied. Art. 59 is clearly inapplicable. Art. 61 is not applicable to the present case as no money was paid for the defendant. Expenses were incurred in filing a suit on a mortgage and the mortgage decree was for the benefit of the 1st defendant as well. The proper Article applicable to the case is Art. 120. In *Viswanadha Vijia Kumara Bangaroo* v. *G. R. Orr* (2), the facts were, the lessees of the Sivaganga Zemindari executed certain necessary repairs to a tank which irrigated their lands and the defendants' lands and also the lands of other persons. The lessees claimed a propotionate share of the expenses from the defendants under S. 70 of the Contract Act. Abdur Rahim and Oldfield, JJ. held that Art. 120 and not Art. 61 of the Limitation Act applied to the facts of the case.

The next question is, from what date did limitation begin to run ? Time began to run, only from the date when the first defendant enjoyed the benefit of the plaintiffs' act, *i.e.*, from the date when he got cheques from the Munsif's Court on 21st December, 1914 and 22nd December, 1914. In *Upendra Krishna Mandal* v. *Naba Kishore Mandal* (5) the facts were—the plaintiffs and defendants were joint-owners of a tank situated within the limits of the Calcutta Municipality. The tank was in an insanitary condition and the water was so unwholesome as to be a menace to the health of the locality. The corporation issued a notice on the common manager of the estate of the plaintiffs and the defendants directing him to fill up the tank. As the requisition was ignored criminal proceedings were started. The common manager arranged with the plaintiffs to take steps to fill up the tank. The tank was filled up and the plaintiffs demanded a proportionate share of the expenses from the defendants who refused to contribute. The plaintiffs sued the defendants for contribution. Mookerjee and Fletcher, JJ. held " that Art. 120 applied and that the liability of the defendant did not arise in successive fragments as the plaintiff paid money to the contractor from day to day; the liability arose when the tank was filled up and the contemplated benefit was conferred."

In *Umatol Soghar* v. *Zohra* (6) Chapman and Atkinson, JJ., of the Patna High Court held, that plaintiff would have no cause of action against the defendant if the suit intended to benefit both the plaintiff and the defendant was dismissed. It follows that the cause of action arose only when the 1st defendant received the benefit of the suit, that is, when he got cheques for his share of the amount realized in execution.

It was contended by Mr. Padmanabha Aiyangar that the order on the amendment petition was a decree and the defendant was a judgment-debtor and he could not be asked to contribute after 3 years. In the first place the order on the amendment petition was not a decree and secondly the cause of action could not arise before the defendant received the benefit of the plaintiff's action.

The defendant is liable to pay his share of Rs. 258-2-0. With regard to the rest of the claim the lower Appellate Court has not recorded a finding as to whether it was necessary to incur it for the conduct of the suit. Before the Second Appeal could be disposed of a finding is necessary.

I agree with my learned brother in the order proposed by him.

5. (1920) 25 C. W. N. 813.

6. (1916) 34 I. C. 54.

1923 Madras. 67.

KRISHNAN AND VENKATASUBBA RAO, JJ.

Venkatarama Aiyar ... Plaintiff—Appellant.

v.

Aiyasami Aiyar and others ... Defendants—Respondents.

S. A. No. 705 of 1920, dated 19th July 1922 against the decree of Dt. Judge, Trichinopoly, in A. No. 598 of 1919.

(a) *Limitation Act, Art. 144—Right to sue—When accrues with right of—Sale gift, etc.*

Where plaintiff gifted property to another on condition that on his return from Port Blair the donee was to return it and where the donee sold

the property more than 12 years before his return. *Held*, that for a suit by plaintiff against vendee, limitation began only on return from Port Blair.

(*b*) *T. P. Act, Ss.* 126, 31—*Defeasance clause enforceable if,—Hindu Law and rights of* bona fide *transferee not abrogated.*

Subject to two limitations, provisions for defeasance on the occurrence of an uncertain event are legal and enforceable. The limitations are that no rule of Hindu Law should be infringed and that the rights of transferees for consideration without notice should be safeguarded.

(*c*) *Hindu Law—Gift with right of revoking binds donee's heirs.*

Where the transfer deed provides that the property conveyed shall go to transferee and pass to his heirs in the ordinary course of inheritance subject to the single contingency that if the plaintiff returns, it will go back to him and pass to him and pass to his heirs in the ordinary course of inheritance. *Held*, the clause providing that in the event of the plaintiff's return all the properties shall revert to him, is legal and enforceable equally upon transferee and upon his heirs. 6 M. I. A. 555 ; 16 Cal. 383 ; 9 M. I. A. 136 Foll.

(*d*) *Civil P. C., S.* 105—*Scope of.*

Points decided by remand order cannot be reconsidered at final hearing.

K. R. Rangaswami Aiyengar—for Appellant.

T. V. Muthukrishna Aiyar and K. F. Srinivasa Aiyar—for Respondent.

JUDGMENT :—This appeal arises out of a somewhat curious case. The plaintiff Venkatrama Aiyar was convicted of the murder of his wife and sentenced to transportation for life. On the eve of departure for Port Blair he executed a deed of gift in favour of one Singam Aiyar a relation of his. This was on 23—5—1900. The deed of gift omitting unnecessary words, runs as follows :—'You, Singam Aiyar, should obtain possession of and enjoy the undermentioned moveable and immoveable properties with the rights of gift, sale, etc. In case my sentence should terminate and I should come back to my village, you should hand over the said properties to me. If I should not return you should get the undermentioned properties. You should discharge the debts due by me from my property and also collect the debts due to me." Four years afterwards on 20—6—1904, Singam Aiyar sold certain of the immoveable properties, which are the subject-matter of the present suit, to the defendants. Singam Aiyar died subsequently. Plaintiff was released after serving 16 years and returned to his native place in October 1916. He brings the present suit to recover possession of the property from the vendees of Singam Aiyar. The District Munsif gave him a decree for possession and mesne profits. The District Judge has set aside the decree and directed that the suit should be dismissed with costs. This Second Appeal is now preferred to us.

The District Judge has decided against the plaintiff on two grounds : one is limitation, which is not supported before us, and on which we have no hesitation in differing from him. The second ground is that the obligation to surrender the properties is only a personal one against Singam Aiyar and his heirs and not against the alienees and that this suit against the alienees alone without impleading Singam Aiyar's sons, is unmaintainable. No objection was taken in the first Court on the ground of mis-joinder for failure to implead the sons of Singam Aiyar, and the question of whether the right to recover the property is personal only to Singam Aiyar and possibly his sons will depend on the question of whether the defeasance clause is legal and enforceable. On this point we heard a long and detailed argument. The relevant provisions of the Transfer of Property Act are Ss. 31 and 126, S. 31 says that "subject to the provisions of S. 12" (with which we have no concern), "on a transfer of property an interest therein, may be created with the condition superadded that it shall cease to exist in case a specified uncertain event shall happen, or in case a specified uncertain event shall not happen." This is a general clause. But the specific clause having reference only to gifts is S. 126. This runs thus : "The donor and donee may agree that on the happening of any specified event, which does not depend on the will of the donor, a gift shall be suspended or revoked. Nothing in this section shall be deemed to affect the rights of transferees for consideration without notice." Both S. 31 and S. 126 are subject to the limitation that no rule of Hindu Law should be infringed. This is provided by S. 2 of the Act, as regards S. 31 and by S. 129 as regards S. 126. The general effect of this is that subject to two limitations, provisions for defeasance on the occurrence of an uncertain event are legal and enforceable. The

limitations are that no rule of Hindu Law should be infringed and that the rights of transferees for consideration without notice should be safeguarded. This general rule appears to be in accordance with English Law.—*Vide* 24 Halsbury 170. "An estate in fee may be granted with words of direct limitation so as to be *prima facie* a fee simple, but with further words sometimes called words of collateral limitation whereby it is liable to be determined on the happening of some future event, provided that this is of such a nature that by possibility it may never happen at all. An estate so limited is called a 'determinable fee' and moreover it is no objection that the future event may happen at a time beyond the limit allowed by the rule against perpetuities." Whether the defendants are transferees for consideration without notice so as to be entitled to the benefit of the last paragraph of S. 126 is a point which has not been determined by the District Judge and on which a finding will be necessary.

The other question to which the argument before us has been almost entirely devoted is whether a defeasance clause, such as the present, transgresses any rule of Hindu Law. The respondents contend that, unlike English Law, Hindu Law treats all conditions of defeasance as illegal. Apart from any question of alienation by Singam Aiyar they say that if the plaintiff had returned within a month of the execution of the gift-deed, Singam Aiyar being alive and the properties not alienated, the plaintiff would even then not be entitled to recover the gifted properties. We have been referred to no authority which lays down that an estate once vested cannot be divested; and the main authority to which we have been referred *Krishnaswami Aiyar* v. *Appuvier* (1) in which the principal rulings quoted to us are discussed is to the contrary effect, and we can see no reason why we should hold in appellant's favour on this point. What we have been referred to is the collection of rulings (of which *Sreemathi Soorjeemoney Dassee* v. *Deenobando Mullic* (2) and the *Tagore case* (3) are the best examples), dealing with variations in the ordinary rules of inheritance purporting to be directed by wills. We make no distinction between gifts and wills. But we must observe that the general principle of all these decisions appears to be the desirability of frustrating the attempts of private individuals to vary the course of inheritance prescribed by Hindu Law. We will quote one passage from the Tagore case: "It follows directly from this that a private individual, who attempts by gift or will to make property inheritable otherwise than the law directs, is assuming to legislate, and that the gift must fail and the inheritance take place as the law directs." This was well expressed by Lord Justice Turner in *Soorjeemony Dossee* v. *Deenobondo Mullick.* (4) "A man cannot create a new form of estate or alter the line of succession allowed by law, for the purpose of carrying out his own wishes or views of policy." Similarly in *Kristoromoni Dasi* v. *Narendra Krishna Bahadur,* (5) what is condemned is the initiation of a course of succession unknown to Hindu Law. It is with this principle in mind that a reference has been made in *Sreemathi Surjeemoney Dasse* v. *Deenobondo Mullick,* (6) to the limitation of the defeasibility of an event which has to happen, "if at all immediately on the close of a life in being." Now the slightest consideration of the deed of gift which we are considering, Ex. A, will show that it does not purport or attempt to alter the ordinary course of succession by inheritance or to create any new form of estate unless the defeasible estate is *perse* unknown to Hindu Law, a point on which, as already stated we can find no authority. Exhibit A provides that the property conveyed shall go to Singam Aiyar and pass to his heirs in the ordinary course of inheritance subject to the single contingency that, if the plaintiff returns, it will go back to him and pass to him and pass to his heirs in the ordinary course of inheritance. We do not, therefore, think that any of the rulings of this class quoted by the learned vakil for the respondents has any bearing on the present case. In our opinion the clause providing that in the event of the plaintiff's return, all the properties shall revert to him is legal and enforceable,

1. (1920) 12 L. W. 519.
2. (1862) 9 M. I. A. 123.
3. I. A. Supp. Vol. p. 47.
4. (1856) 6 M. I. A. 526.
5. (1882) 16 Cal. 383=19 I. A. 29.
6. (1862) 9 M. I. A. 136.

upon equally Singam Aiyar and upon Singam Aiyar's heirs.

It only remains to determine whether the defendants are entitled to resist the suit as purchasers for consideration without notice. This is embodied in the second issue, and on this we must request the District Judge to return a finding within two months on the evidence already on record. Seven days are allowed for filing objections. On return of the finding the following judgment was delivered :

JUDGMENT :—In this case, the learned Judges who heard the case in the first instance called for a finding on the question raised in issue (2) whether the contesting defendants were *bona fide* purchasers for value without notice and as such have a valid title against the plaintiff which they could rely upon under S. 126 of the Transfer of Property Act. The learned District Judge has returned a finding that they were purchasers for value. But on the question of notice his finding is somewhat indefinite. On looking to the facts stated by him, it is however clear to our mind that they are persons who purchased the property with notice of the defeasance clause in the original deed of gift granted by the plaintiff to Singam Aiyar. The District Judge says that their attention was drawn to the terms of the document and that they read the document. Reading the document and looking at the nature of the title under which Singam Aiyar held the property, he thinks is a kind of constructive notice ; this is clearly wrong. They had actual notice of the title under which the property was held by Singam Aiyar, and therefore we must hold that the contesting defendants do not bring themselves within S. 126 last clause, so as to be able to support their title as against the plaintiff.

The learned Judges on the former occasion observed at the end of their judgment "It only remains to determine whether the defendants are entitled to resist the suit as purchasers for consideration without notice." It is only on that issue that they sent the case down for a finding. It is now argued before us that there are still matters to be disposed of by this Court before a final decree is passed in this case, and it is contended in the first instance that really no question of notice would arise on a proper construction of Ex. A as the sale in the particular instance to the contesting defendants was authorized by the document. We could not allow this point to be raised now even if there is anything in it as it would be entirely against the judgment of the learned Judges on the former occasion by which the parties are bound.

In the next place it was argued that we should call for a finding on issues 5 and 6, issue 5 relating to the question of equities that might arise in favour of the defendants, and issue 6 relating to compensation for improvements alleged to have been made.

As regards issue 5, it is clear that the equities could not be worked out in this case as an account will have to be gone into of all the dealings with all the properties of the plaintiff from the time when he left this country. The learned District Judge held that that could not be done without his heirs being made parties to the suit. Apparently on the former occasion when the case was before this Court the matter was not pressed and no finding was asked for on that issue.

Again as regards issue (6) the matter stands thus. The learned District Munsif found in very strong terms that the alleged claim for improvement was mythical and unproved. Against that no doubt on appeal to the District Judge a ground was stated in the appeal memo but it would appear from the judgment of the District Judge that the point was not really argued before him. Perhaps as he was reversing the decree in favour of the defendants the fact that it was not argued before him may not be very material. But when the case was before this Court on the former occasion when a finding was called for it should certainly have been brought to the notice of the learned Judges that a finding on this matter would be necessary for the disposal of this case. However, that may be, acting under S. 103 of the Civil Procedure Code we have heard the evidence on the point ourselves. We consider that the District Munsif's view of the claim for improvement is clearly correct. It is therefore unnecessary to remit the case on issue (6) even if we think that that issue is open to consideration at this stage. In these circumstances we must accept the finding.

In the result the decree of the lower Appellate Court must be set aside and that of the District Munsif restored with costs in both Courts.

1923 Madras. 71.

SCHWABE, C.J. AND WALLACE, J.

Bysani Madhava Chettiar Charity Fund represented by its Secretary K. Nammalwar Chetty ... Appellant.

v.

G. R. Krishnasamy Chetty ... Respondent.

O. S. A. No. 109 of 1921, dated 2nd August 1922 against the judgment and decree of Phillips, J., dated 1st September 1921.

T. P. Act, S. 58 Mortgage—Construction.

The meaning and the legal effect of a document is to be determined on its own terms alone. Under a mortgage possession of the mortgaged property was given to the mortgagee but rent and profits were not given in lieu of interest. There was a separate provision fixing the rate of interest and the method by which it was to be recovered, namely that the rents and profits were to be set off, as far as available, towards the payment of interest. The contingency of an excess of rents and profits over interest or *vice versa* was specifically contemplated, and for the case of deficit, where the whole of the interest was not met from rents and profits, it was provided that the mortgagee may recover from the mortgagors month after month. The sum to be repaid prior to redemption and for the purpose of redemption was merely the original principal sum. *Held*: that the document meant that interest was not to be a charge on the mortgaged property but was left to be recovered under the personal covenant of the mortgagors.

A. Krishnaswami Aiyar, S. Rangaswami Aiyengar—for the Appellant.

K. Rajah Aiyar and R. Ganapathi Aiyangar—for the Respondent.

WALLACE, J.:—The chief point in this appeal is whether the terms of the mortgage document in suit imply and impose a charge on the mortgaged property. The mortgage is not one which will come under the definition of any of the ordinary kinds of mortgage. It is not a simple mortgage because possession of the mortgaged property is given; hence the usual principle that in simple mortgage interest as well as principal is secured on the property will not *prima facie* apply. It is not a usufructuary mortgage, because the rents and profits are not given *in lieu of interest*; but there is a separate provision fixing the rate of interest and the method by which it is to be recovered, namely that the rents and profits are to be set off, as far as available, towards the payment of interest. The contingency of an excess of rents and profits over interest or *vice versa* is specifically contemplated and for the case of deficit, where the whole of the interest is not met from rents and profits, it is provided that the mortgagee may recover "from us (that is the mortgagors) month after month." This to my mind means that the remedy which the parties secured by the mortgage for any interest not discharged by the rents and profits was a personal remedy, and that such deficiency was not to be added to the principal mortgage sum. This view is strengthened by a further sentence in the mortgage-deed "we shall pay the aforesaid principal of Rs. 10,000 to you or your order, redeem this mortgaged property and take back the document" which seems to me to indicate further that the sum to be repaid, prior to redemption and for the purpose of redemption, was merely the original principal sum, I therefore hold that this document means that interest was not to be a charge on the mortgaged property, but was left to be recovered under the personal covenant of the mortgagors.

Several reported cases have been put before us. With regard to these it is essential to say first that the meaning and the legal effect of a document is to be determined on its own terms alone. The two cases most akin to the present one are *Phul Kuar* v. *Murli Dhar* (1), and *Chintaman* v. *Dulari* (2). In the former case the chief point for decision was whether there was a mortgage at all, but it was incidentally decided that where there was a recital in the document that interest should be paid by the mortgagor "from his own pocket", there was no charge created on the property for interest. Such a recital is similar to the recital now before us that interest shall be recoverable "from us month after month". In 33 All. 107 it was held that, where the document provided that the rents and profits were to be appropriated by the mortgagee 'on account of interest' and that, for any deficiency to recover the

1. (1878) 2 All. 527.
2. (1911) 33 All. 107.

whole amount due for interest, the mortgagor would meet that deficiency with interest at Rs. 2 per cent. per mensem this deficiency was realizable from the mortgaged property. With reference to this case I would point out that the exact terms of the document are not given in the judgment, and that the exact terms are obviously of peculiar importance, since although the *resume* of the document given in the judgment seems to show that the stipulation regarding the payment of interest on the deficiency of interest was shown as that regarding deficiency of interest itself, the learned Judges held that while there was a charge on the property for the latter there was no charge on it for the former. Therefore in the absence of the exact terms of the document in that case I am not prepared to adopt the ruling to the present case. In *Ali Ahmeed* v. *Kalka Prasad* (3) the mortgagee took the annual profit in lieu of interest and therefore there was a true usufructuary mortgage under which no question of a charge on the property for interest can arise, and the covenant was to pay "from my own pocket" the deficiency, not of interest, but of profits—obviously a personal covenant. The other cases quoted before us do not seem to have any useful bearing on the present case.

I therefore hold that there is no sufficient reason for disturbing the finding of the lower Court that there was no provision in this mortgage charging the property with payments of the interest.

As to the other point argued it is sufficient to say that I agree with the original Court that there is no evidence that there was any refusal by the mortgagors to pay the assessment, quit-rent, etc., which compelled the mortgagee to find money for those charges in order to preserve the property from sale, and that therefore S. 72 of the Transfer of Property Act cannot be called in aid to charge the property with these payments. The document clearly says that if the mortgagors do not pay the charges the mortgagee shall recover "from us", that is, the covenant is a personal one.

I would therefore dismiss the appeal with costs.

3. (1916) 14 A. L. J. 986.

SCHWABE, C.J.:—I agree and have nothing to add. The appeal will be dismissed with costs.

1923 Madras. 72.

SCHWABE, C. J. AND WALLACE, J.

P. R. Srinivasa Iyengar ... Judgment-debtor—Appellant.

v.

S. L. Narayana Rao ... Decree-holder—Respondent.

O. S. A. No. 40 of 1921, dated 24th August 1922 from the order of Kumaraswami Sastri, J., dated 1st March 1921.

(a) *Limitation Act—Art.* 182, *Cl.* 5—*Foreign decree—Execution in British India—Step-in-aid of execution—Construction.*

An application in Mysore Court to transmit the papers to a Court in British India, as to any Court in Mysore is a step-in-aid of execution according to the Mysore Law which must be applied to the case. The Full Bench decision in *Peares Leslie* v. *Perumal* (1) that an application to transmit the papers to a foreign Court is not a step-in-aid of execution is not applicable to the case. 42 Bom 420 Appr.

(P. 73, Col. 2.)

PER SCHWABE, C.J.:—The law to be considered is that of the place where the application is made which will generally also be the place of origin of the decree and Cl. 5 of the Art. 182 of the Indian Limitation Act must be read to mean "to take some step which, according to the law of the place where the application therein referred to has to be made, is a step-in-aid of execution."

(P. 73, Col. 2.)

PER WALLACE, J:—When we have to consider the interpretation of Art. 182 with reference to execution of a foreign decree, we have to consider not whether the application would have been a step-in-aid in British India with reference to the execution of a British Indian decree, but whether the application having reference to a foreign decree and having been brought in the proper foreign Court, was a step-in-aid under the law of that Court and if it was, such a step-in-aid, it satisfies Art. 182. When a foreign Court has laid down that an application such as the present to transmit the documents to British India was at the time it was made, a proper step-in-aid of execution, it would be wrong for the British Indian Court to hold, when called on to execute that foreign decree that that application was not at the time it was made, a perfectly legal step-in-aid within the meaning of Art. 182 of the Indian Limitation Act.

(P. 76, Col. 1.)

(b) *Civil P. C., S.* 13—*Foreign judgment—Whether binding on a Court in British India—A step-in-aid of execution.*

1. 40 Mad. 1069.

Per Schwabe, C. J.—Where there has been a foreign judgment on a matter directly adjudicated upon between the same parties, under the section it is not open, whatever the High Court might have said in such cases, to an unsuccessful party to the application in the foreign Court, to contend that the law there is otherwise.

(P. 73, Col. 2).

A. Krishnaswami Aiyer and S. Doraiswami Aiyer—for the Appellant.

L. S. Veeraraghava Aiyar—for the Respondent.

SCHWABE, C.J.:—This appeal is from an order of Kumaraswami Sastri, J., granting an application to execute a decree for costs of the District Court of Mysore. The judgment-debtor objected on the ground that it was barred by limitation. The facts so far as they are relevant are that the original decree was dated June 19th 1911, and that in 1912 and 1914 attempts were made to execute the decree through the Small Cause Court, Madras, which failed through want of jurisdiction of that Court and ended in about April 1914 by the sending back of the papers in the case by the Small Cause Court to the District of Mysore. In December 1916 an application was made to the District Court of Mysore to transmit the decree to the Madras High Court which failed owing to there being an attachment on the decree. A further application of the same nature was made on March 15th, 1918 which application was dismissed by the Mysore District Court on January 30, 1919 but granted on appeal by the Chief Court of Mysore on July 21, 1920.

In pursuance of that order, a certified copy of the decree has been transmitted to this Court, and the application in this case is for leave to execute that decree. The period of limitation in such cases is provided by Art. 182, Cl. 5 of the Limitation Act of 1908 under which the time from which the period of limitation begins to run is the date of applying in accordance with law to the proper Court for execution to take some step-in-aid of the execution of the decree. It is common ground in this case that if the applications to the Mysore Court of 1916, 1918 are steps-in-aid of execution, this application is in time, whereas if they are not steps-in-aid of execution, this application is barred by limitation. The application of the 15th March 1918 to the District Court and the subsequent appeal were attended and argued by both the parties and the point was then raised and fully argued that the application to transmit the papers with a view to obtaining execution by this Court is not a step-in-aid of the execution of decree, and the Full Bench of the Chief Court of Mysore (*vide* Mysore Chief Court Reports, Vol. 25, page 298) decided that it was according to the law of Mysore a step-in-aid of execution. The law of limitation contained in Cl. 5, Art. 182 of the Mysore Act is identical with Cl. 5, Art. 182 of the Indian Limitation Act. The difficulty arises owing to the fact that a converse case of the transmission of papers from this Court to a Native State for the purpose of obtaining the assistance of the Court of that Native State in executing a decree of a Court in this Presidency came before a Full Bench of this Court in *Piearce Leslie* v. *Perumal* (1) and it was there held that such a step was not a step-in-aid of execution. We therefore have the anomalous position that in interpreting statutes in identical terms, the Chief Court of Mysore has held that an application to transmit the papers in a Mysore case to this Court is a step-in-aid of execution, while this Court has held that the application to transmit the papers in a Madras case to Travancore is not a step-in-aid of execution. The question to be considered is according to that system of law, the step taken is or is not a step-in-aid of execution, and in my judgment the law to be considered is that of the place where the application is made which will generally also be the place of origin of the decree and I think that Cl. 5 of the Art. 182 of the Indian Limitation Act must be read to mean "to take some step which according to the law of the place where the application therein referred to has to be made, is a step-in-aid of execution." It follows that it is the law of Mysore that has to be considered. By S. 13 of the Civil Procedure Code, a foreign judgment is conclusive as to any matter thereby directly adjudicated upon between the same parties. There has in this case been a foreign judgment on this matter directly adjudicated upon between the same parties, namely that according to the law of Mysore this is a step-in-aid of

1. (1917) 40 Mad. 1069.

execution and I think that under that section it is not open, whatever this Court might have said in such cases, to an unsuccessful party to the application in Mysore to contend here that the law of Mysore is otherwise. I should add that I do not agree with the contention addressed to us that the order applied for in Mysore was an application for the mere performance of a ministerial act. It was an application to the Court in its judicial capacity and the Court's order was a judgment. Further apart from this section, there is in this case a decision to this effect by the highest Court in Mysore. In my judgment the fact that a Full Bench of this Court holds that the law in British India is otherwise is not a sufficient ground for this Court to hold that the Chief Court of Mysore has interpreted the Mysore statute wrongly, although the statutes are in identical terms. It follows that as the step is to be a step which according to the law of Mysore is a step-in-aid, in my judgment we are bound to hold that this application to transmit the papers here was a step-in-aid of the execution of the decree.

I desire to add this; that the question whether a similar application to transmit the papers would have been a step-in-aid if made in British India, in the view that I have expressed, does not arise for decision. If it did I should feel myself bound by the decision of the Full Bench of this Court in 40 Mad. 1069. I must, however, not be taken to agree with that decision. It has been strongly disapproved of by a Divisional Bench in *Janardan Govind* v. *Narayanakrishnaiyer.* (2) The point has been argued before us and the inclination of my mind is to agree with the Bombay decision and not with that of the Full Bench of Madras, and if the same point arises again, I should wish to have it reconsidered by a Full Bench. For the reasons given above the appeal must be dismissed with costs.

WALLACE, J.:—The District Court of Mysore has transmitted to this Court, at the request of the respondent for purposes of execution in this Court a decree of that Court in which he is the assignee decree-holder, a certificate of non-satisfaction and a copy of the decree and previous execution orders. There is in force a reciprocal working arrangement between the Courts in the Madras Presidency and those in Mysore State under which a decree obtained in one locality may be executed in the other on application by the decree-holder, provided he has arranged with the Court of the former locality to transmit to the latter a copy of the decree, a certificate of non-satisfaction, and copies of previous orders in execution. It was contended before the District Court of Mysore by the present appellant, the judgment-debtor, that the execution was time-barred. He succeeded in that Court but in the Chief Court to which he took the matter in appeal he failed. Now the respondent seeks to execute the decree in British India. The appellant urges the same ground, namely that the execution is time-barred. The point on which for the purposes of this appeal, the discussion of the question of limitation arose was whether the application to the District Court of Mysore, dated 9—12—1916 continued by a further application, dated 15—3—1918 to transmit the decree to this Court was or was not a step-in-aid of execution. That Court and Chief Court of Mysore on appeal held that it was and that execution was not time-barred. The appellant invites us to hold that it was not a step-in-aid of execution and therefore the decree is time-barred. That is his standpoint and the only one which he has taken in this appeal.

Three points arise: first of all, whether the judgment of the Chief Court is *res judicata* and binding on the appellant by force of S. 13 of the Civil Procedure Code; secondly whether, if not, this Court can give an independent finding on the point, and thirdly whether if it can, the application was or was not a step-in-aid.

On the first point there is a preliminary contention of appellant that the District Court of Mysore was acting without jurisdiction or rather extrajudicially, in transmitting the decree papers to this Court and that therefore S. 13 of the Civil Procedure Code will not apply. To that I do not agree. It was essential for that Court before transmitting the papers to satisfy itself that the decree was subsisting and executable, and that the case was a fit one for obliging the decree-holder. Fur-

2. (1918) 42 Bom. 420.

ther, in sending the papers it presumably divested itself of any further powers of executing the decree itself. Such acts of the Court are undoubtedly judicial and within its jurisdiction. The District Court in transmitting the documents, was acting under O. XXI, R. 6 of its own Civil Procedure Code, *vide* its order, dated 15—12—1920. S. 13, Civil Procedure Code will then apply to the judgment of the Chief Court which was clearly an adjudication that, according to Mysore law, the application was a step-in-aid and therefore the execution in Mysore was not time-barred. The adjudication cannot however be stretched to mean that, according to British law, execution is in time. The judgment is only *res judicata* so far as it goes and no further, and I do not think it can be interpreted as deciding once and for all so to make the matter *res judicata* that a proper step-in-aid within the meaning of Art. 182 of the Indian Limitation Act, was taken on 9-12-1916, and that the respondent cannot now be reheard in that respect. If the application before us now has to be dealt with under Art. 182 of the Indian Limitation Act, as to which I feel no doubt, that article is to be applied as stands, unless there is some bar apart from it which stands in the way of that application. The Chief Court's order in my view is not such a bar since it only lays down that, in that territory within the jurisdiction of that Court, the application was not barred, I therefore answer the first point accordingly.

As to point 2, it is really already answered. On this point I uphold the appellant's contention that, when such an application comes before a British India Court, that Court is entitled to consider, and indeed is bound to consider, whether it is time-barred under the law of British India and to come to an independent conclusion. If it finds that the law of British India declares that the application is time-barred it will refuse to take steps in execution of the decree. This is the principle laid down in *Nabibhai Vazirbhai* v. *Dayabhai Amulakh* (3) and by Oldfield, J. in *Pierce Leslie* v. *Perumal* (1). That is to say *lex fori* governs all such cases and each Court must execute under its own laws. The respondent cannot therefore ask a British India Court to execute this decree if under British India law the execution of it is time-barred. That is my answer to point 2.

As to point 3, I have now to decide whether as a matter of fact the application is time-barred, that is, whether the application of 9—12—1916 was a step-in-aid of execution or not within the meaning of Art. 182 of the Indian Limitation Act. *In limine* the appellant contends that the Full Bench decision in 40 Mad. 1069 concludes the matter, but there I cannot agree with him. That decision laid down that an application to a British India Court to transmit to a foreign Court such execution papers as are required to enable it to execute the decree is not a step-in-aid of execution within the meaning of Art. 182 and it proceeds on the principle that, there being no legal provision for reciprocity by which British India Courts can send their decrees for execution to a foreign Court and *vice versa*, but only an arrangement of comity by which either Court will, when asked send the necessary papers to the other in order to assist execution, such despatch of papers is not a step-in-aid of execution. Wallis, C.J., however goes further and lays down that no application for execution arising under a foreign law in a foreign State can be an application under Art. 182 for the purpose of executing a British India decree, *i.e.*, a British India Court must in fact in executing a British India decree rule these out of Court altogether. Oldfield, J., decides the case on another footing, *viz.*, that there is a general uncertainty as to whether a foreign Court will, in carrying out execution of British India decree, conform to the law under which the transmitting British India Court does the act of transmitting the papers. But the Full Bench judgment does not deal with the converse case or lay down that an application to a foreign Court to transmit papers to assist execution of a foreign decree in British India is not a step-in-aid of execution under Art. 182, and I conceive that it is open to us to come to our own conclusion on this point. To lay down that an application to a foreign Court to execute its own decree cannot be a step-in-aid of execution under Art. 182 of the Indian Limitation Act would be to stultify the whole reciprocal arrangement for assisting in the execution

3. (1916) 40 Bom. 504.

of decrees which has been mentioned above, since it will follow that no execution of a foreign decree could be obtained in a British India Court after the expiry of three years from the date of the decree, for, however many execution applications may have kept it alive in its own state, none of those would keep it alive in British India, since they would not be applications for or steps-in-aid of execution under Art. 182. This application seems to me to be a very difficult one to maintain. The essence of the comity arrangement which is described and relied on in *Janardan Govind* v. *Narayan Krishnaji* (2) is that such reciprocating Court will recognize the other's proceedings, so that if one Court has laid down that at a particular date the decree was not time-barred, the other shall not lay down that on the same date it was time-barred. When the foreign Court has laid down that an application such as the present to transmit the documents to British India was at the time it was made, a proper step-in-aid of execution I think it would be wrong for the British India Court to hold, when called on to execute that foreign decree, that that application was not, at the time it was made, a perfectly legal step-in-aid within the meaning of Art. 182 of the Indian Limitation Act. The present case is clearly distinguishable from 40 Bom. 504. There was no ruling there of a foreign Court on the matter which came before the British India Court. I therefore conclude that the 40 Bom. case does not compel us in applying Art. 182 of the Indian Limitation Act, to hold that the application in the Mysore Court, which was a proper step-in-aid under Mysore law, was not a step-in-aid of execution within the meaning of that Article. That is, when we have to consider the interpretation of that Article with reference to execution of a foreign decree, we have to consider not whether the application would have been a step-in-aid in British India with reference to the execution of a British India decree, but whether the application having reference to a foreign decree and having been brought in the proper foreign Court, was a step-in-aid under the law of that Court; and, if it was, as it was, such a step-in-aid, it satisfies Art. 182. The conclusion then is plain that the present application is a step-in-aid and therefore the execution of the decree is not time-barred. I therefore agree that this appeal be dismissed with costs.

1923 Madras. 76.

SCHWABE, C. J.

Abdul Kadir Sahib ... Defendant (Appellant.)

U. T. M. Somasundaram Chettiar Plaintiff (Respondent.)

S. A. No. 893 of 1920, dated 3rd May 1922 against the decree of Dist. Judge, Madura, in A. S. No. 331 of 1919.

(*a*) *Civil P. C., O.* 21, *Rr.* 58 *and* 63—*Auction sale—Application by mortgagee to hold sale proceeds in Court deposit subject to his claim—Application dismissed—Limitation Act, Art.* 11.

At the auction sale of certain properties in execution of a money-decree, a mortgagee of the properties applied that the sale proceeds should be kept in Court deposit being subject to his hypothecation. His application was dismissed with the order "Sale is concluded already and decree-holder set off the decree amount. Dismissed." *Held*, the order did not expressly state that the application was dismissed under O. 21, R. 58. Seeing that R. 58 lays down that the Court to which a claim or objection is made shall proceed to investigate it unless it acts under the proviso, it may be held that it is the duty of the Court to go into every claim that is not dismissed for intentional or unnecessary delay and it therefore follows that if a Court does not take either of these two alternative courses, the order that it passes is not an order against the claimant and does not cause limitation to run against him. Consequently a subsequent suit is not barred under Art. 11 of the Limitation Act. 39 M. L. J. 350 Foll.

(P. 80, Col. 1.)

(*b*) *Limitation Act, Art.* 132.

Where property which represented the security for a mortgage has been converted into money, the article applicable to a suit upon the mortgage is Art. 132 under which the plaintiff has 12 years to follow up the proceeds in the hands of the defendants 33 Cal. 92 Foll.

(P. 78, Col. 1.)

K. V. Krishnaswami Aiyar, for the Appellant.

K. Bashyam Aiyangar, for the Respondent.

ORDER OF REFERENCE TO A THIRD JUDGE.

SPENCER, J.:—The respondent brought this suit to enforce the terms of a simple mortgage against a person whom he alleged to be in possession of the proceeds of the property secured to him under his mortgage.

The question to be decided in the second appeal is whether the suit is time-barred by reason of Art. 11 of the 1st

schedule of the Limitation Act, or otherwise. By Art. 11 a person who prefers a claim or makes an objection to the attachment of property attached in execution of a decree must, if an order is passed under the Code of Civil Procedure against him after investigation of his claim, institute a suit under O. XXI, R. 63 within one year to establish the right which he claims to the property in dispute. If the Court declines to investigate the claim on the ground that it has been designedly or unnecessarily delayed and dismisses it under the proviso to O. XXI, R. 58, the claimant still has only one year to institute his suit. That is the effect of the Full Bench decision in *Venkataratnam* v. *Ranganayakamma* (1). The respondent's father on 20th and 21st November, 1913, put in two petitions in the District Munsif's Court which was executing the appellant's money-decree by sale of a tin-shed standing on the property mortgaged to the petitioner. In one he asked that the sale proceeds of the tin sheets should be kept in Court deposit and in the other he asked that the moveable properties belonging to the judgment-debtor should be ordered not to be removed pending further orders of the Court. The Court's order on the first was that the sale had been already concluded and the decree-holder who purchased the articles sold had set off the amount against his decree. The order on the second petition was that the moveables had been already handed over. Both petitions were dismissed.

Now both applications must be taken to have been made on the strength of the respondent's mortgage right, as the existence of the simple mortgage in favour of petitioner's agent is mentioned in each case in the petition or in the accompanying affidavit. But there was no prayer to have the mortgage right investigated, and the Court seems to have considered it unnecessary to investigate it. The orders, on the petitions indicate that the Court declined to adjudicate upon the petitioner's claim. There is no doubt that the principal reason that influenced the Court in dismissing the petitions was that it was too late to interfere after the property had ceased to be *in custodia legis*. But this is not the same thing as saying that the Court considered that the claim or objection had been designedly or unnecessarily delayed. It dismissed the petitions as there was no object in keeping them pending. It did not expressly state that they were dismissed for delay under the proviso to O. XXI, R. 58, nor have the orders been understood as passed under that proviso in the District Munsif's Court where they were passed.

Seeing that R. 58 lays down that the Court to which a claim or objection is made "shall proceed to investigate" it unless it acts under the proviso, it may be held that it is the duty of the Court to go into every claim that is not dismissed for intentional or unnecessary delay. That in fact was the view of Wallis, C.J., in *Ramaswami Chettiar* v. *Mallappa Reddiar*. (2) It follows that if a Court does not take either of these two alternative courses, the order that it passes is not an order against the claimant and does not cause limitation to run against him.

The decision in *Munisami Reddi* v. *Arunachala Reddi* (3), *Koyyana Chittemma* v. *Doosy Gavaramma* (4) and *Sarala Subba Rau* v. *Kamsala Timmayya* (5) which laid down that there must be an investigation into the merits of the claim to make the one year's period of limitation applicable, were passed under the Code of the Civil Procedure of 1882 and may not be considered as altogether good law under the altered language of the present Code according to the interpretation placed upon it in the Full Bench decision in *Venkataratnam* v. *Ranganayakamma* (1). The decision of Mr. Justice Greaves in *Panchu Muchi* v. *Bhuto Muchi* (6) that Art. 11 has no application to a consent order made without investigation of the claim conflicts with the judgment of a Bench of this Court in *Venkatarama Iyer* v. *Narayana Iyer* (7) which expressed an opinion that even an order passed with the consent of a claimant might nevertheless be against him.

But the decisions in *Balarami Reddi* v. *Hazi Mahomed Abdul* (8), S. A. No. 1986

1. (1918) 41 Mad. 985 (F. B.).

2. (1920) 43 Mad. 760=39 M. L. J. 350.
3. (1895) 18 Mad. 265.
4. (1906) 29 Mad. 225.
5. (1908) 31 Mad. 5.
6. (1919) 50 I. C. 649.
7. (1915) M. W. N. 237.
8. (1914) 26 M. L. J. 499.

of 1916, *Ayya Pattar* v. *Attupurath Manakkal Karnavan* (9) and *Lakshmi Ammal* v. *Kadiresan Chettiar* (10) are instances of orders being passed which did not distinctly negative claims made under O. XXI, R. 58, and this Court held in those cases that the claimant was not bound to institute a suit under R. 63 to have the order in question set aside. The two former were decisions under the present Code of Civil Procedure and the two latter were subsequent to the Full Bench ruling in *Venkataratnam* v. *Ranganayakamma* (1)

Velu Padayachi v. *Arumugam Pillai* (11), was a plain case of a mortgage claim being dismissed under the proviso to R. 58, as being too late owing to the claimant's delay, and the same may be said of *Lakshmanan Chettiar* v. *Parasivan Pillai* (12) which it followed.

I am therefore of opinion that the present suit was not barred by Art. 11 of the Limitation Act. It is clear from the Privy Council decision in *Barhamdeo Prasad* v. *Tara Chand* (13), which dismissed an appeal against a Full Bench decision of the Calcutta High Court in *Barhamdeo Prasad* v. *Tara Chand* (14), that where property which represented the security for a mortgage has been converted into money, the article applicable to a suit upon the mortgage is Art. 132 under which the plaintiff has 12 years to follow up the proceeds in the hands of the defendants.

The present suit accordingly is in time and I consider that the Second Appeal should be dismissed with costs. As my learned brother differs from me we refer under S. 98 of the Code of Civil Procedure the question of law whether the suit is barred by limitation for decision by a third Judge.

KRISHNAN, J. :—The question for decision in this Second Appeal is one of limitation. Plaintiff sues to recover the balance due to him on a simple mortgage bond executed to him by one Lakshmanan Servai, from the defendant on the ground that one of the mortgaged properties, a 'tin-shed,' was pulled down by him and sold in Court-auction and the sale proceeds were taken by him without recognizing the mortgage on it. Defendant had obtained a decree for possession of the land on which the shed had been built by the Servai, after removal of the superstructure and also for payment of a certain sum of money. He obtained possession of the land after pulling down the shed and converting it into tin sheets and attached the latter in execution of the money portion of his decree. He also seems to have obtained permission to bid at the auction and to set off his decree against the purchase-money. When the sale was about to take place, the plaintiff's father put in a petition to Court on the day of the sale and the point whether the plaintiff is or is not barred by limitation under Art. 11 of the Act depends upon the nature of that petition and of the order thereon.

The petition is a short one and is as follows :—

"1. The articles that are going to be sold in this suit belong to this petitioner under hypothecation.

2. The plaintiff herein has taken the leave of the Court to bid for the properties in auction and he is attempting to appropriate the proceeds himself. If he does so, this petitioner will not be in a position to realize his amount. The leave obtained is not also valid.

I therefore pray that the sale proceeds are not taken by the plaintiff and that the same be held in Court deposit."

The order on it was only passed the next day; it says "Sale is concluded already and decree-holder set off the decree amount. Dismissed."

There was some question raised whether the petition itself was not filed after the sale had been concluded in which case it was argued it should be treated as a nullity. But that does not seem to be so; the opening sentence of the petition shows that the sale had not taken place at the time.

The petition did not cite the provision of law under which it was put in. But it seems to me clear that it was in the nature of a claim to the attached property which was going to be sold outright; it was based upon the plaintiff's mortgage right over it which had not been recognized in the proclamation as the sale was not stated to be subject to any encumbrance. Though the plaintiff's father did not ask the sale to be stopped or to be held subject to his mortgage right, his petition certainly put in issue his mortgage right as against the decree-holder and if

9. (1919) M. W. N. 805.
10. (1921) 14 L. W. 12.
11. (1920) 38 M. L. J. 397=11 L. W. 843.
12. (1919) 37 M. L. J. 159.
13. (1914) 41 Cal. 654=41 I. A. 45.
14. (1906) 33 Cal. 92.

notice of the petition had gone to the latter, that right would have been investigated by the Court. Whether on proof of the claim the Court would have acted under O. XXI, R. 62 or allowed a lien to the mortgagee on the sale proceeds as prayed for is, it seems to me, immaterial in considering the nature of the petition filed. I am of opinion that the petition was one under O. XXI, R. 58, there being no other provision under which it could have been filed and when the Court dismissed it, and refused to recognize any rights in the plaintiff as mortgagee on the ground that the petitioner had come too late, it acted under proviso of R. 58 and its order was one against the plaintiff and he was bound to bring a suit under R. 63 within one year from its date if he wanted to assert his mortgage right on the property sold in the decree-holder, auction-purchaser's hands.

We are not concerned with the question whether the order on the petition was right or wrong but only as to whether it was against the claimant or not. It is now settled by the Full Bench in *Venkataratnam* v. *Ranganayakammal* (1) that an order refusing to investigate a claim on the ground of delay is an order against the claimant and Art. 11 of the Limitation Act applies. Following that ruling I would hold that the present suit brought about four years after the order on the claim petition is barred by limitation.

Reliance was placed for the respondent on the recent ruling of my learned brother and Ramesam, J., in *Lakshmi Ammal* v. *Kadiresan Chettiar* (10) but that ruling has no application to the present case. That was an order passed by a Court which had no jurisdiction and it was further held by my learned brother that the order in the case was not against the claimant as the sale was actually stopped. Here the sale was completed without any recognition of the claimant's mortgage right and the sale proceeds were allowed to be taken by the decree-holder in spite of his petition to retain them in Court. The two cases are thus quite dissimilar.

With all respect to my learned brother I am inclined to hold that the suit is barred by limitation under Art. 11 and I would allow the Second Appeal and dismiss the suit with costs throughout. But as we are differing on the question of law raised in this case I agree to the order proposed by my learned brother.

[This Second Appeal came on for final hearing this day in pursuance of the Order of Reference to a Third Judge, before Sir Walter Salis Schwabe, K.C., C.J.]

JUDGMENT:—This Second Appeal is referred to me by reason of a difference of opinion between Spencer and Krishnan, JJ., the referring Bench. The question referred is whether the suit is barred by limitation.

The first article of the schedule to the Limitation Act which is relied upon is Art. 11. The effect of that article is that, where an order is made under the Civil Procedure Code, 1908, on a claim preferred to, or objection made to the attachment of property in execution of a decree, the limitation is one year from the date of the order. The facts of this case are these: Property which was mortgaged to the present plaintiff was seized in execution by the present defendant and brought to sale. The sale was advertised to take place on the 20th of November 1913. On that day an application was filed on behalf of the plaintiff asking that the proceeds of the sale which was about to take place should be held in Court because he claimed they belonged to him under hypothecation. I have very considerable doubt whether, in fact, that was filed before or after the actual sale, and I am rather inclined to the view that it was filed after the sale, because when the matter came before the Court next day, the Court said that the sale was already concluded and the decree-holder had got his amount, and dismissed the application. It is difficult to understand how the Court could have done that if the petition was in time, and I am told that under O. XXI, it is the recognized practice that you are too late altogether if you take your proceeding after the sale has taken place. If the petition was out of time it is quite easy to understand the order of the District Munsif. Otherwise it is very difficult to understand how the District Munsif came to make that order. But however that may be, one thing to my mind, is quite clear that the District Munsif dismissed that application not on the ground of delay or anything of that kind, but on the ground that he had no

jurisdiction to hear it. He says " the sale has taken place, I cannot hear this "—that is how I interpret the order that he has made, and it is quite clear that he did not hear it. He did not consider the question whether or not there was a mortgage, or whether or not the present plaintiff was entitled to the property or the proceeds of the sale. It was never considered at all. That being so, in my judgment, there is no order on a claim preferred within the meaning of the Limitation Act and no order within the words of O. XXI, R. 63 on a claim or objection preferred against the present plaintiff. Rightly or wrongly, in my view, the District Munsif simply said, " I will not hear you." It is argued, however, that notwithstanding that, I am bound by the decision of the Full Bench of this Court in *Venkataratnam* v. *Ranganayakamma* (1) to hold that this was an order coming within the rules and Art. 11 of the Limitation Act. I do not read that case to decide anything of the kind. What that case did was to take an order which was made by the District Munsif and referred to as Ex. V, which I have sent for and examined, and treat that order as a refusal of the application on the ground that there had been *laches* or delay which brought the matter under the proviso to O. XXI, R. 58 which is in these terms :—

" Provided that no such investigation shall be made where the Court considers that the claim or objection was designedly or unnecessarily delayed."

And the Full Bench held, and held only, that where a decision is given on the ground that the matter has been designedly or unnecessarily delayed, that is a decision and an order against the applicant under R. 63 to which Art. 11 applies. I think this is quite clear from the judgment of the learned Chief Justice and Seshagiri Aiyar, J. The latter says.

" The language of O. XXI, R. 63, leaves little room for doubt that all orders which negative the right set up by the claimant or the decree-holder are within the rule."

Assuming that to be rightly decided, it does not affect this case, because there is no order, in my judgment, in this case negativing the rights set up by the claimant. It follows that I agree with Spencer, J., that this suit is not barred under Art. 11 of the Limitation Act.

Another point was taken and I have held that it is covered by the terms of the reference though I confess I have very grave doubt on that subject because Spencer, J., decided it one way and Krishnan, J., said nothing about it at all; but I accept what I am told that he having said nothing about it might have been going to differ about it, and it was unnecessary for his decision to say anything about it at all, in the view he took of the case on the other point, and that on its being pointed out to the Court, the Court answered, " well, your point is covered by the Order of Reference." Therefore, I think it is right that I should deal with the matter and save the parties from further expense and further hearing. On this matter too I agree with Spencer, J. I think the matter is really concluded by the decision of the Privy Council in *Barhamdeo Prasad* v. *Tara Chand* (13). It would indeed be a singular thing if a person in possession of mortgaged property by going through the form of a sale by Court auction to himself got the mortgaged property in fact, but also by reason of the sale got the money, and were enabled to say when attacked by the mortgagee, " I have not got the mortgaged property at all: I have got some money and the article barring suits for money had and received is the article that applies; and I escape from liability and can retain both the money and the property." But the learned vakil argues, " you cannot sue for the money but only for the property; and if you sue for the property you cannot succeed in this action but you must bring another." In *Barhamdeo Prasad* v. *Tara Chand* (13) it was held that proceeds of mortgaged property for the purpose of the Limitation Act are to be treated as within the meaning of Art. 132 of the schedule to the Limitation Act. An action to enforce payment of money charged upon immoveable property, says the Privy Council is within the meaning of Art. 132. This is really an action to enforce payment of money charged upon the property. The money was charged on the property. The defendant has got the property and I cannot see how by himself converting the property into money he could bring into play articles of the Limitation Act other than those which would apply if he had not converted it into money.

I, therefore, answer the question of the Referring Bench by saying that the suit is not barred by limitation. I, therefore, hold that this appeal must be dismissed with costs.

Appeal dismissed.

1923 Madras. 81.

PHILLIPS AND DEVADOSS, JJ.

Nallanchakkravarthula Appalacharyulu and others ... Defendants—Appellants.

v.

Nallanchakkravarthula Ramchandracharyulu, minor by mother and guardian Perindevi Thayaramma ... Plaintiff—Respondent.

F. A. No. 65 of 1920, dated 24th April 1922 against the decree of Sub-Judge of Bezwada in O. S. No. 31 of 1917.

(*a*) *Registration Act, Ss.* 21 *and* 22—*Description of property.*

Cl. (2) of S. 22 provides that a document shall not be refused registration merely because there has been a notification under S. 22, Cl.(1) unless that notification so provides. If notification merely provides that in certain districts the description should be in a certain manner and does not give any further direction it seems that the proviso under cl. (2) would have the effect of entitling a document to be registered provided the description is sufficient to identify the property.

The document sought to be registered was substantially a compromise agreement and one of the conditions of that compromise was that "all the immoveable properties pertaining to the family of the executants and mentioned in Sch. A described therein below shall be divided into four equal shares" and also "a deed of partition shall be executed separately on a proper stamp paper and that the same shall be got registered." *Held*, the description is sufficient for the identification of the property. It could have been registered at least so far as it purports to be an agreement for partition. 31 All. 523 Not Foll. 10 M. L. J. 104; 13 M. L. J. 303 Foll.

(*b*) *Civil P. C., O.* 1, *Rr.* 1 *to* 3—*Registration suit—Minor executants whether parties.*

When a document purports to be executed by certain persons it is essential that those persons even though they are minors should be brought on record in a suit to enforce registration so as to make the proceedings binding upon them in so far as the proceedings have been conducted *bona fide* by their guardians. They are clearly necessary parties to such a suit.

(P. 82, Col. 2.)

A. Krishnaswami Aiyar—for the Appellants.

P. Narayanamurthi—for the Respondents.

JUDGMENT:—In this case the plaintiff has obtained a decree to compel registration of the document Ex. A, and an appeal is filed by the defendants. This document was presented for registration and registration was refused both by the Sub-Registrar and by the Registrar on appeal, on the ground that it was a document dealing with immoveable property and the description of the property was not sufficient to identify the same.

Under S. 21 of the Registration Act there are certain provisions for the description of immoveable property in documents presented for registration, but under S. 22, Cl. (2) it is provided that "save as otherwise provided by any rule made under Sub-S. (1) failure to comply with the provisions of S. 21, Sub-S. (2) or Sub-S. (3) shall not disentitle a document to be registered if the description of the property to which it relates is sufficient to identify that property." In this appeal, it is first of all contended that there has been a notification relating to Kistna District under S. 22 of the Act and apparently there has been some such notification but it does not appear that the village in which the immoveable property is situated has been surveyed or that it would be possible to describe the property by its survey number as prescribed by the notification. Apart from this it appears to us that Cl. (2) of S. 22 provides that a document shall not be refused registration merely because there has been a notification under S. 22, Cl. (1) unless that notification so provides. If such notification provides that "certain description shall be given" of the immoveable property and failing such description registration can be refused, the question would be clear, but, if it merely provides that in certain Districts the description should be in a certain manner and does not give any further direction, it seems to us that the proviso under Cl. (2) would have the effect of entitling a document to be registered provided the description is sufficient to identify the property. It would appear that in *Saiyed Mahamud* v. *Muhammad Zubair* (1) it was held that a

1 (1909) 31 All. 523.

rule framed under S. 22, Cl. (1) was imperative and was not affected by the proviso in Cl. (2) of the same section. If that is the effect of that decision, we may say, with respect, that at present we are not altogether prepared to accept it, but in the present case this is a matter which need not be decided for it does not appear that the property now in question can be described by survey numbers as directed in the notification of the local Government regarding the Kistna District.

We then have to see whether the description of the property is sufficient to identify the same. The document sought to be registered is substantially a compromise agreement and one of the conditions of that compromise is that "all the immoveable properties pertaining to the family of the executants and mentioned in Sch. A described herein below shall be divided into four equal shares" and the division is to take place six months after the execution of the document. There is another provision also that "a deed of partition shall be executed separately on a proper stamp paper and that the same shall be got registered and that this agreement shall be got registered on 19th December 1916." I doubt the property is not very definitely described but it is stated to be the family property and we think that the description is sufficient for the identification of the property. It is not as if this were a document effecting an actual transfer of the property, it is merely a declaration of the intention to effect a partition with a recital that the partition is to be finally effected by a separate registered instrument. Our view, that this description is sufficient, is completely supported by the decision of this Court in *Narasimha Nayanemvaru* v. *Ramalingama Rao* (2) in which it was held that the description of the property as 'my family property' without anything further was sufficient. Here we have also a schedule which does to a certain extent define the lands referred to. We accordingly find that the description is sufficient.

Even if the document could not be registered so far as regards the immoveable property and decided in *Amirdam* v. *Muthukumara Chetty* (3) it could have been registered at least so far as it purports to be an agreement for partition. We accordingly hold that the Subordinate Judge was right and that the document should be registered.

A further objection is taken that defendants 4 and 5 who were minors at the time of execution and on whose behalf the document was executed by their guardians were unnecessary parties to this suit, the argument being that under the Registration Act, the executant of the document is the guardian and not the minor. Whether this is so or not is immaterial for when a document purports to be executed by certain persons it is essential that those persons even though they are minors should be brought on record in a suit to enforce registration so as to make the proceedings binding upon them in so far as the proceedings have been conducted *bona fide* by their guardians. They are clearly necessary parties to this suit and this contention fails.

The appeal is accordingly dismissed with costs.

2. (1900) 10 M. L. J. 104.
3 (1903) 13 M. L. J. 303.

1923 Madras. 82.

SCHWABE, C.J. AND WALLACE, J.

Murugappa Naickar ... Plaintiff (Appellant)

v.

Thayammal ... Defendant (Respondent.)

F.A.No. 5 of 1921, dated 24th July 1922 from the decree of Kumaraswami Sastri, J., dated 11th August 1920.

Limitation Act, S. 5—Appeal admitted out of time—Preliminary objection raised after one year.

An appeal presented out of time was admitted by the Court under S. 5. After over a year when the appeal came on for hearing, the respondent raised a preliminary objection to the appeal. *Held*, it is not a preliminary point at all, and any such application ought to be made by way of motion. A Court will never allow people to wait upon their rights while the other party incurs expenses in a case of this kind it being open to the respondent to move the Court to set aside the leave.

(P. 83, Col. 1.)

N. K. Mohanarangam Pillai—for the Appellant.

T. R. Ramchandra Aiyar and K. B. Ranganatha Aiyar—for the Respondent.

SCHWABE, C. J.—In my judgment this preliminary point fails. By the rules in existence, if a petition of appeal is presented out of time the grounds for

delay must be stated so that when the matter comes before the Admission Court, the Court may decide whether it shall be admitted notwithstanding its being out of time. In this case it appears that the case came before Napier, J. that learned judge accepted the excuse and admitted the appeal. Within a short time of that the respondent must have been perfectly aware that the appeal was admitted. As has been decided by the Privy Council in *Krishnasami Panikondar* v. *Ramasami Chettiar*, (1) he could have moved the Court to set aside the leave to appeal although out of time. He did not do so. But he says, 'Never mind. I am not going to ask you to do it now. When the case comes on for hearing on appeal, I shall then take it not by way of motion but by way of a preliminary point to the appeal.' In the first place, in my judgment, it is not a preliminary point at all, and any such applications ought to be made by way of motion. There is no motion before the Court. But I will assume that there is a motion before the Court. We have been told by the vakil what would be put before us on such a motion and if that motion were before the Court I should refuse it. I should refuse it on the ground that it is much too late. A Court will never allow people to wait upon their rights while the other party incurs expenses, and in a case of this kind, it being open, as was found in the Privy Council case, to the respondent to move the Court to set aside the leave, he did nothing of the kind. He has waited for a period of one year and a half until all the expenses of the hearing have been incurred and now comes into Court and says that the appeal should be dismissed because it was originally out of time. I should never entertain such an application and I do not propose to listen to it to-day.

WALLACE, J.—I agree. I think it is sufficient to say that there is no application before us to set aside Napier, J's. *ex parte* order such as there was in the Privy Council case which has been quoted.

[The judgment then dealt with the merits of the case.]

1. (1918) 41 Mad. 412=45 I. A. 25 (P.C.).

1923 Madras. 83.

AYLING, A.C.J. AND ODGERS, J.

Perla Venkatakrishnamma ... Petitioner (Plaintiff.)

v.

Bolisetti Venkataratnam ... Respondent (Defendant.)

Civ. Rev. No. 90 of 1921, dated 3rd May 1922 revising the decree of Addl. D. Munsiff of Tenali in S. C. S. No. 1032 of 1919.

Provincial Small Cause Courts Act, S. 17 (1)—Ex parte *decree, setting aside of—Decretal amount not deposited—Effect.*

The provisions of S. 17 (1) are mandatory and unless they are complied with, the order setting aside the *ex parte* decree is illegal. 48 Mad. 579 Foll.

P. Narayanamurti and K Kamanna—for the Petitioner.

P. Satyanarayana—for the Respondent.

JUDGMENT :—This is a revision petition against a decree of the Small Cause Court dismissing the suit. A decree in favour of the plaintiff was originally passed *ex parte*. But on the application of the defendant, the *ex parte* decree was set aside. It is now pointed out on behalf of the plaintiff, who is the petitioner before us, that the decree amount was not deposited in Court, nor was security given as is provided in S. 17 of the Provincial Small Cause Courts Act; and we are referred to the ruling of a Full Bench of this Court in *Assan Mohamed Sahib* v. *Rahim Sahib* (1), for the proposition that the provisions of S. 17 (1) of the Provincial Small Cause Courts Act are mandatory, and that unless they are complied with the order setting aside the *ex parte* decree is illegal. This appears to be so. In this case no security for the decree amount was given, and only half the decree amount was deposited subsequent to the application to set aside the order. We have made a special reference to the lower Court at the instance of the respondent to ascertain whether the full amount was at any time deposited and from the report now received it is clear that the full amount has never been deposited. The order setting aside the decree was therefore *ultra vires*. The decree now under revision is set aside and the *ex parte* decree originally passed restored. In the circumstances, we direct each party to bear its own costs throughout.

1. (1920) 43 Mad. 579.

1923 Madras. 84

SCHWABE, C. J. AND WALLACE, J.

K. M. Parthasarathy Naidu and others Plaintiffs (Appellants.)

v.

P. Mukundammal ... Defendant (Respondent).

O. S. A. No. 90 of 1921, dated 26th July 1922 from the judgment and decree of Coutts-Trotter, J., dated 2nd August 1921.

Probate and Administration Act, S. 90—Will—Construction—Power to sell given to executor, whether includes power to mortgage.

Where by a Will power is given to sell the property to pay off debts, that power includes the power to mortgage. By S. 90 of the Probate and Administration Act, the power of an executor to dispose of immoveable property is subject to any restrictions which may be imposed by the Will. But the power of sale is not a restriction imposed by the Will and the power of mortgage, so far from being inconsistent with it, is included in it, unless there be some reason to be gathered from the terms of the Will itself why it should be excluded. The onus of proving that the executor was acting within his powers in executing the mortgage is not upon the mortgagee. 8 Cal. W. N. 362 Foll.

T. S. Rajagopala Aiyar and T. L. Venkatarama Aiyar—for the Appellants.

T. Ethiraja Mudaliar—for the Respondent.

SCHWABE, C. J.—In this case the mortgagees brought a suit to enforce the mortgage. The mortgage was executed by an executor under a Will. That Will gave the executor express power to sell any part of the estate, moveable or immoveable as the executor might wish for purposes of paying off debts. It was contended before the learned Judge that, this power being an express power of sale, he had no power to mortgage. The learned Judge with regret came to the conclusion that that was the proper construction of the Will and that he was bound by *Haldenby* v. *Spofforth*(1) and Indian Cases following that case so to hold. On a careful examination of that case so far from being authority in favour of the proposition that the executor with power of sale cannot mortgage, it is, in my judgment, direct authority for the proposition that he can, except in cases, such as the case there, where a prohibition against mortgage can be inferred. The Master of the Rolls, Lord Landale, referring to the case of *Ivy* v. *Gilbert* (2) said thus :—

"Lord Macclesfield also observed that the Court had decreed that the trust declared concerning the term, empowered, the trustees to sell the premises and a power to sell implied a power to mortgage which was a conditional sale. This I conceive to mean, that where it is intended to preserve the estate, there, under a direction for sale, a mortgage will sufficiently answer the purpose."

The facts of *Haldenby* v. *Spofforth* (1) were that the direction there was not to preserve the estate but to convert the whole estate into money. Turning to the authorities in this country it is sufficient to quote *Purna Chundra Bakshi* v. *Nobin Chandra Gangopadhya* (3) which is a direct authority for the proposition that, where by a Will power is given to sell the property to pay off debts, that power includes the power to mortgage. By S. 90 of the Probate and Administration Act, 1881, the power of an executor to dispose of immoveable property is subject to any restrictions which may be imposed by the Will. But in my judgment the power of sale is not a restriction imposed by the Will and the power of mortgage so far from being inconsistent with it, is, as pointed out in the English case, included in it unless there be some reason to be gathered from the terms of the Will itself why it should be excluded. We are then asked to remand the case so that further evidence may by given. The learned Judge held, as I understand his judgment, that the *onus* was on the defendant to show, if it was open to him to show, that there were no debts and that the executor was not mortgaging for the purpose of paying off debts. No evidence of that kind was tendered and it is therefore unnecessary to consider whether, if it had been tendered, it would have been admissible. In my judgment it was a perfectly proper ruling that it was not upon the mortgagee to prove as part of his case that the executor with power of sale was acting properly in effecting the mortgage. On those grounds I think the judgment must be reversed and judgment must be entered for the plaintiffs as prayed for with costs here and below.

WALLACE, J.:—I agree. I just wish to say a few words on the second point. I agree

1. (1839) 1 Beav. 390.

2. (1722) 2 P. Wms. 13.

3. (1903) 8 C. W. N. 362.

with the trying Judge that, where an executor has the power to mortgage, the mortgagees cannot be called upon to show the reality of the testator's debts for which their money was borrowed and, as the defendant here merely does not admit that there were debts other than the mortgage debts of 24th February, 1918 and does not assert that there were no other debts, there seems to me no sound ground for remand for proof of the reality of the debts for which the mortgage was taken. I agree that the second mortgage is binding on the defendant.

1923 Madras. 85 (1).

AYLING, J.

Muthayya Chetty ... Petitioner.

v.

P. R. S. Somasundaram Chetty by Agent S. Narayanasami Ayyangar ... Respondent.

Civ. Rev. No. 147 of 1921, dated 3rd February 1922 revising the decree of Dist. Munsif of Ariyalur in S. C. S. No. 2034 of 1919.

Civil P. C., O. 1, R. 1—Suit to recover debt due to partnership—Plaintiffs to the suit.

As a general rule, all the members of a partnership firm ought to be joined as plaintiffs in a suit in respect of a transaction with the partnership. 17 Mad. 108 Dist.—18 Mad. 83 Foll.

S. Sankara Aiyar—for the Petitioner.

R. Kesava Aiyangar—for the Respondent.

JUDGMENT:—This is a suit brought to recover a debt due to a partnership which consisted of three partners, Somasundaram Chetty, Arunachalam Chetty and Muthiah Chetti; of these three Muthiah Chetti is dead and as a consequence the partnership dissolved. This suit is instituted by one of the surviving partners of the late firm Somasundaram Chetty. The question is whether it is maintainable by him.

As far as I can gather the District Munsif appears to have decided this point under the misapprehension that the plaintiff, Somasundaram Chetty, was the only survivor of the partnership of two and under that impression relies on the ruling in *Vaidyanatha Ayyar* v. *Chinnasami Naik* (1). That ruling is of course inapplicable to the present case where one of two surviving partners brings a suit. This case is governed by the ruling in *Alagappa Chetti* v. *Vellian Chetti* (2), which so far as I can understand, has never been dissented from or questioned and wherein it is clearly laid down that, as a general rule, all the members of a partnership firm ought to be joined as plaintiffs in a suit in respect of a transaction with the partnership. The learned Vakil for the respondent has referred to S. 263 of the Contract Act which says that, after dissolution of partnership, the right and obligations of the partners continue in all things necessary for winding up the business of the partnership. But if a single one of the partners could not sue during the continuance of the partnership still less can one of two surviving partners sue after the dissolution of the partnership.

Attention was also drawn to the provisions of O. 30 of the Civil Procedure Code but they only apply to cases in which two or more persons claiming to be partners sue.

I am forced to the conclusion that the suit brought by the plaintiff in this case is not maintainable. The suit must therefore be dismissed with costs in both Courts.

1. (1894) 17 Mad. 108.

2. (1895) 18 Mad. 83.

1923 Madras. 85 (2).

KRISHNAN AND VENKATASUBBA RAO, JJ.

R. M. P. Palaniappa Chetti... Defendant (Appellant.)

v.

M. S. A. Pl. Palaniappa Chetti... Plaintiff (Respondent.)

Appeal against Order No. 300 of 1921, dated 29th August 1922 against the order of Addl. Sub.-Judge, Ramnad, in I. A. No. 282 of 1921, dated 14th September 1921.

(a) Civil P. C., O. 40, R. 4 (b)—Appeal—Scope—Order for payment in Court—Court's duty.

In an appeal from order under O. 40, R. 4 it is open to the Receiver to question the correctness of the amount said to be due from him. A Court should first direct the Receiver to submit his accounts for the period during which he was in possession of the properties; and then give the plaintiff an opportunity to surcharge and falsify them and raise his objection to them. Thereafter hearing the objections, he should decide the exact amount which the Receiver is liable to pay. After that the Receiver should be directed to pay into Court the amount due within

a certain time fixed by the Court. If he fails to pay the amount without proper reason within the time fixed, the Court can then pass an order directing the attachment of his property under R. 4.

C. S. Venkatachariar—for the Appellant.

K. S. Jayarama Aiyar—for the Respondent.

JUDGMENT :—This is an appeal against the order of the Subordinate Judge of Ramnad made under O. 40, R. 4, Civil Procedure Code, against the Receiver appointed in O. S. No. 68 of 1916 on his file directing attachment of his property as he failed to pay into Court the sum of Rs. 36,100 directed to be paid. It is not denied by the respondent, that an appeal lies under O. 43, R. 1, Cl. (s). But it is contended by Mr. Jayarama Aiyar for him that as the amount which the Receiver was directed to pay was fixed by the Court under R. 3 and as there is no appeal provided against orders under that rule it is not open to the appellant to question in this appeal the amount fixed as due from him by the lower Court, in other words he says that that order has become final. We are unable to accept this contention. The fact that no appeal is given under R. 3 is clearly due to the Receiver not being damnified by any order under that rule. It is only when an order is passed under R. 4 that any injury will be caused to the Receiver and he will have grievance. That is the reason why an appeal is given under R. 4. R. 4 says that where a Receiver fails to pay the amount due from him as the Court directs, the Court may direct his property to be attached. We think it is clearly open to the Receiver in appeal to show that the amount fixed as due by the lower Court is not really the amount due from him but a very much smaller amount only is due. Nothing in the rules in our opinion prevents him from questioning in appeal the correctness of the amount said to be due from him. If we hold otherwise it will practically reduce the appeal under R. 4 to something of very little use. For he would then only be able to object on grounds such as that he had not failed to pay the amount. We, therefore, overrule the objection of the respondent that it is not open to us to consider in appeal the correctness of the amount fixed as due from him by the lower Court.

Coming to the merits of the order of the lower Court we cannot help saying that we are unable to understand the Subordinate Judge's calculations. It is very difficult to follow his reasoning by which he arrived at the figure Rs. 36,100 as approximately due from the Receiver. The learned Vakil for the respondent has not been able to throw much light on the way in which the Subordinate Judge has arrived at this figure. We also notice that the Subordinate Judge has not fixed the exact amount of the Receiver's indebtedness. He has made what he says an approximate estimate and then directed the Receiver to pay. This we think is not the right procedure, what he should have done was to direct the Receiver to submit his accounts for the period during which he was in possession of the properties; and then give the plaintiff an opportunity to surcharge, and falsify them and raise his objection to them. If the Court finds that the matter would take an unnecessary long time for disposal, the proper procedure would then be to refer the accounts and objections to a commissioner and to direct him to go through it carefully and make a report and on that report after hearing the objections, to decide the exact amount which the Receiver is liable to pay. After that the Receiver should have been directed to pay into Court the amount due within a certain time fixed by the Court. If he failed to pay that amount without proper reason within the time fixed, the Court could then pass an order directing the attachment of his property under R.4. In the circumstances of this case it is impossible for us satisfactorily to dispose of the appeal on the materials before us. Therefore we set aside the order of the Subordinate Judge and remand the case to him for disposal according to law in the light of our observations. The respondent will pay the costs of the appellant in this appeal. The security that has been given by the appellant in his stay application will continue till the disposal of this application against the Receiver by the lower Court.

1923 Madras. 87 (1).

SCHWABE, C. J. AND KRISHNAN, J.

Mattam Shinna Viraiah and others ... Petitioners.

Cr. Rev. No. 363 of 1921 and Cr. R. Pet. No. 288 of 1921 dated 1st February 1922 to quash the order of commitment, dated 2nd December 1920 of Taluq Magistrate of Gooty in P. R. Case No. 1 of 1920.

(*a*) *Penal Code, S. 471—Proceedings before a Deputy Tahsildar—Sanction—Offence.*

Certain forged Will was presented by the accused in proceedings for the transfer of a patta before a Deputy Tahsildar. *Held* the Deputy Tahsildar constituted a Revenue authority and his sanction was necessary for the parties to the proceedings to be proceeded against under S. 471, Cr. P. C.

(*b*) *Penal Code, S. 467—Accused not parties to the proceedings in which the document was produced—Sanction—Criminal P. C., S. 195.*

No sanction is necessary for an offence under S. 467 when the accused are not parties in the proceedings in which the document is produced. 24 Mad. 121 Foll.

V. S. Narasimhachar—for the Petitioners.

The Public Prosecutor—for the Crown.

KRISHNAN, J.—In this case, the petitioners before us were committed to the Sessions Court of Anantapur, accused 1 and 2 charged under S. 476, Indian Penal Code for using as genuine a forged document, a Will, which they knew to be forged or had reason to believe to be forged in certain proceedings for the transfer of patta with regard to certain landed properties and accused 3, 4 and 5 under S. 467, Indian Penal Code, with forging of that document. The petitioners contend before us that the case cannot be proceeded with against them without a proper sanction being obtained under S. 195, Cl. 1 (*c*), Criminal Procedure Code. It is clear from the record that the Will was produced by accused 1 and 2 in certain proceedings for the transfer of patta before the Revenue authorities and that though the Deputy Tahsildar had the enquiry in these proceedings conducted through the Revenue Inspector, he passed the final orders refusing mutation of names in the pattah. In circumstances like this it has been already held by this Court in *Queen-Empress* v. *Munda Shetti* (1) that the Deputy Tahsildar constitutes a Revenue Court and that the sanction of that Court is necessary for the parties to the proceedings to be proceeded against under S. 471 of the Indian Penal Code with reference to the document filed before that Court. Following that ruling I must hold that so far as accused 1 and 2 are concerned the committal order must be quashed for want of necessary sanction.

As regards the other accused 3, 4, and 5, their case stands on a different footing. They were not parties to the proceedings before the Revenue Court and what is more they are not charged with the same offence as accused 1 and 2. They are charged with one kind of offence under S. 467 while accused 1 and 2 are charged with another under S. 471 as already pointed out.

The Vakil for the petitioners has drawn our attention to the ruling in *In re Narayan Dhonddev Risbud,* (2) and has asked that we should read S. 195, Cl. 1 (*c*) as meaning that if an offence has been committed with reference to any document produced or given in evidence in any proceeding before a Court no person who is a party to that offence whether he be a party to the proceeding or not can be proceeded against criminally without the necessary sanction being obtained under the section. That question, however, we need not decide for even assuming that the Bombay ruling is correct, on which I express no opinion at present, it could not apply to the present case as the offences charged here are two different offences. Therefore so far as accused 3, 4 and 5 are concerned, there is no ground for setting aside the committal order and against them the trial must go on.

SCHWABE, C. J.:—I agree and have nothing to add.

1. (1901) 24 Mad. 121.

2. (1910) 12 Bom. L. R. 983.

1923 Madras. 87 (2).

AYLING, J.

Palaniandi Servai and others. Petitioners.

v.

Sammandi Ammal ... Respondent.

Cr. Rev. No. 600 of 1921 and Cr. Rev. Pet. No. 484 of 1921, dated 12th April 1922 revising the order of Sub.-Divnl.

Magistrate of Usilampatti, dated 29th April 1921 in M. C. No. 23 of 1920.

Criminal P. C., S. 148—Application for costs—No notice to the other party—Effect.

An order awarding costs on the application of one of the parties without notice to the other party is without jurisdiction.

F. S. Vaz—for the Petitioners.

The Public Prosecutor—for the Crown.

K. V. Krishnaswami Aiyar—for the Respondent.

ORDER :—In this case the Magistrate has passed an order making all the counter-petitioners in a possession case liable for petitioner's costs in the shape of of Vakil's fee.

This order was passed some six weeks after the possessory order, apparently immediately on the presentation of a petition by the successful party to the possession case and the counter-petitioners seem to have had no opportunity of being heard.

I am not prepared to say that the delay in passing the order necessarily affected the jurisdiction of the Magistrate, but it certainly could not be passed without notice to the other side affected by it and the present petitioners who did not claim possession had a special case for exemption from liability for costs which called for consideration.

The Magistrate's order, dated 29th April, 1921, awarding costs is set aside; he will restore the petition (presented under S. 148 of the Code of Criminal Procedure, bearing order of 29th April, 1921) to file and dispose of it according to law bearing in mind the decision in *Vythinada Thambiran* v. *Mayandi Chetty* (1).

The costs if paid should be refunded.

(1) (1906) 29 Mad. 373.

1923 Madras. 88 (1).

PHILLIPS, J.

Ramchandram Pillai ... Petitioner.

v.

Neelambal Achi ... Respondent.

Civ. Rev. No. 607 of 1921, dated 18th April 1922 revising the order and judgment of 2nd Addl. Sub Judge of Tanjore at Mayavaram in I. A. No. 280 of 1921.

Civil P. C., Ss. 115 and 10—Refusal to stay—Revision.

High Court will revise an order refusing to stay a suit when the same question is in issue between the parties in two different suits.

K. Rajah Aiyar—for the Petitioner.

S. Viswanatha Aiyar and S. Srinivasa Aiyar—for the Respondent.

JUDGMENT :—The same question is in issue in both the suits, *i.e.*, the validity of the alienation by respondent to petitioner, and the disposal of the issue in the first suit will practically dispose of the second suit, for petitioner does not dispute his liability under the mortgage if the alienation is valid. The Subordinate Judge's order refusing to stay proceedings therefore involves a question of jurisdiction, for he has assumed jurisdiction which is denied to him by S. 10 of the Code of Civil Procedure. It is argued for respondent that this Court has no power to interfere in revision with orders under S. 10 of the Code of Civil Procedure, and reliance is placed on *Sultanat Jahan Begam* v. *Sunder Lal* (1). In that case, however, the order sought to be revised was an order of stay and not a refusal to stay and thus the Court has not assumed jurisdiction which it did not possess. If the decision is meant to apply to all orders under S. 10, Civil Procedure Code, I must with all respect dissent, for this High Court has consistently allowed revision in cases of mere interlocutory orders, and I see no reason to refuse jurisdiction in this case. The Subordinate Judge's order is therefore set aside and proceedings stayed in Original Suit No. 19 of 1920. Respondent will pay petitioner's costs of this petition.

1. (1920) 42 All. 409.

1923 Madras. 88 (2).

SPENCER AND VENKATASUBBA RAO, JJ.

Singaravelu Mudaliar ... Defendant—Appellant.

v.

Chokka Mudaliar alias *Chokkalinga Mudaliar* ... Plaintiff—Respondent.

S. A. No. 1164 of 1921, dated 24th April 1922 against the decree and judgment of Addl. Sub-J., Tanjore, in A. S. No. 2 of 1921.

(a) Adverse possession—Previous decree that the person in adverse possession had no legal title—Effect—Limitation.

The judgment of a Court declaring that one of the parties has no legal title to the properties in suit cannot have the effect of causing his possession to cease to be adverse to the opposite party from the moment of its pronouncement so long as possession remains undisturbed.
(P. 91, Col. 1.)

(b) *Civil Procedure Code, S.* 11—*Possession, nature of, declared in a previous suit—Res judicata.*

A judgment in a prior suit operates as *res judicata* in a subsequent suit between the same parties or their representatives in interest if it decides what was the character of the possession of any person who was a party to that suit *e.g.*, whether it was then adverse or permissive possession or whether it was separate or joint possession.
(P. 89, Col. 1.)

K. Rajah Aiyar—for the Appellant.

N. Muthuswami Aiyar—for the Respondent.

SPENCER, J.:—I agree with the judgment which my learned brother is about to deliver. The question whether possession in any particular case is adverse is a question of fact. A judgment in a prior suit may operate as *res judicata* in a subsequent suit between the same parties or their representatives in interest if it decides what was the character of the possession of any person who was a party to that suit, *e.g.*, whether it was then adverse or permissive possession or whether it was separate or joint possession. But I am with due respect quite unable to understand how the judgment of a Court declaring that one of the parties has no legal title to the properties in suit, can have the effect of causing his possession to cease to be adverse to the opposite party from the moment of its pronouncement so long as possession remains undisturbed. Such a judgment would rather appear to emphasise the adverseness of the possession of the trespasser as against the true owner. It cannot benefit the true owner who omits for some reason or other to take steps to eject the trespasser before the latter completes the period of possession required for the establishment of a prescriptive title. The judgment relied upon in this case, O. S. No. 151 of 1912, was a judgment in a suit brought by the present defendant. It decided a question of title without declaring the character of his possession. As in the result the suit was dismissed, the present plaintiff could not make use of it for ejecting the present defendant in execution of that decree. He waited too long to institute this suit with the consequence that when he came to a Court as a plaintiff he found himself barred by the Statute of Limitations. We must follow the decisions of this Court in preference to that in *Mir Akbarali* v *Abdul Ajij* (1). The article governing limitation in this suit was rightly taken to be Art. 124: Vide *Pattaikara Manakkal Kuppen* v *Choorakkapatti Munde Kottil* (2).

The appeal is allowed with costs of appellant here and in the lower Appellate Court to be paid by plaintiff, and the decree of the District Munsif dismissing the suit with costs will be restored.

VENKATASUBBA RAO, J.—The dispute relates to charity known as Abiraman Thiruvasal Choultry. The plaintiff (Respondent before us) brought the suit for recovery of possession of a Choultry building belonging to the said charity alleging that he was the trustee thereof. The 1st defendant resisted the suit on the ground that the plaintiff was not the trustee and the right, if any, which the plaintiff possessed to the trusteeship became barred by limitation. The first issue framed is: "Whether the plaintiff is the trustee of the suit charity?" and the 2nd "Whether the plaintiffs' claim to the trusteeship is time-barred?"

The institution is thus described by the Subordinate Judge: "The plaint Thiruvasal is a small building at Sikkal, near Negapatam where Paradesis take rest. The origin of the Thiruvasal is not known. The Trust owns the Choultry and a few house sites. It has only an income of about Rs. 10 or 11 per annum."

The history of this institution so far as it is relevant to the facts of this case may be briefly set forth. One Mangam Paradesi was managing the Choultry. During his time a stranger Kathan Paradesi was living with him in the Choultry. Sometime after Mangam's death about 1898 disputes arose between the plaintiff, who is Mangam's first cousin, and the 1st defendant who is Mangam's sister's son. The 1st defendant was not at first serious in regard to denying the plaintiff's title, for when he received information about Mangam's death the 1st defendant authorized Kathan to act under the plaintiff. So Kathan obtained registered lease deeds in the name of the plaintiff from

1. (1920) 44 Bom. 934.
2. (1912) 14 I. C. 168.

tenants occupying the house sites belonging to the trust. The 1st defendant soon after asserted that he was the trustee, ousted Kathan from the Choultry in 1901 and himself took actual possession. From 1907 the plaintiff has been disputing the title of the 1st defendant to the trusteeship of the charity. In 1901 the 1st defendant executed certain mortgage deeds for loans borrowed for repairing the Choultry. The creditor brought O. S. No. 87 of 1907 on the file of the Negapatam District Munsif's Court against the 1st defendant and others and on objection taken by some defendants the present plaintiff was also impleaded as the 9th defendant. It was found by the Court that though the present plaintiff had legal title to the trusteeship the 1st defendant was the *de facto* trustee or manager from 1901. Subsequently several rent-suits were filed by the 1st defendant against the tenants for the recovery of rents in respect of trust properties. The finding in effect in those suits was that the present plaintiff has a better title to the office of the trusteeship, that the present 1st defendant was *de facto* trustee from 1901 and that the plaintiff's title was not barred by limitation as the 1st defendant had not acquired a valid title by adverse possession for the full period of 12 years. On this finding the suits for rent were dismissed. The first defendant thereupon filed O. S. No. 151 of 1912 on the file of the Negapatam District Munsif's Court for a declaration that he was the trustee. It was found that the present plaintiff had the legal title and that the present 1st defendant had mere possession. In consequence of this finding the suit was dismissed on 27th June 1913. The 1st defendant continued to remain in possession and the plaintiff brought the present suit on 21st July, 1914.

The District Munsif fully discussed the evidence and recorded his findings on the two issues mentioned above that the plaintiff had the legal title to the office of trustee; but that the 1st defendant had had the effective control of the Choultry, and its management in his own rights as trustee from the year 1901 and that the title of the plaintiff was therefore barred under Art. 124 of the Limitation Act. The Subordinate Judge accepted the findings of the District Munsif that the plaintiff is the trustee and that the possession of the 1st defendant was adverse from 1901.

From the wording of the issues framed and from the discussion of the evidence, it is abundantly clear that both the District Munsif and the Subordinate Judge have applied their minds to the question of the trusteeship of the suit charity and not merely to the Choultry building which is only one item of the properties belonging to the trust. The contention therefore of the respondent, that the lower Courts have not considered the applicability of Art. 124 is utterly untenable. The District Munsif expressly refers to that Article at the end of paragraph 7 of the judgment.

The Subordinate Judge, however, reversed the decision of the District Munsif, and the ground on which he set aside that decision involves the determination of a question of some importance and interest. In the opinion of the Subordinate Judge the judgment in O. S. No. 151 of 1912 dated 27th June, 1913, breaks the continuity of the 1st defendant's adverse possession; and for his proposition he relies upon the authority of *Mir Akbarali* v. *Abdul Ajij*. (1) The Subordinate Judge says:—

"Then the question is whether, because if the failure of the 1st defendant in getting a declaration in his favour as trustee in O. S. No. 151 of 1912 his adverse possession ceased from the date of that decree (June 1913) and he cannot tack on his previous possession from 1901 to mature his title by adverse possession. The decision in *Mir Akbarali* v. *Abdul Ajij* (1), clearly supports the plaintiff's contention."

He concludes:—

"Following the decision in *Mir Akbarali* v. *Abdul Ajij* (1), I find that 1st defendant cannot tack on the period of his possession prior to the decision in O. S. No. 151 of 1912.

I may at once state that this reasoning is unsound; for in his view the adverse possession of the 1st defendant ceased from the date of the decree. The question of 'tacking on' does not arise at all because there are no two periods of adverse possession referred to by the Subordinate Judge. According to him the decree in O. S. No. 151 of 1912 had the effect of preventing the statute of limitation from running and the Subordinate Judge was misled into using the expression 'tacking on' by some observations which were made in *Mir Akbarali* v. *Abdul Ajij* (1). I shall presently refer to the cases that bear upon the subject but on princi-

ple it seems to me, with great respect that the decision on which reliance was placed, by the lower Appellate Court is wrong. Adverse possession is a question of fact and always implies that the right to immediate possession subsists in the true owner and not in the person having adverse possession. An adjudication that the true owner had a good title to possession is entirely consistent with the fact, that the actual possession is with another party who ousted the true owner and has been holding possession as against the true owner on his own behalf. I therefore fail to see how a decree which negatived the 1st defendant's right could possibly be regarded in the nature of an interruption of the continuity of possession. In *Mir Akbarali* v. *Abdul Ajij* (1) Macleod, C. J., assumes that when there is a decree of Court deciding that a certain party has no right, he must, if he wishes to acquire a good title by adverse possession, start afresh after the decree, because his losing the suit puts an end to his previous adverse possession. The learned Chief Justice bases this conclusion upon the ground that it cannot be presumed that the party having adverse possession, intended, the moment the decree was passed negativing his rights, to continue to hold adversely to the successful party and in effect in contempt of the decree aforesaid. The judgment proceeds to say that it is quite possible that the party relying upon adverse possession might, finding that the successful party was remiss in seeking to execute the decree, gather fresh courage and might, after a certain period had elapsed from the date of the decree, determine to set up again a title in himself against the successful party in the suit. These in short are the grounds of the decision in *Mir Akbarali* v. *Abdul Ajij* (1). If the Court comes to a conclusion that as a fact the adverse possession ceased and that the party setting up adverse possession, on account of his respect for the decision, determined not to hold the property adversely, there is then no continuity of adverse possession because the party deliberately ceased to hold the property adversely. But the decision of the Bombay High Court appears to be based upon a presumption that a decree against the party in possession *ipso facto* determines adverse possession. The learned Chief Justice does not support his view by reference to any authority and with great deference, I am unable to follow the decision above referred to.

With the exception of the case quoted, the authority seems to be entirely on the side of the appellant.

In *Shaikh Mukbool Ali* v. *Shaikh Wajed Hossein* (3) Sir Richard Garth, C. J., and Birch, J., held that where a person was in actual possession of property from the time when the deed conveyed it to him, the decision which declared that deed to be fraudulent did not have the effect of putting another claimant in possession. Garth, C. J., observed :—

> "Whatever the decree might have been, the defendant's possession could not be considered as having ceased in consequence of that decree, unless he were actually dispossessed. The fact that there is a decree against him does not prevent the statute of limitation from running."

Ram Lal v. *Masum Ali Khan* (4) also supports the appellant's contention.

Babaji Akoba v. *Dattu Laxman* (5) has been relied upon by the plaintiff. It must be said that this is not a direct authority on the question under consideration. But the following observations of Batchelor, J., have some bearing :

> "In 1898 it was held that he was a member of a joint family. But it was not decided that he was in possession of any part of the family property either directly or constructively ; and at a given moment a Hindu may be a member of a joint family entitled on partition to his share and may still be in process of being excluded to his knowledge. That is what has happened here. Possession is a mere matter of fact, and adverse possession, as I understand it, means possession held by some person on his own behalf or on behalf of some person other than the true owner, the true owner having a right to immediate possession. To say, therefore, that in 1898 the plaintiff had a good title to possession is perfectly consistent with saying that in fact possession was with the defendants who were ousting the plaintiff to his knowledge in spite of his title."

Raghunathachariar v. *Tiruvengada Ramanujachariar* (6) deals with the question of adverse possession under Art. 124. As in the case on hand, there also it was the effect of a declaratory decree that had to be considered, and the learned Judges observed :—

3. 25 W. R. 249.
4. (1903) 25 All. 35.
5. (1913) 37 Bom. 64.
6. (1910) 9 M. L. T. 171.

"And no authority has been cited in support of the proposition that the passing of a declaratory decree in favour of the plaintiff will stand in the way of the defendant in the suit acquiring the title to the property by adverse possession, such possession having commenced before the institution of the suit for title and continued afterwards for the period required by law."

There is an observation in the judgment which may be said to involve the inference that the result will be different if the decree were a decree for possession. But I do not think that there is any warrant for this distinction. This case is a direct authority against the respondent and has not been referred to in the judgment of the lower Appellate Court. The same view was taken in *Ayissa v. Lakshmana Prabhu* (7) and the following observation is made in the course of the judgment :—

"This Court has more than once held that a decree in favour of a party with regard to property does not by itself stop the running of limitation when the property continues to be in the possession of the defendant. It is, therefore, possible that, though the former suit was not barred when it was instituted, the present suit may be barred by limitation."

I may observe that no distinction is to be found in this judgment between a declaratory decree and a decree for possession.

In *Akbar* v. *Tabu* (8), the Punjab Chief Court followed *Ayissa* v. *Lakshmana Prabhu* (7). The question arose in reference to adverse possession of a co-sharer. It was found that the plaintiff was in exclusive possession, that it was contended on behalf of the opposite party that there was a break in the adverse possession as a result of the decree which negatived the plaintiff's right. The Court in dealing with this contention said that a decree in favour of the defendants "not accompanied by actual effective assertion of rights and taking of possession of those rights" was of no avail to them. *Hans Raj* v. *Maulu* (9) is a recent decision of the Lahore High Court, and though it is not quite in point it is useful as containing that Court's approval of the passage in *Akbar* v. *Tabu* (8) where relying upon *Ayissa* v. *Lakshmana Prabhu* (7), the learned Judges laid down the proposition that a mere bringing of an action and a judgment thereon not accompanied by an entry does not break the continuity of adverse possession.

I have referred to the last two cases because the view taken by the Madras High Court was accepted in them.

This proposition set forth above may be inferred from the following passage, in the judgment of Srinivasa Aiyangar, J., at page 657 of *Viyapuri* v. *Sonamma Boi Ammani* (10) :—

"A simple suit for declaration of the mortgagee's right when such a right is denied by the trespasser may probably be brought, but that is a proceeding which the mortgagee is not bound to take, and a decree in such a suit cannot save the rights of the mortgagee from becoming barred, if otherwise they would be."

Passages from certain other judgments of this Court have been relied upon by the appellant in order to show that the same inference can be drawn from them. But I do not propose to refer to them as the cases containing the said passages are not direct authorities on the point and as moreover in the cases that have been already referred to, the question has been considered and decided.

Both on principle and on authority I am of opinion that the 1st defendant is bound to succeed and my judgment is therefore for him. I would allow the appeal, set aside the decree of the lower Appellate Court and dismiss the plaintiff's suit for possession.

Appeal allowed.

7. (1911) 9 M. L. T. 420.
8. (1914) 22 I. C. 805.
9. (1921) 63 I. C. 881.
10. (1915) 39 Mad. 811=29 M. L. J. 645.

1923 Madras. 92.

KRISHNAN AND VENKATASUBBA RAO, JJ.

Mouna Guruswamy Naicker...Petitioner—Appellant.

v.

Sheikh Muhammadhu Rowther and another ...Respondents.

Appeal against Order No. 11 of 1922 dated 14th September 1922 against the order of Sub-Judge Dindigul, dated 3rd September 1921 in I. A. No. 62 of 1921.

Civil P.C.,—O. 39, R. 2 (3) and S. 150—Breach of injunction—Business of the Court granting the injunction transferred to another Court—Jurisdiction to entertain application for breach of injunction.

Where business of the Court that granted the injunction was transferred to another Court and an application under O. 39, R. 2 (3) was made to

the latter Court for punishing the breach of the injunction but the Court refused to hear the application. *Held*, that primarily it is the Court granting the injunction that can punish the disobedience. But this does not prevent the Court to which the business of that Court is transferred from exercising the power under S. 150, O. 39, R. 2 (3) does not say that it is only the Court granting the injunction that should make the order under it; so that there is nothing in that rule which excludes the application of S. 150 by bringing it within the words "save as otherwise provided for". 26 Cal. W. N. 216 Diss.

(*b*) *Civil P. C., S.* 150—'*Transfer*'—*Scope.*

The word 'transfer' in S. 150 is not inapplicable to a case where the District Judge fixed the jurisdiction of the Court under the Civil Courts Act and transferred the whole of the business within the area to it.

B. Sitarama Rao and S. R. Muthuswami Aiyar—for the Appellants.

L. A. Govindaraghava Aiyar—for the Respondents.

JUDGMENT :—This is an appeal by the plaintiff under O. 43, R. 1 (*r*), of the Civil Procedure Code against the order passed by the Subordinate Judge of Dindigul on an application made to him under O. 39, R. 2 (3) to have the defendant punished for disobedience of an injunction which had been issued to him in the suit. The Subordinate Judge has declined jurisdiction on the ground that the proper Court to punish for disobedience was the Court which passed the order of injunction and that as his Court was not that Court, he held, he was not entitled to act under O. 39, R. 2 (3).

The way in which this case came to the Dindigul Court was an order of the District Judge transferring to that Court all the business within the areas of certain Munsifs over which the Dindigul Court was given jurisdiction for the first time.

It is contended before us that the Subordinate Judge in refusing jurisdiction misconstrued the provisions of S. 150, Civil Procedure Code and that as the business of the Court which granted the injunction namely the Mudura Sub-Court, was transferred so far as the local jurisdiction over certain Munsif was concerned to the Dindigul Court, that Court must be held to have the same powers and authorised to perform the same duties as the Madura Sub-Court. It is perfectly clear to us that this is a case to which S. 150 does apply and that there is nothing in O. 39, R. 2 (3) which prevented the Dindigul Court from acting under that rule and dealing with the application that was made to that Court by the plaintiff. The argument addressed to us by the learned vakil for the respondent against that view is first of all that because O. 39, R. 2 (3) speaks of "the Court granting the injunction may order" no other Court could be held to have jurisdiction to pass the order and secondly, that the application of S. 150 is excluded by the words "save as otherwise provided" in that section. A very similar argument we had to consider with reference to O. 9, R. 13 where there had been a territorial re-distribution of jurisdiction between two Munsifs' Courts where we held that the "words save as otherwise provided for" did not prevent S. 150 from applying and enabling the Court to which the business had been transferred from setting aside an *ex parte* decree: See *Ranganatha Rao* v. *Hanumantha Rao* (1). That was a case under O. 9, R. 13 and there were some special reasons there, more than there is in this case, for the view we took, but we think that it is nevertheless an authority for saying that the words "save as otherwise provided for" do not exclude the application of S. 150 merely because in the rule that gives the Court power to take action, there are the words "the Court granting the injunction". As was pointed out by Srinivasa Aiyangar, J., in *Suppi* v. *Kunhi Koya* (2) the words "that the Court which granted the injunction" were introduced into the new Code not with any object of changing the law which existed before but because the wording of the corresponding section in the old Code was not very happy as it implied that the injunction was "to be enforced by" imprisonment of the party whereas the imprisonment was really a punishment for disobedience. Those words "may be enforced," as pointed out by the learned Judge, had to be changed in the corresponding new rule and it resulted in a re-drafting of that rule itself. Naturally when the active form of expression was used by the legislature it was necessary to describe the Court which was to be given power to punish for disobedience and of course that was primarily the Court granting the injunction but it is clear to our minds that this does not

1. (1922) Mad. 10=15 L. W. 458.
2. (1916) 39 Mad. 907 (913).

prevent the Court to which the business of that Court was transferred from exercising the power under S. 150. O. 39, R. 2 (3) does not say that it is only the Court granting the injunction that should make the order under it, so that there is nothing in that rule which excludes the application of S. 150 by bringing it within the words "save as otherwise provided for." If the suggestion that is made by the learned vakil for the respondent is taken, the result will be that in case the Court which passed the injunction was abolished altogether for some reason, there will be no Court to punish for disobedience of the injunction even if the whole business of the abolished Court had been transferred to some other Court and was carried on by that other Court. We are not prepared to adopt such a construction as this unless the language is perfectly clear in favour of it. Here so far as we can see there is nothing in O. 39, R. 2 (3) and in S. 150 to prevent the Court to which the business of the first Court is transferred from exercising its powers under O. 39, R. 2 (3).

It is also argued for the respondent, to exclude the application of S. 150 in this case, that the transfer of the business in the area over which the Dindigul Court had been given jurisdiction by the order of the District Judge was not one which fell under S. 150 as there was only an assignment of the business of the one Court to another and such an assignment, it is said, is not the same as the transfer spoken of in S. 150. The learned vakil for the respondents has cited the case in *Munshi Md. Kazemali* v. *Munshi Niamuddin Ahmed* (3) to support his argument but with all respect we are unable to follow that ruling for we do not agree with the learned Judges in that case that the word transfer is inapplicable to a case where the District Judge fixed the jurisdiction of the Court under the Civil Courts Act and transfers the whole of the business within the area to it. The learned Judges seem to think that in such a case there is only an assignment of business and not a transfer of the business. So far as we can see there seems to be no reason why such a distinction should be made. Holding as we do that the present case falls under S. 150, we think the Subordinate Judge acted wrongly in declining jurisdiction in the matter of this application.

We set aside his order and remand the application to him for fresh disposal according to law. Costs to abide and follow the result.

3. (1922) Cal. 41=26 C. W. N. 216.

1923 Madras. 94.

RAMESAM, J.

Sinnaswami Mudali and others ... Petitioners.

Cr. Rev. No. and Cr. Rev. Pet. No. 42 of 1922, dated 5th May 1922 revising the judgment of Sub-Divnl. Magistrate, Erode, in C. A. No. 73 of 1921.

Penal Code S. 147—Common object only against 4 out of 9 accused found—Conviction.

When the common object of the 5 out of the 9 accused is not traceable, the conviction of the remaining four under S. 147 can not be sustained.

V. C. Seshacharriar—for the Petitioners.

V. L Ethiraj for the Public Prosecutor—for the Crown.

ORDER :—There is no finding in the judgment of either the first Court or the appellate Magistrate as to what accused 5 to 9 did. It is expressly stated by the Appellate Court that they were not guilty of trespass. The first Court stated in paragraph 7, after setting forth the evidence of P. W. 3 who saw the accused going together and using abusive language. "This fact clearly shows that accused formed themselves into an unlawful assembly and marched together to execute their common object." What the common object was, was not stated, nor is it easy to infer that they had any common object at all at that stage, seeing accused 5 to 9 did nothing even afterwards. It is doubtful if they are guilty of any offence. If so the conviction of accused 1 to 4 under S. 147 cannot stand as there are not five persons who committed the offence of criminal trespass together. As to the conviction of the accused 1 to 4 under S. 448, Indian Penal Code, I think the conviction is right and must stand. Though there is no express finding that the intention of the trespass was to cause annoyance, etc., it is so obvious on the

facts found that it is not necessary to interfere with the conviction.

The petitioners are acquitted of the offence under S. 147, Indian Penal Code and the sentence in each case reduced to the sentence of fine imposed. The sentence of imprisonment will be cancelled.

1923 Madras. 95.

OLDFIELD AND RAMESAM, JJ.

Nittoor Moideen Hajee and others ... Appellants.

Cr. A. Nos. 325 and 342 of 1922, dated 11th August 1922 against the judgment of Special Mag., Calicut, in S.C. No. 22 of the Calendar for 1922.

(*a*) *Limitation Act, S. 5 - Applicability to special or local law—Act X of* 1922.

S. 5 under which the Court can excuse delay is not one of the provisions, the application of which is extended by Act X of 1922 to proceedings under a special or local law.

(*b*) *Criminal P. C., Ss.* 423, 421 *and* 422—*Scope*

It is only when an appeal has been properly admitted under S. 421 that S. 423 becomes applicable and hence the power to excuse delay in filing an appeal cannot be regarded as incidental to the exercise of powers conferred on an Appellate Court by S. 423.

(*c*) *Criminal P. C., S.* 404—*Jurisdiction to hear—Appeal.*

For the purpose of deciding the tribunal before which the appeal lies, each accused must be deemed to have been convicted in a separate case of his own; and the determination of the Court having jurisdiction to hear his appeal will depend on the extent of his individual sentence.

T. Krishna Kurup—for the Appellants.

J. C. Adam the Public Prosecutor—for the Crown.

OLDFIELD, J. :—These appeals came before one of us for admission and notice was issued to the Public Prosecutor solely on the question whether they could be admitted or whether they were out of time. The point arises primarily, because the convictions and the sentences were passed under Ordinance No. 1 of 1922, a special enactment. The time provided for appealing under that Ordinance is only 15 days. Judgment was given in each of these appeals on the 31st March. The presentation in this Court was in Appeal No. 325 on the 24th April, and in Appeal No. 342 on the 28th April. It is clear that this presentation was out of time, unless the appellants were entitled at least to an allowance for the period requisite for obtaining copies of the judgment appealed against. Such a deduction would of course be admissible in any appeal against a conviction under the ordinary law with reference to S. 12 of the Limitation Act. This Court has however recently held in *Lingayya* v. *Chinna Narayana* (1) that S. 12 cannot be applied in the case of appeals under a special law, such as the Ordinance we have to deal with.

The point however calls for no further consideration since the passing of Act X of 1922, which became law on the 5th March, 1922 and provided that Ss. 4, 9 to 18 and 22 of the Indian Limitation Act should be applicable to proceedings under any special or local law, in so far as and to the extent to which they are not expressly excluded by such law. It may be said at once that there is nothing in the Ordinance expressly excluding this provision. The appellants are therefore entitled to credit for the time they spent in obtaining copies; and that is as Mr. Kurup on their behalf agrees, from the date of judgment, 31st March, 1922, to the date on which copies were given to their vakil 2nd April, 1922.

That deduction however made, the presentation on the 24th and 28th April was still beyond the 15 days allowed by the Ordinance. Mr. Kurup has accordingly conceded that there is delay in the presentation of Appeal No. 325 and has urged that the delay should be excused by this Court. The difficulty is that S. 5 of the Limitation Act under which the Court can excuse delay is not one of the provisions, the application of which is extended by Act X of 1922 to proceedings under a special or local law. We therefore have no right to utilise S. 5 in dealing with these appeals. Next it has been argued that we have power to excuse the delay under S. 423 (1) (*a*), Criminal Procedure Code, because an order excusing the delay would be a consequential or incidental order and would be just or proper in their disposal. We are unable to take that view of the nature of such an order. It is not consequential. We must then consider whether it is incidental and, if so, incidental to what? S. 423 begins: "The Appellate Court shall then send for the record of

1. (1918) 41 Mad. 169 (F.B.).

the case, if such record is not already in Court;" and it has to be presumed that any power conferred by S. 423 can be used only after the stage, at which S. 423 becomes applicable to the proceedings, has been reached. That is clearly indicated by the use of the word "then". The application of S. 423 must, we think, be taken as legitimate only after the preliminary stage indicated in Ss. 421 and 422 has been passed. That is after the appeal has been admitted and after the notice referred to in the latter section has been given. It is true that notice has been given in this case to the Public Prosecutor; but (as was stated distinctly in the order directing it) it was given only for the special purpose of enabling him to appear to take part in the proceedings authorised by S. 421, at which the question of admission and the question whether there should be further proceedings, with respect to which S. 423 applied are considered. We do not think that S. 423 confers on us any power, the exercise of which can help these appellants. We must therefore dismiss Appeal No. 325 as out of time.

These considerations however are not sufficient for the disposal of Appeal No. 342 because it is presented by the 36th accused, who was sentenced only to four years' rigorous imprisonment and a fine and who therefore is entitled under S. 11 of the Ordinance to appeal only to the Special Judge and not to this Court. In fact he did present his appeal originally to the Special Judge. But that Officer returned it to him on the ground that some of the accused had been sentenced in the judgment appealed against to five years' rigorous imprisonment and that the appeal lay in the case of those also, who had been sentenced to a shorter period, to the High Court. That view of the law is incorrect. Vide re *Venkatakrishnayya* (2). For the purpose of deciding the tribunal, before which the appeal lies, each accused must be deemed to have been convicted in a separate case of his own; and the determination of the Court having jurisdiction to hear his appeal will depend on the extent of his individual sentence. That being the law the learned Special Judge was wrong in returning the appeal to the appellant for presentation to this Court.

We have only then to decide whether the presentation to the learned Special Judge was in time. It is not disputed that, if allowance is made for the time taken for obtaining copies and for the time, during which the Court was closed for the holidays, presentation there on 24th April, 1922, was in time. That being so, the learned Special Judge has refused to exercise the jurisdiction vested in him by law, and we must deal with his order in revision. We therefore in Appeal No. 342 return the appeal to the appellant's Counsel for representation in the Court of the Special Judge.

2. (1917) 40 Mad. 591.

1923 Madras. 96.

SPENCER AND DEVADOSS, JJ.

S. Paramasivam Pillai ... Defendant—Appellant.

v.

Meenakshisundaram Pillai (dead) and others ... Plaintiff—Respondents.

F. A. Nos. 314 of 1918 and 60 of 1919, dated 15th August 1922 against the decrees of Sub-Judge, Ramnad, at Madura, in O.S. No. 82 of 1916.

Partition—Co-owners—A minor co-owner, partition with—Duty of adult co-owner—Onus when shifted.

Plaintiff's father and defendant purchased the plaint land in 1900. His father died in 1902 and in 1904, during plaintiff's minority, the defendant entered into an arrangement with the minor's young mother acting as his guardian whereby the plaint land was allotted to the defendant and another plot which belonged in common to his father and the defendant was allotted to the plaintiff for his share. The plaint plot being worth more than the price assigned to it, the plaintiff claimed a moiety of the plaint site or in the alternative its price on the ground that the arrangement of 1904 was not binding on him inasmuch as there was no necessity for it and that his mother had no independent competent advice. *Held* on the question of onus that the plaintiff has to make out a case before he could ask for a decree. But when it is admitted that the plaintiff is a minor, his mother, a young widow, with no near male relations who could give independent advice to her, and when the defendant knows all about the property from the very beginning and a great disparity in extent of the two lands exists and when there is no ostensible reason except the wish of the defendant, the onus shifts and it is for the defendant to make out that the transaction was a fair one. The case of a co-owner asking for a division of property belonging to himself and a minor occupies a position between

that of partition in a joint family and that of alienation by the guardian of a minor. Whenever an adult person deals with a minor through the minor's guardian, it is his duty to see that the transaction is a fair one and that the minor is not prejudiced in any way by any act or omission on his part.

(P. 98, Col. 2; P. 100, Col. 1.)

T. R. Ramchandra Aiyar, S. Ramaswami Aiyangar, K. Bashyam Aiyangar, V. Ramaswami Aiyangar and K. S. Ramabhadra Aiyar—for the Appellant, in A. S. 314 and for the Respondent in A. S. 60.

T. Rangachariar, N. Srinivasacharya and A. Chidambaram—for the Respondents in A. S. 314 and for Appellants in A. S. 60.

DEVADOSS, J.:—The first defendant is the appellant in Appeal No. 314 of 1918. The suit is by one Meenakshisundaram Pillai for a division of the plaint property which belonged to him and to the 1st defendant or for the value of his share, should the Court consider that it was inequitable that he should get possession of a moiety of the plaint land. The main allegations in the plaint are that plaintiff's father Chelaperumal Pillai was a first-grade pleader at Sattur, that he purchased the plaint land in 1900 along with the 1st defendant under Ex. D, that his father died in 1902, that in 1904 when the plaintiff was a minor, the 1st defendant entered into an arrangement with his mother as evidenced by Ex. A, whereby the plaint plot was allotted to the 1st defendant and another plot which belonged in common to his father and the 1st defendant was allotted to him for his share, that he attained majority on 3rd January, 1914 and that the plaint plot was worth much more than Rs. 500 the value given in Ex. A, that he was entitled to be given a moiety of the plaint site as there was no necessity for the execution of Ex. A by his guardian and that it was not binding on him. The 1st defendant pleaded among other things that the arrangement evidenced by Ex. A was a *bona fide* arrangement, that the plaint plot was not worth more than five hundred rupees in 1904, that the plot allotted to the plaintiff was the more valuable of the two as it was situated opposite to the District Munsif's Court-house and other public buildings, that he did not act in any way unfairly to the plaintiff and that the plaintiff's guardian had "the very competent, independent and absolutely disinterested advice of the plaintiff's father's best and trusted friend," that the arrangement was beneficial to the plaintiff and that he was not entitled to claim a moiety of the plaint land and that the suit was barred by limitation. The other defendants are alienees from the 1st defendant who have built houses on the plaint land. They adopted the defence of the 1st defendant and added that in any event the plaintiff was not entitled to possession of the plaint land, that they had invested large sums of money in erecting houses and that the plaintiff was not entitled to ask that they should be pulled down and removed.

The Temporary Subordinate Judge, Ramnad, held that the plaintiff's suit was not barred by limitation, that the arrangement evidenced by Ex. A was without any necessity, that the 1st defendant did not act *bona fide* and that the other defendants were not *bona fide* purchasers for value, and gave a decree to the plaintiff for a sum of Rs. 16,500 being the value of a half share of the plaint property. Against this decree the 1st defendant has preferred Appeal No. 314 of 1918. The other defendants have preferred Appeal No. 60 of 1919.

It is unnecessary to consider Appeal No. 60 of 1919 as the appellants did not bring the legal representatives of the 1st respondent on record within the time allowed by law. The plaintiff who was 1st respondent died in April, 1921 and the application of the vakil at the time of the hearing of the appeal to be allowed to bring on record the legal representatives of the plaintiff, respondent, cannot be entertained after the lapse of one year and three months. The decree of the Subordinate Judge will stand so far as the appellants in Appeal No. 60 of 1919 are concerned. Appeal No. 60 is dismissed.

Appeal No. 314 of 1918 was argued at great length and the main contention for the appellant was that Ex. A being an ordinary partition arrangement unless the plaintiff could show that it was brought about by fraud, or any improper act on the part of the 1st defendant, it could not be set aside, and that the Subordinate Judge had wrongly thrown the *onus* of proving the necessity for the transaction

on the 1st defendant and that the finding of the Subordinate Judge was vitiated by his wrong view of the law as regards the *onus* of proof. It is necessary to see what the facts are before applying the law to the facts of the case. The admitted facts are that the plaintiff's father Chellaperumal Pillai was a well-known first-grade pleader in Sattur and acquired considerable property. He purchased the plaint property in 1900 under Ex. D for Rs. 500 in his name as well as in that of the 1st defendant. He died in 1902 leaving the plaintiff and another son aged about 3 and his wife aged about 23 or 24 years. His wife was his own sister's daughter and after his death his affairs were managed by his widow and sister. In his Will he appointed four persons to assist the widow in the management of his estate one of whom is defendants' witness 1. Another piece of land consisting of 4 plots situated opposite to the present District Munsif's Court-house was purchased for Rs. 500 in the joint names of 1st defendant and Chellaperumal Pillai. Though the document evidencing the purchase of the latter four plots has not been exhibited, yet it can be fairly held to have been proved that it was purchased in 1897 for Rs. 500. It is also well known that Sattur is a place of commercial importance. There are several cotton mills and a number of factories. The plaint site is near the road leading to the Railway Station, one of the principal thoroughfares of the town. The extent of the plaint land is 11,000 kulis. The extent of the other plot opposite to the District Munsif's Court-house is 512 kulis. The plaintiff was a minor of about seven years of age and his mother a young Hindu widow at the time of Ex. A. There is no evidence that there was any need for partition in 1904. The plaintiff's father had acquired before 1900 two plots of land called Marakadai or Timber depot land adjoining the road to the Railway Station which could connect the plaint land with the road. There was no access from the plaint land to any of the public roads in 1904 and subsequent to the date of Ex. A, the 1st defendant bought the plots to the south and north of the plaint land in order to get access to the road on either sides by Ex. III and H. There is also evidence to show that from 1897 people began to build near and about the plaint land. There is no evidence that the plaintiff's mother consulted any independent person with regard to the division of the plaint land excepting defendants' witness 1 about whose evidence I shall have to say something later on.

On these facts the question is whether the *onus* which was primarily on the plaintiff to show that the transaction was not one for his benefit has really shifted to the 1st defendant. The plaintiff has no doubt to make out a case before he could ask for a decree in his favour. When it is admitted that the plaintiff was a minor and that his mother was a young widow and there were no near male relations who could give independent advice to her, when it is remembered that the 1st defendant knew all about this property from the very beginning, and when it is also remembered that defendants' witness 1 who was supposed to give disinterested advice acted, to say the least, most carelessly, for he says in his evidence,

> "I did not look into the extent as to how many kulis it was. I did not then question any of them for what sum the land opposite to the Court-house has been bought and how much had been spent on it."

and when we find a great disparity in extent between the extent of the plaint land and that of the land opposite the Court-house and when there is no ostensible reason for the division except the wish of the 1st defendant, the *onus* shifts and it is for the defendant to make out that the transaction was a fair one and not an unconscionable one. The plaintiff's father had acquired, as I said above, the timber depot land adjoining the road, and that would have given access to the plaint land from the road. When he acquired such a large plot as the plaint one measuring over two acres and when it is proved that houses were beginning to spring up from 1897 in or about the locality, one cannot but come to the conclusion that the plaintiff's father knew that the land would become valuable as house-site in the course of a few years, that it would appreciate very much in value and that considerable profit would accrue by parcelling it out and selling the parcels to different people. That such an idea was also in the mind of the 1st defendant could be inferred from the fact that soon

after the purchase under Ex. D he began to purchase land adjoining the plaint land, *vide* Exs. I and II. When the circumstances were such that the 1st defendant must have known that in the course of a few years the land would become very valuable as house-sites, it was most unfair on his part to take the whole of the plaint land for his share and give the plaintiff a small plot which according to him was worth Rs. 500.

Mr. T. R. Ramachandra Aiyar very strenuously contended that all we have to look to, is the value of the two plots on the date of Ex. A in order to decide whether the transaction was a fair one or an unfair one. If the two plots were in the same locality and the environments were the same, his argument might be considered tenable. But when it is shown that one plot was more than 20 times the size of the other, and when it is remembered that in a growing town of commercial importance open land inside the town may sooner or later become valuable as house-sites, it is impossible to resist the conclusion that the 1st defendant induced the plaintiff's mother and her advisers to take the small plot near the public buildings and got for himself a large plot likely to rise in value in a short time. In this connection we have to see whether the plaintiff's mother had not only really disinterested, but sound advice. The defendants' 1st witness Mr. Viswasa Nadar is a respectable 2nd grade Pleader who is also the Government Pleader of Sattur. But a reading of his evidence shows that either he was careless of the interests of his friend's son or paid no attention to the contents of the documents to which he put his signature as attesting witness. He does not seem to have made any enquiry as regards the extent of the plaint land or its value on the date of Ex. A. He made no enquiries as to the value of the plot opposite the Court-house or the superstructure thereon, and his statement that some Pariahs offered Rs. 3 to 5 per kuli for a portion of the plot for a pathway without taking the trouble to find out how much he could realise by such sale is not of much value. As a pleader he ought to have known that a minor's property could not be parted with unless some advantage was likely to accrue to him by such transaction; and his utter indifference as to what really happened to the minor's property shows that however honest his intention might have been, his conduct was wholly against the interests of the minor. He, as a vakil, ought to have advised the mother not to part with an extensive property which was likely to become valuable. He, as a local resident, must have known the state of things not far from his own house. That houses were beginning to spring up from 1897 about the plaint land he must have been aware of as it lay near the road going to the Railway Station. That the plaint site was attracting the attention of would-be buyers must have been known to him, and his not advising the plaintiff's mother not to part with the whole of the plaint site, I can only attribute to sheer indifference and carelessness. He could very well have advised the mother to take a half share of the plaint property as well as a half share of the property opposite to the Court-house. Defendants' 2nd witness is an old retired First Grade Pleader of Sattur. His evidence that Chellaperumal Pillai was anxious to build an office or bungalow opposite to the District Munsif's Court-house cannot have any influence in deciding whether the transaction evidenced by Ex. A was beneficial to minor or not, because that wish had ceased with his death and nobody in his senses could have imagined that the plaintiff, a young boy of seven years of age was going to become a vakil and was going to build an office opposite the Court-house. There is some inconsistency in the evidence of defendants' witness 1 when he says that the District Judge of Tinnevelly, Mr. Phillips inspected the site for a Court-house in 1897. It is well known that Mr. Phillips, now Phillips, J., was District Judge of Tinnevelly from 1903 to 1906 and from the records called for from the office, it is found that the Government placed funds at the disposal of the D. P. W. for building a Court-house only in 1902. So it cannot be said to have been satisfactorily made out that Chellaperumal Pillai expected in 1900 that a Court-house was going to be built about 1905—1906 and he had an intention of building an office in front of the Court-house which did not exist before 1905. It may be that Chellaperumal Pillai had an idea of building an office on that road. But that is no ground for depriving the plaintiff of

a very valuable house-site of considerable extent.

Mr. Ramachandra Aiyar's main contention is that Ex. A was a partition arrangement and that a partition arrangement, unless it was brought about by fraud, or undue influence ought to be upheld and he relies on *Balkishen Das* v. *Ram Narain* (1). No doubt in a joint Hindu family partition at some time or other is likely to take place and the mere existence of minors cannot prevent a partition taking place. But it is always open to a minor member to show that the partition was not fair. Lord Davey delivering the judgment of their Lordships of the Privy Council observes at page 752:

"There is no doubt that a valid agreement for partition may be made during the minority of one or more of the coparceners. That seems to follow from the admitted right of one coparcener to claim a partition; and (as has been said) if an agreement for partition could not be made binding on minors, a partition could hardly ever take place. No doubt if the partition was unfair or prejudicial to the minor's interest, he might, on attaining his majority, by proper proceedings, set it aside so far as regards himself."

This is the principle which governs partitions in Hindu joint families. It is open to a minor member to show that a partition was unfair or prejudicial to the minor's interests. The case of a co-owner claiming a division with a minor stands on a slightly different footing. In a joint Hindu family there may be a number of members and it may not be in the interests of the family to keep them joint. But in the case of a co-owner who is only interested along with a minor in one or more items of property, when division is effected, such division must be a fair one and not prejudicial to the interests of the minor. The case of an alienation by a minor's guardian stands on a different footing. In order to justify the alienation of a minor's property the tests laid down in *Hunooman Persaud* v. *Mussumat Babooee* (2) should be satisfied the actual pressure on the estate, the danger to be averted or the benefit to be conferred. But the case of a co-owner asking for a division of property belonging to himself and a minor occupies a position midway between that of partition in a joint family and that of alienation by the guardian of a minor. Whenever an adult person deals with a minor through the minor's guardian, it is the duty to see that the transaction is a fair one and that the minor is not prejudiced in any way by any act or omission on his part. Reliance was also placed by the appellant on *Yechuri Ramamurthi* v. *Yechuri Ramamma* (3), as supporting the contention of the appellant. Srinivasa Aiyangar, J., in delivering the judgment of the Court observed at page 311:

"Partition amongst the members of the family is a family arrangement and is generally resorted to in order to keep peace in the family or preserve the family properties; and the principles applicable to family settlements are applicable to partitions among the members of a family. There must of course be equal knowledge on the part of the members and there must not be any over-reaching or fraud.....In some cases the very nature of the transaction or the method of division may show that it was unfair or prejudicial to the interest of the minor, and in such cases the burden which was on the plaintiff in the first instance may be shifted at once. The burden may also be shifted in cases where the facts are specially in the knowledge of a particular party (Sect. 106 of Evidence Act)."

This case instead of supporting the appellants' contention is against it. The ruling in *Nullappa Reddi* v. *Balammal* (4) was strongly pressed upon our attention by the appellant; there a minor on attaining majority sought to set aside a partition in which he was represented by his mother as guardian. The learned judges say:—

"In this case the plaintiff and his brothers appear to have been represented in good faith by their mother and natural guardian, and there is nothing to indicate fraud, or that any undue advantage was taken of the plaintiff's minority, or of the sex of their mother."

It appears that the plaintiff's branch in that case obtained only one *muttah* as its share while four *muttahs* were allotted to the other branch, and it was contended that the division was unequal on the face of it. Dealing with this contention the learned Judges observe:—

"There is no evidence of the relative value of these five *muttahs*" and in the concluding portion of the judgment say that "no such gross inequality has been shown, as would justify us in setting aside the division of 1837 on this ground."

It was urged by Mr. T. Rangachariar for the 1st respondent's legal representative that a tenant in common or a co-owner was entitled to be given his share

1. (1903) 30 Cal. 738=30 I. A. 139 (P. C.).
2. 6 M. I. A. 393.
3. (1916) 30 M. L. J. 308.
4. 2 M. H. C. R. 182.

in every item of the property belonging to himself and other co-owners and he relied upon *Debendra Nath Bhattacharjee* v. *Haridas Bhattacharjee* (5), *Ashanullah* v. *Kali Kinkur* (6), *Mahomed* v. *Haji* (7) and *Moideensa Rowthen* v. *Mohammad Kasim Rowthen.* (8) It is no doubt proper that wherever practicable co-owners should be given a share in each item of property; but this doctrine should not be too strictly applied by Courts. Where property cannot be divided conveniently or where division into small portions would affect the value of the property prejudicially it is inequitable that Courts should grant to the various members, property which according to his estimate would be equal in value, but where property could be divided without in any way affecting its utility or its commercial value into a number of plots, it is proper that each co-sharer should have a slice of it according to his share. In India the feeling against parting with immoveable property is strong and Courts should give due regard to it in effecting division of family or ancestral property. The principles governing cases of partition in joint Hindu families cannot apply to cases of co-owners as is seen from *Moideensa Rowthen* v. *Mohammad Kasin Rowthen* (8) where Ayling and Tyabjee, JJ., observed at page 896:—

"It is, therefore, futile to describe a suit in which one heir claims to receive his share of the property of the deceased from another heir as a suit for partial partition and to say that, therefore, the suit is not maintainable. Both the terminology and the principles of the Hindu Law are in such a case inapplicable. This point must be kept distinct from the questions that may arise when an heir claims his share of the property of the deceased, and when he in reality ought to institute a suit for administration he asks for what is styled 'partial partition.' In such a case it would be a question for the Court whether in order to avoid multiplicity of suits the plea of defendant ought not to be given effect to in order that the whole estate of the deceased should be administered and in due administration should be partitioned for once. But the question cannot permit of a hard and fast rule to govern all circumstances."

It is clear therefore that a co owner can bring a suit for division of a particular item of property and any subsequent suit for division of other items would not ordinarily be barred. It is unnecessary to consider the contention of the respondent that a person effecting a division of property with a minor is an alienee of the property and therefore the necessity for it and the advantage to be gained by it should in all cases be proved by the party dealing with the minor. Each case must depend upon its circumstances. The learned Subordinate Judge no doubt considered that it was the duty of the 1st defendant to prove the necessity for the division in 1904 and the advantage to be gained by the plaintiff thereby. That is not a correct view of the law. All that he had to show was that it was a fair transaction and the guardian acting on behalf of the plaintiff had all the information which he himself could have had if he had taken the trouble to get it.

The decision reported in *Keramattulla Meah* v. *Keamatulla Meah* (9), may seem to support the respondent's contention but a careful reading of it would show that it cannot support such a wide proposition.

Justice Newbould in delivering judgment of the Court observed at page 123:

"There is nothing in the doctrine of family arrangements opposed to the general principle that, when it is sought to bind a minor by an agreement entered into on his behalf, it must be shown that the agreement was for the benefit of the minor. If improper advantage has been taken of the minor's position, a family arrangement can be set aside on the ground of undue influence or inequality of position or one of the other grounds which would vitiate such an arrangement in the case of adults. But where there is no defect of this nature, the settlement of a doubtful claim is of as much advantage to a minor as to an adult and where a genuine dispute has been fairly settled, we hold that the dispute cannot be re-opened solely on the ground that one of the parties to the family arrangement was a minor."

It is quite clear therefore that when an arrangement is not fair, it cannot be for the benefit of the minor.

Now let us see from the evidence on record whether the arrangement under Ex. A could have been for the benefit of the minor. Ex. F, dated 8th October, 1905, throws considerable light on the state of things in 1905, Ex. A was dated 15th July 1904. According to that document 11,000 kulis are valued at Rs. 500. In Ex. F which was executed about 15 months after Ex. A we find that two

5. (1910) 18 C. L. J. 322.
6. (1884) 10 Cal. 675.
7. (1905) 7 Bom. L. R. 482 at 485.
8. (1915) 28 I. C. 895.
9. 23 C. W. N. 118 at 123.

hundred kulis were valued at Rs. 100 and the vendee was asked to leave 2 yards of space along the house to be built for a road way. So it may be fairly taken that a kuli at that time in a plot of land which had no access to the public road was worth at least annas eight. So in 1905, 11,000 kulis must have been worth at least Rs. 5,500. Could it be said that the value of the land which was only Rs. 500 in July, 1904, suddenly jumped up to Rs. 5,000 or Rs. 6,000 in October 1905? Ex. F clearly shows that people were beginning to consider that the plaint land could be utilised for house sites. On the date of Ex. F the first defendant was not in a position to give his vendees access to public roads, but he was hoping to buy land to the south and north of plaint land in order to lay out roads to connect it with public roads. Unless there is specific evidence that on the date of Ex. A the price of plaint land was only Rs. 500 and had not risen even by a few rupees above the price paid for it in 1900, it would be impossible to hold that the price remained stationary; considerable light is thrown by the number of purchases of small plots of the plaint land by different persons in 1900. There were no less than 20 sales by the 1st defendant, *vide* documents Exs. 19, 20, 24, 25, 26, 28, 30 to 36 and houses began to be built soon after and the evidence is that more than 80 houses, some of them worth from Rs. 2,000 to Rs. 3,000 had been built on the plaint land prior to the date of suit. In these circumstances it can be safely assumed that the plaint land was worth much more than Rs. 500 the nominal value put upon it in Ex. A. There is, however, one important fact—its potential value; the plaintiff's father had bought the timber depot land in order to give access to the road. If the 1st defendant had only dealt fairly with the plaintiff, he would have told the plaintiff's mother that there was the Marakadai land belonging to her husband which could be made use of for the purpose of making a road-way to the plaint site. His suppression of that knowledge from the plaintiff's mother, I consider, is sufficient to vitiate the whole transaction. He has not gone into witness-box to tell the Court why he demanded a division in 1904 and under what circumstances Ex. A came to be executed and that he acted *bona fide* with due regard to the interest of the minor. I, therefore, hold that the transaction evidenced by Ex. A was not a fair one but an unconscionable one brought about by the suppression of facts which should have been brought to the notice of the plaintiff's guardian. It is unnecessary to notice in detail the other cases quoted by the appellant as those cases turned upon the facts proved. In *Natesa Iyer* v. *Rama Iyer* (10) which was a second appeal, there was a finding of fact and the learned Judges observed that strong reason for supporting the arrangement under discussion beneficial to the plaintiff was available and that the settlement was fair and prudent. In *Hajee Summar Sait* v. *Mahomed Husshum Sait* (11), Abdur Rahim, Officiating Chief Justice, observed at page 525:

> "As there is really no allegation that the settlement was not *bona fide*, or that the account so settled is impeachable because of any substantial errors, I see no reason why the settlement should not be held binding."

and Seshagiri Aiyar, J., observed at page 527 that:

> "Inasmuch as there is no allegation that this settlement was not come to after careful scrutiny of the accounts, there is no reason to doubt that this sum did not represent the actual amount due to the minor on the date of the settlement."

The next contention urged by Mr. Ramachandra Aiyar was that no preliminary decree was passed. This can be no objection to the decree as it stands as it gives the plaintiff only the value of his share. There is no direction to divide the plaint property by metes and bounds. The plaintiff very rightly gave up his claim to a moiety of the plaint property and was content to receive its market value inasmuch as a number of people about 80 had built houses on the plaint land. Mr. Ramachandra Aiyar further contended that the plot opposite the District Munsif's Court-house was not brought into the hotchpot. The learned Subordinate Judge directed that the plaint should be amended by including it. Evidently owing to some oversight it was not included. The plaintiff's legal representative does not object to the 1st defendant getting his share of it. In respect of that there will be a preliminary decree for division by metes and bounds.

10. 9 M. L. T. 498.
11. (1916) 4 L. W. 521.

Mr. Ramachandra Aiyar further objected to his client being made responsible for the whole of the decree amount as he had realised by sale of the plaint property a much smaller amount, I think there is some force in this contention. The plaintiff could have insisted upon his getting possession of the plaint property and could also have insisted upon defendants other than the 1st defendant removing their superstructures because the transaction under Ex. A was wholly void so far as he was concerned. But the plaintiff was well advised in not asking that the land should be vacated by the defendants and it is in the interests of the defendants that a money-decree was passed in favour of the plaintiff. The land has considerably risen in value since the purchase by the various defendants on account of their having built houses on the plots purchased by them. The Subordinate Judge has found that the alienees from 1st defendant were not *bona fide* purchasers for value. I think the Court could very well exercise its discretion in the circumstances by directing the defendants other than the 1st defendant to bear a proportionate share of the value of the property after deducting the actual amount paid by them. In other words, the 1st defendant is liable as between himself and the other defendants only to the extent of the amounts received by him as the price of plots sold to them. The plaintiff could execute his decree against the defendant and other defendants for the whole amount. But the other defendants could claim as contribution from the 1st defendant amounts not exceeding the amounts actually paid by them for buying the property. A note should be made in the decree to this effect. The question of limitation was not pressed by Mr. Ramachandra Aiyar. He did not challenge the finding of the lower Court on the point.

Subject to the modification as regards the other plot the appeal is dismissed with costs of the 1st respondent's legal representative.

Mr. Rangachari pressed his Memorandum of Objections and claimed a higher amount than that allowed by the Subordinate Judge. There is no clear evidence that the value of the plaint land was anything more than that estimated by the Subordinate Judge. The evidence of defendants' witness 4 is not at all satisfactory; and the few documents such as Exs. 14 (*a*) and 29 do not throw any light on the actual value of the plaint land on the date of the plaint. I see no reason to disturb the finding of the learned Subordinate Judge as regards valuation. In the result the Memorandum of Objections is dismissed with costs.

SPENCER, J.:—I agree.

Appeal dismissed: Decree modified.

1923 Madras. 103.

SCHWABE, C. J. AND KRISHNAN, J.

Adam Haji Peera Mohamed Ishack ... Defendant—Appellant.

v.

Sakavath Hussain Akbari ... Plaintiff—Respondent.

City Civil Court A. No. 26 of 1920 dated 8th March 1922 against the decree of C. C. C., Madras in O. S. No. 457 of 1918.

(*a*) *Contract Act, Ss. 73, 54—Contract for the sale of goods—Term, whether essential justifying rescission or merely collateral—Damages for breach—When to be awarded.*

In construing mercantile contracts it must be assumed that any clause in it was inserted by the parties to some good purpose and with some definite meaning as merchants are not in the habit of inserting in their contracts stipulations to which they do not attach some value and importance. In order that the latter part of S. 73 of the Contract Act may apply, it has to be proved that not only the plaintiff but the defendant also knew when the contract was made that such loss was likely to result from the breach. Remfrey on Sale of Goods, p. 34 Ref.

(*b*) *Practice—Appeal—Question of fact, appeal on—Finding of fact—When to be disturbed on appeal.*

In all cases where there is an appeal on questions of fact, it is a good working rule that the appellate tribunal will not lightly interfere with the findings of fact of the Court below. This rule applies most strongly where there has been a conflict of oral testimony and the judge had the advantage of seeing the witnesses and of observing their demeanour. But it is a rule which should not be pressed too far for there are many cases where there has been a conflict of evidence in the Court below in which the Court of appeal is bound to give effect to its own view if it differs from that of the judge, *e.g.*, probabilities may be strongly against the view of the judge or there may be documents consistent with the evidence of appellant and inconsistent with that of respondent etc. The demeanour of witnesses is not invariably a safe guide to the truth of their evidence.

(P. 104, Col. 1.)

K. P. Padmanabha Pillai for T. C. K. Kurup—for Appellant.

Mahomed Ibrahim Sahib and G. Ramakrishna Ayyar—for Respondent.

SCHWABE, C. J.:—This appeal is from the judgment of the City Civil Court in favour of the plaintiff for the return of Rs. 1,000 deposited on a contract for sale by the defendant to the plaintiff of sugar and for Rs. 800 damages for breach of that contract. So far as the facts are concerned, the learned Judge has accepted the evidence of the plaintiff and disbelieved the evidence given on behalf of the defendant. If the determination of this case turned on a question of fact, I should want to hear further arguments on the facts for, as at present advised, I am not inclined to agree with some of the findings of fact of the learned Judge. In all cases where there is an appeal on questions of fact, it has been found that it is a good working rule that the appellate tribunal will not lightly interfere with the findings of fact of the Court below and this rule applies most strongly where there has been a conflict of oral testimony and the judge has had the advantage of seeing the witnesses and of observing their demeanour, but there in my view the application of the rule should stop, and it is a rule which should not be pressed too far, for there are many cases where there has been a conflict of evidence in the Court below in which the Court of appeal is bound to give effect to its own view if it differs from that of the judge; as for instance where the probabilities of the case are so strongly against the view of the judge that the Court of appeal disagrees with it, or where there are documents consistent with the evidence for the appellant and inconsistent with the evidence for the respondent and in the view of the Court of appeal, they are irreconcilable with the finding of the judge. The demeanour of witnesses is not invariably a safe guide to the truth of their evidence. In this case, however, most of the evidence on which there was a conflict, was in my view irrelevant, and the matter falls to be decided on the proper interpretation of the contract, coupled with facts which are common to both sides.

The contract was for the sale of 1300 bags of sugar at an agreed price to be shipped by a named steamer sailing from Singapore. On the date of the contract, 22nd October 1918, owing to the war the arrival of documents was uncertain and it became the practice in Madras for sales to be made upon what were called delivery telegrams which were telegrams stating that the goods had been shipped, and they to some extent took the place of Bills of Lading, and by arrangement between merchants passed from had to hand by endorsement, their production being treated as evidence of the right to the goods. They differed from Bills of Lading in that they could not in law be treated as negotiable instruments because negotiability cannot be given by agreement of the parties or otherwise than by a long established custom of merchants or by statute. What happened in this case was that a delivery telegram for a larger quantity of sugar than that sold under the contract was received by the defendant. He lodged that telegram with Messrs. Binny & Co., agents of the ship, and the ship carrying the sugar having arrived at Madras, he obtained from Binny & Co., delivery order to himself for the contract quantity and tendered it to the plaintiff. The plaintiff with that document could have got his goods. He was in fact acting for merchants in Ceylon and the goods would have to be forwarded there, and as the goods were transit goods for export, a rebate of duty would be required from the Customs authorities. I have no doubt on the evidence that such rebate could have been obtained from the Customs authorities without the least difficulty. I am also equally satisfied that the plaintiff did not want the goods though I do not think that is a relevant consideration. He went to Binny & Co., with the delivery order and objected to the delivery order being made out to the defendant " or order ", and on his request Binny & Co., struck out the words " or order". In my judgment this did not affect the validity or the operation of the delivery order in any way, for a delivery order is not negotiable though it too passes from hand to hand as though it were negotiable, but the law is that the holder of it does not obtain title to the goods comprised in the delivery order until the warehouseman (in this case Binny & Co., as representing the ship has attorned to the holder of the delivery order in the sense of intimating

expressly or implicitly that he holds the goods to his order.

The question to be decided is whether on the true construction of the contract, it was a condition that the purchaser should be entitled to receive from the vendor a delivery telegram, that is to say, whether the failure to hand over to him that particular form of document covering these goods alone would entitle him to reject the goods.

The contract is in Gujarati and we have before us a translation by the Court interpreter and also the translation by him of each word in the contract. The full translation is as follows:—"To Salt Akbery Company Baroda Shop. "Written by Salt Adam Haji Peer Mahomed Isaac, To wit, (we) have this day made sale upon delivery telegram to you through the broker Joseph Mahomed, of goods of the steamer "Fuitala", coming from Sri Singapur (*viz.*) Sugar Java., white, such as it may come in the steamer, bags 1,300 in letters thirteen hundred bags at the rate of Rs. 29-15-6 in letters Rupees twenty-nine and fifteen and half annas per one bag. Expenses thereof (such as) harbour dues, boat-rent, customs charges all are on your head. On account of advance of the aforesaid goods Rs. 1,000 in letters Rupees one thousand have been received through the aforesaid broker. Regarding the remaining rupees in full relating to the account, after receiving delivery telegram (and) on coming of the steamer, on (our) giving you intimation, you have to make payment in full of the rupees thereof and on making sale (endorsement) on the delivery telegram and on obtaining signature, (you) have to take it away. Regarding slack bags which may be in the goods; if you will give intimation to us before storage takes place, we shall weigh and give the slack bags (to you) when Binny Company people will make survey and give to us, and you have to take delivery in the same manner in which the customs people would give delivery, of the goods to us; if you will give intimation of slack bags after storage charges have become due, we will not weigh and give. And in such manner as Binny Company people would give delivery of the bags, in the same manner you have to take (them) without objection; according to the above condition, you have to take delivery of the goods without raising objection (or) dispute of any kind whatsoever. Therein if you will raise objection (or) dispute of any kind, the advance paid becomes null and void; whatever loss would arise in the said goods, you are responsible for the same; in consequence of the aforesaid steamer not coming (this) contract is (stands) cancelled."

The delivery telegram is mentioned twice. It is stated that the sale is made upon the delivery telegram and it is further stated that after receipt of the telegram and after the arrival of the ship, payment is to be made and the vendor is to endorse the telegram and then the words of the translation are "(you) have to take it away". The actual words literally translated are "and on obtaining signature have to take away". This may mean and probably does mean that the vendor is to endorse the telegram to the purchaser and the purchaser is to take the goods away.

It was clearly contemplated by the contract that the delivery telegram would be handed by the vendor to the purchaser. In this case that was impossible because the telegram included other goods and the course pursued by the vendor under such circumstances, namely lodging the telegram with the ship's agent and obtaining delivery orders for different parts of the goods included in the same telegram was an ordinary business solution of the difficulty. But that is immaterial if the contract required the handing of a separate telegram to the purchaser as a condition. The question is a very difficult one; but I have with great hesitation and regret come to the conclusion that it was a term of the contract that the delivery telegram should be endorsed over, and an essential term. This requirement of a delivery telegram was a novel and ephemeral plan arising out of emergency caused by War, but it was the only form of delivery stipulated for in the contract and it not having been endorsed and handed over, it follows that the plaintiff had in law the right to reject the goods. In my judgment there was no justification for the award of damages of Rs. 800 to the plaintiff. Such damages if suffered were not recoverable for remoteness.

The result is the appeal must be allowed and the judgment reversed in so far as

it awards damages to the plaintiff and judgment must be reduced to Rs. 1,000 and costs of suit.

The appellant having had to come to this Court to obtain that result, he is entitled to the costs of the appeal except in so far as they have been increased by his claim to have the whole judgment set aside. I think the justice of the case will be met by awarding him half of the costs of appeal.

KRISHNAN, J.:—The decision of this appeal really turns upon the question whether the provision in Ex. B, the written contract between the parties, to endorse and deliver to the buyer the plaintiff, delivery telegram for the sugar sold, is an essential part of the contract the breach of which would justify a rescission of the whole contract or whether it is only a collateral agreement the breach of which will only give rise to a claim for compensation flowing from it. In other words the question is whether that provision is a condition of the contract or only a term in it which does not go to the root of the contract. If the former view is adopted as the lower Court has done plaintiff was justified in cancelling the contract as he did and in claiming damages as it is not denied that no proper offer was made to him of a delivery telegram duly endorsed at any time. I am inclined to adopt that view.

The terms of the contract as translated are set out by the learned Chief Justice and do not require repetition and my Lord has also explained what exactly a delivery telegram is. Though a delivery telegram could not well be treated in law as a negotiable instrument like a bill of lading whose negotiability the Courts have recognised, the evidence in this case is that it was treated in practice in Madras by the common consent of merchants and shippers during the War as equivalent to a bill of lading in all particulars. It was taken as passing the ownership of goods by mere endorsement so that the endorsee could have direct recourse to the shippers or their agents without an attornment by them and without being required to go through the original consignee. The parties therefore evidently attached importance to the delivery telegram and we have the admission of the defendant's agent in Madras who acted for him in making this contract as D. W. 1 that the provision for the endorsement of the delivery telegram was stipulated for by the plaintiff and was entered in the contract at his instance.

In construing mercantile contracts we must assume that any clause in it was inserted by the parties to some good purpose and with some definite meaning as merchants are not in the habit of inserting in their contracts stipulations to which they do not attach some value and importance. *See* Remfry on Sales of Goods, page 34.

Turning now to Ex B. we find at the very beginning of it mention made of the sale being "upon delivery telegram" and the matter is again reiterated when the covenant for payment is stated, the words being "Regarding the remaining rupees in full relating to the account after receiving delivery telegram (and) on coming of the steamer on (our) giving you intimation you have to make payment in full of the rupees thereof and on making sale (endorsement) on the delivery telegram and on obtaining signature (you) have to take it away". The word "it" seems to me to refer to the delivery telegram and not to the goods. However that may be when the parties took so much care to have it stated clearly in their contract that a delivery telegram should be endorsed and handed over, it seems to me difficult to treat it merely as an unessential or collateral part of the contract.

The mode of delivery provided for by the vendor in Ex. B is to endorse and deliver the delivery telegram. Once he does that the vendee becomes bound to pay the price and cannot insist on the goods being delivered to him in specie by the vendor. A covenant as to delivery is as much an essential part of a contract of sale of goods as a covenant for payment of price or any other condition in the contract. Is there any reason why we should treat such a covenant in this case as not part of the contract? I do not think there is. So far as the vendor is concerned there can be no doubt that it is a very essential term of the contract for him as it relieved him from the duty of delivering the goods. Why should it be treated as any the less essential so far as the vendee is concerned? If the covenant was intended purely for the benefit of the vendor he may possibly

waive it and give delivery of the actual goods. But as I have already pointed out the covenant was added to the contract at the instance of the vendee as he considered it essential for the purpose of his business to do so. He was therefore entitled in my view to insist on the performance of the covenant before payment just as much as the vendor was entitled to take advantage of it on his side. In my opinion the case is one to which S. 54 of the Contract Act applies. The plaintiff was not bound to take the goods by means of a delivery order as the vendor proposed and pay for it.

In this connection reference may be made to the recent decision of Mc Cardie, J. in *Manbre Saccharine Co.* v. *Corn Products Co.* (1), that under a *c. i. f.* contract where the vendor is bound to tender to the vendee a proper policy of insurance, that obligation is not performed by the vendor guaranteeing to hold the purchaser covered by insurance in accordance with the terms of a policy of insurance in the vendor's possession. It seems to me the covenant in this case to give a delivery telegram endorsed stands on much the same footing as the delivery of an insurance policy in a *c. i. f.* contract as the performance of the bargain is to be fulfilled in each case by delivery of documents and not by actual physical delivery of the goods. The vendor is entitled to what he has stipulated for and cannot be compelled to take something else in substitution for it however effective a substitute it might be. The authorities for this position are discussed by the learned Judge and I need not recapitulate them.

The same principle is illustrated by a still more recent case in *Wilson Halgate and Company* v. *Belgian Grain and Produce Company* (2) where Bailhache, J., has discussed the question, again in connection with a *c. i. f.* contract and has held that the seller could not perform his obligation to deliver an insurance policy by tendering instead a broker's cover note or a certificate of insurance. In this judgment the learned Judge observed that "he (the vendee) cannot be compelled to take a document which is something like that which he has agreed to take. He is entitled to have a document of the very kind he has agreed to take, or at least one which does not differ from it in any material respect." A delivery is different from a delivery telegram as the former requires an attornment by the warehouseman to pass the ownership of the goods to the vendee; *see* Benjamin on Sale, 5th Edn., page 742; whereas the latter was accepted in Madras as passing the goods by mere endorsement.

Now if I am right in thinking that the endorsement and delivery of a delivery telegram by the defendant was a condition of the contract, it is clear that that condition was not fulfilled by him and the plaintiff was entitled to treat the contract as broken and claim damages in spite of the defendant's offer to deliver a delivery order of the goods.

The next question is as to the measure of damages. Now S. 73 of the Contract Act states the law on the point in this country. It is clear that plaintiff will be entitled to be refunded the Rs. 1,000 advanced by him. But as regards the Rs. 800 decreed to him as compensation for the loss of the commission he would have got if the contract had been performed, plaintiff will be entitled to it only if he can bring himself under the latter part of the 1st clause in S. 73 as under the former part such damages will be too remote. To apply the latter part, it has not been shown that the parties that is, not only the plaintiff but the defendant also, knew when the contract was made that such a loss as the loss of commission was likely to result from the breach. There is no evidence to show that defendant had notice of any such special loss and the claim for it therefore fails under the latter part also. I agree with the learned Chief Justice that plaintiff's claim for Rs. 800 as damages must be disallowed.

On my view the appeal fails in part of and is allowed in part, the decree of the lower Court being modified by substituting Rs. 1,000 for Rs. 1,800 in it. I agree to the order proposed by the learned Chief Justice as to the costs of the suit and of this appeal.

I would add in conclusion that I also entirely agree with the learned Chief Justice in his observation regarding the

1. (1919) 1 K. B. 198.
2. (1920) 2 K. B. 1 at 9.

duty of an appellate Court in a first appeal where the appeal is open on facts, in considering the evidence.

Appeal allowed in part.

Decree modified.

1923 Madras. 108.

PHILLIPS AND RAMESAM, JJ.

V. Ranganatha Rao ... Plaintiff—Appellant.

v.

Rama Pandither and others ... Defendants—Respondents.

Appeal No. 58 of 1920 dated 24th April 1922 against the decree of Sub-Judge, Tanjore, in O. S. No. 41 of 1919.

Limitation Act, Art. 141—*Reversioner—Suit for possession—Limitation, suspension of—S.* 9.

The father of plaintiff filed a suit during the lifetime of the widow to set aside alienations by her. The suit was held to be not maintainable as he was held not to be the nearest heir, but another *B*. After the widow's death *B* brought a suit to recover possession of the properties. But he was found not to be a reversioner at all. Then plaintiff filed another suit for possession of the properties more than 12 years after the death of the widow. *Held* that limitation when it once begins to run cannot stop running except in the particular exception mentioned in S. 9 of the Limitation Act. 35 All. 227 Foll.

(P. 109, Col. 1.)

T. R. Ramachandra Aiyar, C. Balarama Rao and T. S. Narayana Aiyar—for the Appellant.

S. Swaminadhan and M. Doraiswami Aiyangar, P. Narayanamurti and T. S. Ranganatha Rao—for the Respondents.

JUDGMENT. :—This appeal arises out of a suit brought by a reversioner to recover possession of the properties alienated by the widows of the last male owner. The second of the widows died in 1897 when the cause of action for the present suit accrued (*vide* Art. 141 of the Limitation Act). The present suit was filed on 31st March, 1919. The Court below held that the suit was barred by limitation. It appears that one Narayana Row whose heir the present plaintiff is and who was the reversioner on the date of the death of the widow had during the life-time of the widow filed a suit for setting aside the alienations and in that suit it was held that the suit was not maintainable because it appeared that he was not the nearest heir but another namely one Balusami Pandither. In 1909 Balusami Pandither filed a suit O. S. No. 3 of 1909 for recovering possession of the properties, but it was found that he was not a reversioner at all as his title rested on alleged adoption which was found not to be true in the case. This decision was given in 1916.

It is now contended before us that neither Narayana Row nor the plaintiff could file a suit for possession prior to 1916 when it was found that Balusami was not a reversioner at all and that therefore it must be considered that the present plaintiff had a fresh cause of action in 1916. In support of the appellant's contention the following cases are relied on. *Mussamat Ranee Surno Moyee* v. *Shooshee Mokhee Burmonia* (1), followed in *Muthuveerappa Chetty* v. *Adaikappa Chetty* (2), *Kartar Singh* v. *Bhagat Singh* (3), *Lakhan Chunder Sen* v. *Madhusudan Sen* (4), affirmed by the Privy Council in *Nrityamoni Dassi* v. *Lakhan Chandra Sen* (5), and explained in *Kuppuswami Chettiar* v. *Rajagopala Aiyar* (6). In each of these cases it appears that the right of the plaintiff was at one time satisfied but afterwards on account of some other proceeding, the satisfaction was cancelled and he was relegated back to his original rights and he had to bring a suit in which it was held that there was a suspension of the cause of action during the period during which his rights were satisfied or that a fresh cause of action accrued to the plaintiff. It is unnecessary to consider these decisions, for, in the present case it cannot be said that at any time the plaintiff's right was satisfied and that on account of the annulment of the satisfaction, a fresh cause of action arose. These cases, therefore, cannot help the appellant. Another case relied on by the appellant is *Hemendra Mohon Khasnobis* v. *Dharaninath Chandra Roy* (7). The facts as stated in the report are not quite intelligible but it is clear in that case, the expression of opinion in

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1. (1868) 12 M. I. A. 244.
2. (1920) 43 Mad. 845.
3. (1921) 64 I. C. 454.
4. (1908) 35 Cal. 209.
5. (1916) 43 Cal. 660.
6. 1922 Mad. 79 (2)=42 M. L. J. 303=15 Mad. L. W. 348.
7. (1911) 25 C. W. N. 376.

the suit of the second mortgagee was for some reason considered to have modified the decree in the suit of the then mortgagee. The facts are intelligible only on such a footing. Therefore this case does not help the appellant. The last case relied on is *Maharajah of Dharbhanga* v. *Homeshvar Singh* (8). That case turned upon when the right to apply for execution under Art. 181 first accrued and cannot help the appellants. The decision in *Soni Ram* v. *Kanhaiya Lal* (9), is an authority for the proposition that limitation when it once begins to run cannot stop running except in the particular exception mentioned in S. 9 of the Limitation Act. This view was also adopted in this Court by a Full Bench of three Judges in a Letters Patent Appeal reported in *Secretary of State for India* v. *Ranganayakamma* (10). It is not even clear that the plaintiff could not bring a suit until the judgment of 1916 was delivered. If the plaintiff concedes that the decision in O. S. No. 56 of 1894 is *res judicata* against him so far as the defendants who are parties to the suit are concerned this present suit is barred by *res judicata* in addition to limitation. But if that suit is not *res judicata* against the present plaintiff then his contention that he could not bring a suit until 1916 cannot be sustainable and therefore the reasons he gives for his inability to sue until 1916 cannot be accepted. In every possible view the suit is barred.

The appeal is dismissed with costs. The costs (one set) will be proportionate to the interests of the respondents.

Appeal dismissed.

8. (1921) 48 I. A. 17=40 M. L. J. 1 (P. C.).
9. (1913) 35 All. 227=40 I. A. 74.
10. (1920) 12 L. W. 334.

1923 Madras. 109.

KRISHNAN AND VENKATASUBBA RAO, JJ.

Nittala Achayya and others ... Plaintiffs —Appellants.

v.

Nittala Yellamma and others. Defendants —Respondents.

F. A. No. 164 of 1920 dated 29th August 1922, against the order of Sub-Judge, Rajahmundry in O. S. No. 68 of 1919 dated 26th January 1920.

Civil P. C., Ss. 20 and 16—Distinction between.

A suit by the plaintiff as one of the two nearest reversioners to the estate of a deceased Hindu for a declaration that the Will set up by his widow as having been executed by him and as giving her absolute rights in his properties is a forgery and is void against him, and for obtaining its cancellation, is clearly one falling under S. 39 of the Specific Relief Act (I of 1887) as Illustration (*b*) to the section shows. For such a suit, the proper section applicable is S. 20, C. P. C. The meaning of the words "cause of action" in this clause has been considered in several cases and they have been held to mean the whole bundle of material facts which it is necessary for a plaintiff to allege and prove to obtain the relief he claims in the suit.

(P. 110, Col. 2.)

PER VENKATASUBBA RAO, J.:—In the case of contract, the cause of action means both the making of the contract, and its breach. The cause of action arises at a place where the document is sought to be enforced independent of the circumstances of its having been executed or the fraud having been practised at an altogether different place. There is no reason to limit the term "cause of action" as used in S. 20 of the Code to contracts; it applies to all suits of whatever nature, subject to the limitations in the preceding sections. Where one of the material facts to be proved to entitle the plaintiff to succeed is that he is interested in the properties, a part of the cause of action arises in the place where the property is situate. There is no difference between moveable and immoveable property in regard to the application of the section. 31 M. L. J. 816; 35 M. L. J. 189 Foll.

(P. 112, Cols. 1 and 2.)

Y. Suryanarayana—for the Appellants.

G. Lakshmanna and A. Satyanarayana—for the Respondents.

KRISHNAN, J.:—The question for our decision in this case is whether the lower Court was right in holding that it had no jurisdiction to try the present suit.

The suit is one brought by the plaintiff as one of the two nearest reversioners to the estate of a deceased Hindu for a declaration that the Will set up by his widow as having been executed by him and as giving her absolute rights in his properties is a forgery and is void against him, and for obtaining its cancellation. The suit was filed originally in the District Court of Godavari and was transferred by the District Judge to the Temporary Subordinate Judge of Rajahmundry for disposal. That Judge has held applying S. 20, Civil Procedure Code, that the cause of action arose wholly within the jurisdiction of the District Court of Kistna and that as the parties were all admittedly resident within that jurisdiction that Court alone could try the case and has directed the plaint

to be returned to the plaintiff to be presented to the proper Court.

Now it is conceded by the respondents that though the bulk of the properties dealt with by the Will lie in Kistna District some moveable and immoveable properties are in the Godavari Districts. The Subordinate Judge has held that that fact did not affect the question of jurisdiction but it is argued before us that he is wrong on that point. It is contended that S. 16, Cl. (*d*), Civil Procedure Code, applies to the case and gives jurisdiction to the Godavari Court as some of the immoveables included in the Will are within that Court's jurisdiction and though the Kistna Court has also jurisdiction, S. 17, Civil Procedure Code gives the choice of the tribunal to the plaintiff. Cl. (*d*) refers to suits "For the determination of any other right to or interest in immoveable property." It seems to me difficult to apply that description to the present suit, for there is no prayer in the plaint for the determination of any such rights. All that it asks for is a declaration and the cancellation of the Will on the ground that it is a forgery. For Cl. (*d*) to apply, the suit must be expressly for the purpose indicated in it. It is not enough in my view, for the clause to apply, to say that the relief granted in the suit would indirectly affect rights in immoveable property but the suit itself must be for the purpose of determining such rights. No doubt as a result of setting aside the Will in the present case the reversioner's rights in the estate will be safeguarded but there is no prayer for declaring what those rights are and over what properties they exist. In fact in the present case the Court need not trouble itself to enquire what the properties are which are dealt with by the Will so long as it is clear that plaintiff has a sufficient interest in them to be able to maintain the suit for its cancellation.

If we apply Cl. (*d*) to a suit such as this to set aside a Will as a forgery merely because it happens to deal with immoveables, as we have to apply a different rule under S. 20, Civil Procedure Code, to similar suits about other Wills which do not happen to dispose of immoveable properties, we introduce a difference between two similar class of cases which, I think, it is desirable to avoid. Furthermore if Cl. (*d*) is to be applied, the suit can be brought only in the place where the immoveable property is situate and nowhere else, as S. 16 makes it imperative that the suit shall be instituted in the Court within the local limits of whose jurisdiction the property is situate. The application of S. 20, Civil Procedure Code, will be excluded as that section is "subject to limitations aforesaid" and as a result it would follow that the suit could not be instituted where the parties reside or where the Will is alleged to have been executed or is sought to be enforced or where the bulk of the property is situate, if moveable, unless these places coincide with the place where the immoveable property is. That is another result that will flow from applying Cl. (*d*) which cannot easily be accepted unless the language of the provision clearly compels us to do so.

All difficulty is avoided if we restrict Cl. (*d*) to suits brought for the purpose of determining rights similiar to the rights dealt with in Cls. (*a*) to (*c*) as the language plainly shows. The present suit is clearly one falling under S. 39 of the Specfic Relief Act (I of 1877) as illustration (*b*) to the section shows. For such a suit, it seems to me, the proper section applicable is S. 20, Civil Procedure Code. That gives three alternatives for deciding the place of suing. Cls. (*a*) and (*b*) however cannot be relied on in the present case to give jurisdiction to the Godavari Court for none of the defendants resides or carries on business or works for gain in Godavari Cl. (*c*) however is relied on for the purpose. That clause gives jurisdiction to the Court within whose local limits the whole or any part of the cause of action for the particular suit arises. The meaning of the words "cause of action" in this clause has been considered in several cases and they have been held to mean the whole bundle of material facts which it is necessary for a plaintiff to allege and prove to obtain the relief he claims in the suit. See *Manepalli Mangamma* v. *Manepalli Sethiraju* (1) and *Maistry Rajabhai Narain* v. *Haji Karim Mahmood* (2). Now in a suit to set aside a Will the plaintiff must allege that he has an interest in one or more of the properties dealt with in it

1. (1916) 31 M. L. J. 816.
2. (1918) 35 M. L. J. 189.

to enable him to maintain a suit for its cancellation. Under S. 39 of the Specific Relief Act plaintiff must allege that if the instrument challenged is left outstanding it will cause him serious injury and to be able to allege that, he must have an interest in the property, which will be jeopardized if the Will is not cancelled. What the plaintiff in the present suit has stated is that he is one of two nearest reversioners to the estate or in other words he will be entitled to succeed to a share in the whole estate on the widow's death if he survives her. Such an interest has been recognised as giving a right of suit for a declaration. His allegation of interest and the threat to his rights involved in the setting up of a forged Will by the widow are thus according to the definition clearly parts of his cause of action and as he claims the same interest in the Godavari properties as in the rest of the properties, part of his cause of action, *viz*, that with reference to Godavari properties, must be held to have arisen in Godavari, just in the same way, as part of the cause of action, *viz.*, that with reference to the Kistna properties, has arisen in Kistna. On this view the Godavari Court had jurisdiction equally with the Kistna Court to try this suit under S. 20, Cl. (*c*), Civil Procedure Code. This is a case which more than one Court has jurisdiction to try and the choice of the tribunal was in the first instance in the plaintiff. But if an application had been made under S. 22, Civil Procedure Code, this Court could have considered in which of those Courts it would be more convenient to have the suit tried; but no such application has been made and it is not necessary to express any opinion on the point at present.

For the above reasons the order of the Subordinate Judge is set aside and he is directed to take the plaint on his file again and to dispose of the suit according to law. The costs up to date will abide and follow the result.

VENKATASUBBA RAO, J.:—In the plaint it is stated that the husband of the first defendant died at Tanuku in the Kistna District, that his paternal uncle and father concocted a Will which purported to have been executed by him at Mandapaka, also in the District of Kistna, that the said Will was presented by the 1st defendant, for registration to the Sub-Registrar of Tanuku who refused to register it, but that on appeal to the District Registrar, Kistna, he ordered its registration. The properties affected by the Will are situated in the District of Kistna excepting three items of land in the taluk of Razole in the Godavari District. The cause of action is alleged in the plaint to have arisen within the jurisdiction of the Godavari Court on the ground that the said three items of land are situated in the District of Godavari. The plaintiff as the nearest male reversioner entitled to the estate after the death of the 1st and the 3rd defendants, the wife and the mother respectively of the deceased person, has filed this suit for a declaration that the Will is a forgery and does not affect his rights in the property. The suit was filed in the District Court of Godavari and was transferred to the Court of the Temporary Subordinate Judge of Rajahmundry.

2. The Subordinate Judge held that the suit could not be regarded as one for determination of any right to or interest in immoveable property, falling within S. 16, Cl. (*d*), Civil Procedure Code, that no part of the cause of action arose within the jurisdiction of the District Court under S. 20, Cl. (*c*), and he accordingly returned the plaint for presentation to the proper Court.

3. The only relief prayed for in this suit is that it may be declared that the Will is a forgery and is inoperative. It cannot therefore be said that the suit falls within S. 16, Cl. (*d*), Civil Procedure Code, and the Subordinate Judge was right in holding that the suit is not one for the determination of any right to or interest in immoveable property.

4. The question however:

"Has the cause of action arisen wholly or in part within the jurisdiction of the Godavari Court?"

is more difficult to decide. No authority has been cited to us bearing on the subject but on a careful consideration, it seems to me that a part of the cause of action has, in this case, arisen within the jurisdiction of the Court in question. The cause of action has been held to mean every fact or the bundle of facts which it is necessary for the plaintiff to prove be-

fore he can succeed in his suit. It is not limited to the infraction of the right but it is this plus the right resident in the plaintiff. To take an example, in the case of contract, the cause of action means both the making of the contract, and its breach. In a suit for a legacy against an administrator, the grant of administration; for a reward for apprehension and conviction of a thief, the conviction; on a life policy, the death of the assured, are parts of the respective causes of action (*see* Woodroffe and Ameer Ali's Civil Procedure Code, Second Edition, page 183).

5. The reasoning that will apply to the case of a Will of this character will be the same as that applicable to a document alleged to have been brought about by the exercise of undue influence or fraud. At the place where the document or the Will is executed, a part of the cause of action certainly arises. It is equally clear that where the whole or a part of the fraud or undue influence is practised or exercised, the cause of action also arises. If the document is sought to be used to the detriment of a person at a particular place, the cause of action doubtless arises also at that place. *Banke Behari Lal* v. *Pokhe Ram* (3). I fail to see, then, why if the document affects the right of a person to a property situated at any place, the cause of action does not arise in that place. The mere existence of the instrument apart from any specific act of the person who relies on the document, prejudicially affects the right of the plaintiff, to the property. If the instrument is left outstanding it constitutes a menace to his right in regard to the property which is within any particular area: it is not merely when the defendant seeks to enforce his rights under the instrument that harm results to the plaintiff. As I observed above, it cannot be denied that the cause of action arises at a place where the document is sought to be enforced independent of the circumstance of its having been executed or the fraud having been practised at an altogether different place. But why should this act on the part of the defendant be essential to the cause of action arising within that place, if as a matter of fact, there is within it some property which the document affects and to which the plaintiff is entitled? There is no reason to limit the term "cause of action" as used in S. 20 of the Code to contracts; it applies to all suits of whatever nature subject to the limitations in the preceding sections. In the present case one of the material facts to be proved to entitle the plaintiff to succeed is that he is interested in the properties within the jurisdiction of the Court of Godavari. In *Hadjee Ismael Hadjee Hubeeb* v. *Hadjee Mohamed Hadjee Joosub* (4) (a suit to set aside a release in Calcutta of the plaintiffs' interest of certain property in Bombay) Couch, C. J., made the following observations in the course of his judgment:

> "The fraudulent representation which led to the execution of the release, may have been made, and the release may have been executed here; but the cause of action in this case consists of more than that. It includes the effect of the release upon the plaintiffs' share of the property; if there had been no property, the execution of the release would not have injured the plaintiff in any way. In order to constitute a cause of action, there must be an injury to him from the operation of the release. Then where did the release take effect? Where was it operative? The property was in Bombay."

It was held that a part of the cause of action arose in the place where the property was situate and the release took effect. I respectfully adopt the argument contained in the passage quoted above.

6. To hold otherwise would lead to an anomaly. If a document is executed at place *A* and if the whole property affected by the document is situated at place *B* why should the plaintiff not have a right to seek relief at the place where the property is situated, that is, where his rights are affected? If a person is a resident of and owns property at Madras and if a stranger claiming right to that property executes a document at Allahabad disposing of the property, it seems unreasonable to hold that a part of the cause of action does not arise within Madras but that the aggrieved person must institute a suit only at Allahabad where there is not a particle of property belonging to him, although in a suit to set aside such a document the most essential facts which give the plaintiff a right to relief are the existence of the property and his interest in it. In the view I have taken there is no

3. (1903) 25 All. 48.

4. 13 B. L. R. 91=21 W. R. 303.

difference between moveable and immoveable property in regard to the application of the section in question. If the property in this suit within the District Court of Godavari happened to be a sum of money instead of three items of land my decision would still be the same.

For these reasons I agree in the order proposed by my learned brother.

Case remanded.

1923 Madras. 113.

DEVADOSS, J.

Pericherla Suryanarayana Raju and another ... Petitioners.

v.

Ganapathy Raju and others ... Respondents.

C. R. P. No. 282 of 1920 dated 11th January 1922 revising the decree and judgment of Sub-J., Vizagapatam dated 23rd April 1919 in A. S. No. 40 of 1918.

C. P. C., O. 41, r. 23—Revision.

Where the appellate Court finds that there was no full enquiry, it should remand the case for fresh trial without recording a finding on any issue. If it finds one issue in favour of the plaintiffs and remands the whole case for trial to the lower Court, there is a clear exercise of jurisdiction with material irregularity. 30 M. L T. 317 Foll.

P. Narayanamoorti—for Petitioners.

Y. Suryanarayana—for Respondents.

JUDGMENT :—In this case the plaintiffs sued to establish their right to irrigate survey Nos. 30 and 32 with the water of a certain pond, and to restrain the defendants from interfering with the plaintiff's use of the water and for damages. The defendants who are owners of survey No. 31 pleaded that the plaintiffs had no right to use the water of the pond for irrigating their fields.

The following issues were framed :—

Whether the plaintiffs have an easement right to take the water of the suit tank to survey Nos. 30 and 32 through the sluice A and the channel B ?

Whether the channel C was newly dug and whether plaintiffs can object to it ?

To what damages, if any, are the plaintiffs entitled ?

The District Munsif found issue 1 against plaintiffs that channel C existed for more than 20 years before the date of suit and that the damages suffered by plaintiffs amounted to Rs. 30. In consequence of his finding on issue 1 he dismissed the plaintiff's suit. On appeal the Subordinate Judge after a fairly full discussion of the evidence on issue 1, upheld the plaintiffs' right and reversed the judgment of the lower Court and passed the following order. "The result is I establish the plaintiffs' right and as I feel that the evidence was not properly directed there was no full trial. I remand the case for fresh disposal according to law. Costs to abide the result." It is difficult to understand what he means by this. If he found that there was no full enquiry he should have remanded the case for fresh trial without recording a finding on any issue. What he does is he finds the 1st issue in favour of the plaintiffs and remands the whole case for trial to the lower Court. This is a clear exercise of jurisdiction with material irregularity. By his recording an emphatic finding on the 1st issue the Subordinate Judge has tied the hands of the District Munsif as regards the trial of that issue and even if the District Munsif was prepared to go against the finding of the appellate Court, on appeal to the same appellate Court, the finding of the District Munsif would be upset as the Sub-Judge was not likely to change his opinion.

My brother *Kumarasamy Sastriar, J.* and I had to consider this question in a recent case [*Subbe Goundan* v. *Krishnamachari* (1)] and we held that it was a material irregularity for the appellate Court to record a finding on the main issue and then remand the whole case to the Court of first instance for disposal. If it was a case in which a preliminary decree could be passed it was the duty of the Court to pass such a decree so as to enable the party against whom the decree was passed to prefer a second appeal if so advised. In that case we treated the order of remand as a decree and heard a second appeal against the decree. In cases where a preliminary decree could not be passed, if the appellate Court records its finding on certain issues, it should ask the lower Court to try the issues which it has not decided. In this case I do not think it necessary to direct the Sub-Judge to

1. 1922 Mad. 263=30 M. L. T. 371=43 M. L. J. 158.

draw up a preliminary decree as was done in *Sidhanath Dhonddev* v. *Ganesh Govind* (2).

I set aside the order of remand of the Subordinate Judge and direct him to record his findings on issues 2 and 3 and pass a decree so that the party against whom the decree is passed may have a chance of preferring a second appeal to the High Court if so advised. I make no order as to the costs of this.

2. (1912) 37 Bom. 60.

1923 Madras. 114 (1).

KRISHNAN AND VENKATASUBBA RAO, JJ.

Kruthiventi Perrazu ... Petitioner.

v.

Sri Rajah Nallaparazu Meerja Seetharama Chandrarazu Garu and others ... Respondents.

Civ. Mis. No. 3376 of 1920 dated 31st July 1922 against the Order of Government Agent of Godavari dated 9th August 1920 in E. P. No. 1 of 1920.

Agency tract—Execution of decree—Judgment property situate in jurisdiction of Agency Court-Court can refuse execution.

Civil Procedure Code not being applicable to Agency Courts the ordinary rule that an executing Court will not canvass the legality of the decree is not applicable. An Agency Court may refuse to sell property within its jurisdiction under a decree not passed by an Agency Court and therefore not by a Court having jurisdiction.

T. M. Ramaswami Aiyar for A. Krishnaswami Aiyar—for the Petitioner.

D. Appa Rao, C. Rama Rao, and K. Krishnaswamy Aiyangar—for the Respondents.

ORDER :—In this case a mortgage decree was passed by the Sub-Court of Cocanada for sale of properties within its jurisdiction as well as of properties situated within the Agency tract. The Agency Court, when the decree was sent to it for execution regarding the properties within its jurisdiction, has held on the authority of the ruling of the Privy Council in *Ramabhadra Raju Bahadur* v. *Maharaja of Jeypore* (1) that that portion of the decree was a nullity and has refused to execute it.

It is not denied that on authority cited, the Agency Court was right in holding that the decree was a nullity but it is contended before us that as an executing Court that Court had no power to canvass the legality or the validity of that decree and *Zamindar of Ettiyapuram* v. *Chidambaram Chetty* (2) is relied on.

The ordinary rule no doubt is that the executing Court has no such power as laid down in that Full Bench case ; but the present case is distinguishable in as much as the Agency Court is not one governed by the Code of Civil Procedure. It seems to us that such a Court may refuse to sell property within its jurisdiction under a decree not passed by an Agency Court and therefore not by a Court having jurisdiction. The decree is on its very face invalid regarding the lands in the Agency tracts and we think the Agency Court is right in refusing to execute such a decree.

The order of the lower Court is right. This application is dismissed with costs.

Petition dismissed.

1. (1919) 42 Mad. 813=46 I. A. 151=37 M. L. J. 11=26 M. L. T. 127=17 A. L. J. 694=21 Bom. L. R. 914=(1919) M. W. N. 502=23 C. W. N. 1033=30 C. L. J. 209=10 L. W. 362=51 I. C. 185 (P. C.).

2. (1920) 43 Mad. 675.

1923 Madras. 114 (2).

OLDFIELD AND VENKATASUBBA RAO, JJ.

Govindasami Padayachi (minor) and another ... Defendants—Petitioners.

v.

R. Sami Padayachi ... Plaintiff—Respondent.

C. R. P. Nos. 58 and 59 of 1921 dated 12th April 1922 revising the decrees of Dist. Munsif of Ariyalur in Small Cause Suits Nos. 166 and 167 of 1920 dated 17th September 1920.

(a) *Civil P. C. (V of 1908) O. 8, r. 5—Fact explicitly relied on in the plaint—No denial of it in the written statement of defendant except a general denial.*

When an allegation of fact is explicitly relied on in the plaint and there is no denial of it in the written reply of the defendants except a general one *viz.*, that facts not admitted must be proved, the general denial will not safeguard defendant's interest unless there is something in the course of trial to justify a suspicion that the defendant was taken by surprise or there was misunderstanding. In the case of a minor defendant however there is an exception which relates to persons under disability in O. 8, R. 5, C. P. C.

(b) *Limitation Act (IX of 1908) Ss. 4, 14—Last day for filing a suit a general holiday—Suit filed in wrong Court next day—Return of plaint and representation in proper Court—Suit whether time-barred—Computation.*

The suit was to recover a sum of money due on a promissory note dated 9 9-1915. The last day for filing the suit was 9-9 1918 which was a holiday. The plaint was presented in the Small Cause Court at Kumbakonam on 10-9-1918. It was returned on 23-1-1920 for presentation to the proper Court and it was re-presented on 26-1-1920 in the Small Cause Court at Ariyalur. It had been found that the plaintiff's prosecution of the previous suit was in good faith and that S. 14 of the Limitation Act was therefore applicable to the period from 10-9-1918 to 28-1-1920 and S. 4 was applicable to the period from 24-1-1920 to 26-1-1920. *Held*, that as the one day between 9-9-1918 and 10-9 1918 cannot be excluded either under S. 4 or S. 14 the suit is time-barred. 45 Bom. 448 ; 28 M. 452 Dist.

R. Kuppuswamy Aiyar—for Petitioners.

N. R. K. Thathachariar and N. R. Govindachariar—for Respondents.

OLDFIELD, J.:—The decisions in these Small Causes come before us in revision. In S. C. No. 166 of 1920 corresponding with C. R. P. No. 58 of 1921 we are asked to interfere on the ground that there was no evidence on record to justify the lower Court's decision in favour of one of the endorsements of payment relied on by the plaintiff in connection with limitation. That endorsement stands on the suit promissory note and was explicitly relied on in the plaint. There was no denial of it in the written statement and nothing except, as usual, a statement that facts not expressly admitted must be proved. As regards that statement we should be unwilling to treat it as necessarily safeguarding the defendant's interest in any conclusive manner in the absence of anything in the course of the trial to justify suspicion that he was taken by surprise or that there was misunderstanding as to what the party had to prove. In the present case, however, there is something more substantial. The 1st defendant, against whom the decree is sought, is a minor and Mr. R. Kuppuswami Aiyar on his behalf has relied on the exception relating to persons under disability in O. 8, R. 5, C.P.C. This exception is no doubt not often relied on. In fact in our experience we have never known it applied and there is no reason for supposing that it was in the mind of either side at the trial. We however are bound to give the minor defendant the benefit of it and to remand the case for further trial.

The facts in S. C. No. 167 of 1920 corresponding with C. R. P. No. 59 of 1921 are that plaintiff, it is not disputed, in order to show that his suit was instituted in time has to avail himself of three different additions to the normal period of limitation. He has firstly with reference to S. 14 to except from the time which has elapsed the interval, during which his plaint was in the Small Cause Court, Kumbakonam, where it was filed erroneously. He has next to except from that time the interval after its return from that Court, until it was filed in the proper Court, the District Munsif's Court of Ariyalur, and for that he claims the application of S. 4 of the Limitation Act, because the days in question were holidays, on which the District Munsif's Court was closed. As regards these two periods on the view I take nothing more need be said. The lower Court's finding, which has not been disputed before us, is that the plaintiff filed his suit in the Small Cause Court of Kumbakonam in good faith and there is no objection to the application of S. 14 to this part of the time. Similarly on no view of the law or authorities is it possible for the defendants to resist the application of S. 4 to the subsequent holiday period.

Unfortunately, however, for plaintiff he must in order to avoid the plea of limitation, rely on S. 4 a second time in order to claim exclusion from the time, which has elapsed, of one day prior to his filing his plaint at Kumbakonam. That day was a holiday, and the question argued before us is whether S.4 can legitimately be applied to it. I note that the one plea is not open to the plaintiff. He cannot, in view of the decision in *Seshagiri Rao* v. *Vajravelayudam Pillai*, (1) ask us to regard the suit as having been finally instituted at Kumbakonam and to treat the subsequent proceedings at Ariyalur as having taken place, whilst the suit was pending. That alternative dismissed from consideration, he must be regarded, unless we are prepared to admit the possibility of the same suit being filed twice, as having filed the suit at Ariyalur and he must argue that S. 4 is applicable to any days on which the Court is closed, whether they occur at

1. (1912) 36 Mad. 482=22 M. L. J. 377.

the end of the period of limitation prescribed for the suit or at some point in its course. On this however, authority, as I understand it, is against him. It is not necessary to consider the decisions of Spencer, J. in *Mira Mohidin Rowther* v. *Nallaperumal Pillai* (2) and *Ummathu* v. *Pathumma* (3) since they seem to have dealt rather with cases, in which with reference to the closure of one of the Courts concerned a period to be allowed was in question, with which no closure of the other Court corresponded. For here the holidays were general holidays and both the Kumbakonam and the Ariyalur Courts were closed on those days. The law seems to be stated most clearly in the judgment of Napier, J. in *Ramalingam Aiyar* v. *Subbier* (4) the learned Judge pointing out that S. 14 and other sections direct the manner, in which the period of limitation is to be ascertained, and that S. 14 becomes applicable only after its ascertainment is complete. That of course will entail in the present case the application of S. 14 up to the holiday which preceded the filing of the suit at Ariyalur and the application of S. 4 only to the period of that holiday. The view taken by Napier, J. seems to me consistent with that taken by Ramesam, J. in *Ummathu* v. *Pathumma* (3) and not inconsistent with anything in the judgment of Ayling, J. in *Mira Mohidin Rowther* v. *Nallaperumal Pillai*. (2) It is true that a wider view has been taken in *Basavanappa* v. *Krishnadas* (5) and there may be some difficulty in reconciling the authorities of this Court, to which I have referred, with the decisions relating to the period requisite for obtaining copies, *Saminatha Aiyar* v. *Venkatasubba Aiyar* (6) and *Subrahmanyan* v. *Narasimhan*. (7) The latter, however, may be explained as proceeding on the interpretation of the words 'time requisite' in S. 12 of the Act. It is urged that a liberal construction of S. 4 should be adopted, since the plaintiff, having acted in good faith, will suffer unmerited hardship. The answer must be that a liberal view cannot be taken, when to do so would involve disregard of the words of the statute. In my opinion C. R. P. No. 59 must be allowed, the lower Court's decree being set aside and the suit dismissed with costs in the lower and in this Court. C. R. P. No. 58 must be allowed to the extent that the lower Court's decree is set aside and the Small Cause is remanded to the lower Court for re-admission and re-hearing in the light of the foregoing.

As the 2nd defendant in her capacity as guardian of 1st defendant never, so far as we can ascertain, brought to the notice of the lower Court the special terms of O. 8, R. 5 at the trial, the 1st defendant will, whatever be the result of the remand, pay the costs of the plaintiff up to date.

VENKATASUBBA RAO, J.:—So far as C. R. P. No. 58 is concerned I agree with the conclusions of my learned brother and in C. R. P. No. 59 I reserve my judgment.

Civil Revision Petition No. 59 of 1921 having been posted for delivery of judgment this 12th day of April 1922, the Court (Venkatasubba Rao, J.) delivered the following.

JUDGMENT:—The District Munsif has passed a decree in favour of the plaintiff. The defendant contends that the suit is barred by limitation. The suit was to recover a sum of money due upon a promissory note dated 9-9-1915. The last day of the period of limitation was 9-9-1918. The plaint was presented on 10-9-1918 in the Small Cause Court of Kumbakonam. It was returned on 23-1-1920 for presentation to the proper Court and it was re-presented on 26-1-1920 in the Small Cause Court of Ariyalur and the suit was tried by the District Munsif of that place. It has been found that the plaintiff's prosecution of the previous suit was in good faith and that S. 14 of the Limitation Act was therefore applicable.

The period between 10-9-1918 and 23-1-1920, it is conceded, can be excluded under S. 14; nor is any objection taken to the exclusion under S. 4 of the period that elapsed between 24-1-1920 and 26-1-1920. The defendant objects to the exclusion of the one day between 9-9-1918 and 10-9-1918 and contends that neither S. 14 nor S. 4 can be of avail to the plaintiff so far as the period of this one day is concerned.

2. (1911) 36 Mad. 131=21 M. L. J. 1000.
3. (1921) 44 Mad. 817=41 M. L. J. 84.
4. (1918) 8 L. W. 256.
5. (1921) 45 Bom. 443.
6. (1903) 27 Mad. 21=13 M. L. J. 300.
7. (1920) 43 Mad. 640=38 M. L. J. 465.

The plaintiff points out that if this view is accepted great hardship will result to him and that the intention underlying the beneficent provision enacted in S. 14 will be defeated; he further argues that the Court having found that he acted in good faith in filing the suit in the first Court on 10-9-1918, he is deprived of the protection intended to be conferred by the said section.

The latest pronouncement on the subject is the judgment of the Bombay High Court in *Basvanappa* v. *Krishnadas* (5) and this authority supports the plaintiff's contention and in it the learned Judges make certain very strong observations in regard to the injustice that follows from the Courts accepting the contrary view. The hardship occasioned to the plaintiff is obvious and in view of this fact and the decision cited above I thought the matter was worthy of further consideration and reserved judgment.

I shall deal with the cases cited and then examine the terms of the Ss. 4 and 14 in order to find out what the proper construction is.

I shall first refer to *Mira Mohidin Rowther* v. *Nallaperumal Pillai* (2). The cause of action arose on the 14th June 1905 and the last day of the period prescribed for the suit was 14th June 1908. The suit was filed in the Madura West Subordinate Judge's Court on the 6th July 1908 as on the 14th June that Court was closed for the recess and the 6th July was the re-opening day. On an objection being taken to the jurisdiction of the Madura West Subordinate Judge's Court, the plaint was returned on 17th February 1909 and was presented to the Tuticorin Subordinate Judge's Court on the next Court day, *viz.*, the 19th February.

Sankaran Nair, J., who heard the revision petition held that the plaintiffs were not entitled to deduct the period from the 14th June 1908 to the 6th July 1908. An appeal was filed under S. 15 of the Letters Patent and Ayling and Spencer, JJ. agreed with Sankaran Nair, J., and dismissed the appeal.

In regard to this case it is to be observed that the proper Court had re-opened before the 6th July 1908 and that so far, the facts of the present case are distinguishable. But as I shall show presently, with reference to the principle applicable, this distinction is of no avail.

The correctness of this decision was affirmed in *Seshagiri Row* v. *Vajra Velayudam Pillai* (1) by Benson and Sundara Aiyar, JJ., who overruled the contention that the suit filed in the second Court should be regarded as a continuation of the infructuous suit filed in the wrong Court. *Mira Mohideen Rowther* v. *Nallaperumal Pillai* (2) was again followed in *Ramalinga Aiyar* v. *Subbier* (4) where Napier, J., observed "If this plaint has been presented in a proper Court on the day after that on which the limitation expired, that day having been a holiday, then the plaintiff would have been able to take advantage of the specific provision in S. 4; but as he has not done so, in my opinion, he is not entitled to take advantage of that provision." The learned Judge points out that while S. 14 deals with the computation of the period of limitation, S. 4 is only "a particular statutory provision not for the purpose of computing the period of limitation but allowing in certain circumstances the filing of suits after the period has expired.

The authorities were reviewed in *Ummathu* v. *Pathumma* (3) and the cases cited above were followed in it. The last day for presenting the plaint was the 30th December 1917. It was actually presented on the 3rd January 1918 in the Small Cause Court of Cochin, that being the day when that Court re-opened after the Christmas holidays. The plaint was returned for want of jurisdiction on the 6th February, as the suit was excepted from the cognizance of a Court of Small Causes and the plaintiff represented the plaint on the following day in the Court of the Subordinate Judge of Cochin. It would have been in time if it had been instituted on the 3rd January in the latter Court, as it was also closed on the 30th December and it re-opened only on the 3rd January.

It was conceded that the period from the 3rd January to the 6th February was to be excluded from computation under S. 14. The question to be decided was whether the days from the 31st December to the 2nd January could be excluded. The answer was in the negative and the suit was held to be barred. In his judgment Ramesam, J., points out that S. 4 affords help to a

plaintiff if the holidays follow the period that can be excluded under S. 14 but not if the holidays precede such period.

The Madras High Court has thus uniformly taken a view opposed to that contended for on behalf of the plaintiff.

In *Mukund Ram* v. *Ramraj* (8) the same construction found favour with the learned Judges. The plaint was filed in the Court of the Subordinate Judge of Agra on the 2nd June 1913 and the proceedings in that Court lasted until the 21st January. The plaint was re-presented in the Court of the Subordinate Judge of Aligarh on the 22nd January 1914. The suit was dismissed as barred on the ground that the period of limitation originally expired on the 1st and not on the 2nd June 1913, and therefore even excluding the time from the 2nd June 1913 to the 22nd January 1914, both days inclusive, plaintiff's suit in the second Court was beyond time. The District Judge's reason for this conclusion is contained in the following passage. "...the period of limitation 'computed' as laid down in S. 14 of Limitation Act did not expire on a day when the Court (of the Subordinate Judge of Aligrah) was closed. Therefore the extra day (1st June 1913 to 2nd June 1913) cannot be allowed." This statement of the law was accepted by the learned Judges who, in a very short judgment disposed of the appeal with an observation which indicates that they were sensible of the hardship that resulted to the plaintiff.

Haridas Ray v. *Saratchandra Ray* (9) cannot be said to be a decision on the question. The case was decided in my opinion with reference to a point which is different from the one under consideration and I shall not therefore deal with it further.

The plaintiff mainly relies on the authority of *Basavanappa* v. *Krishnadas* (5). The learned Judges refuse to follow *Mira Mohideen Rowther* v. *Nallaperumal Pillai* (2) and it is worthy of observation that Macleod, C. J., assumes in his judgment, in regard to the facts of the case that came up for decision before him, that no difficulty would have existed if the second Court had also been closed for the vacation. The learned Judge observes "Clearly the plaintiff is entitled to take advantage of these days during which the first Court was closed for the vacation and calculation should be made in the same way as if the second Court had been closed for the vacation." The actual decision in the Bombay case as well as the assumption involved in the passage referred to, are opposed to the current of the authority of this Court and in my opinion are not warranted by the provisions of the Limitation Act.

Some cases were cited before us which are said to relate to the joint application of Ss. 4 and 12 of the Limitation Act. These are *Saminatha Aiyar* v. *Venkatasubba Aiyar* (6) *Venkata Row* v. *Venkatachella Chetty* (10) and *Subramanyam* v. *Narasimham* (5). I am however of the opinion that these cases do not throw any light on the interpretation of S. 4 and that they deal only with the effect of the words "the time requisite for obtaining a copy" in S. 12.

The facts relevant in *Saminatha Ayyar* v. *Venkatasubba Ayyar* (6) are these :—Judgment was delivered on the 22nd December 1900, the last day before the Christmas vacation at 4 p. m., when according to the practice of the Court, papers were not received. The appellant made his application for a copy of the judgment on the 7th January 1901 the day on which the Court re-opened after the Christmas holidays and presented his appeal on a day which would be in time if he was entitled to deduct the period when the Court was closed. His contention, was, that in computing the period for appeal the time during which the Court was closed, should be deducted. The learned Judges held that the appellant was entitled to deduct the period from the 23rd December to the 6th January, as such period, in the circumstances, must be taken to be part of the "time requisite for obtaining a copy of the judgment."

Similarly the judgments in *Venkata Rao* v. *Venkatachellam Chetty* (10) and *Subbramanyam* v. *Narasimham* (7) leave no room for doubt that they were dealing only with the definition of the words "time requisite" and not with the applicability of S. 4. In the latter case Wallis, C. J., observes "What we have to see in

8. (1916) 14 A. L. J. 310.
9. (1913) 17 C. W. N. 515.
10. (1905) 28 Mad. 452=15 M. L. J. 109.

all these cases is what was the time requisite for obtaining copies within the meaning of the section and by "requisite" I understand "reasonably requisite."

These cases therefore give no assistance in deciding the question at issue.

Turning to the Ss. 4 and 14 of the Limitation Act, which is the right construction to be placed upon them, that adopted in the Madras cases and the Allahabad case cited above, or that approved in *Basavanappa* v. *Krishnadas* (5). With all respect the latter construction seems to be clearly untenable. S. 4 refers to a period of limitation which expires on a day when the Court is closed. How is this period of limitation ascertained? The manner of computing the period in certain circumstances is set out in S. 14. In other words S. 4 assumes that the period of limitation has been ascertained. In computing the period S. 14 allows a certain concession and after the period has been computed in accordance with it, recourse to S. 4 becomes necessary. This is the view taken by Napier, J. in *Ramalinga Aiyar* v. *Subbier* (4), which is in accord with that which received the approval of the Judges who decided *Makund Ram* v. *Ramraj* (8) and has been approved by my learned brother in his judgment. According to this construction, if the holidays follow the period specified under S. 14 they can be availed of but if the holidays precede the said period they cannot be excluded. In my opinion, Ss. 4 and 14 are incapable of any other construction, and the correct view is that set forth above.

In the judgment in *Basavanappa* v. *Krishnadas* (5) the result that follows from this view is described as iniquitous. This is a just criticism of the sections of the Limitation Act under consideration. But the defect is inherent in, and inseparable from these and similar provisions as they can only be general in the matter of wording and cannot possibly provide for all cases that are likely to occur. For instance, the appellant for copies under S. 12 is under no obligation to make an early application and he may apply at any time, even on the last day prescribed for the filing of the appeal. Turning to S. 13, if a defendant leaves British India on the day after the accrual of the cause of action, say, in respect of a promissory note executed by him and is absent from British India for three years the period of limitation is extended to six years by reason of the section in question and in this instance the protection afforded is far beyond the needs of the case; whereas if the defendant leaves British India just a day previous to the expiration of the period of limitation and is absent from British India for three years it becomes the plaintiff's duty to find at his peril that the defendant has returned to British India and file his suit forthwith because there is only a day outstanding out of the period of limitation prescribed; and it must be said that the concession granted falls in this instance short of what may be considered equitable. It is possible to conceive of many more cases of a like nature in respect of Ss. 12, 13 and 14; but these considerations cannot affect the construction of the sections and the present case is an extreme instance of the very great hardship that is sometimes occasioned in consequence of the very general wording of the aforesaid sections.

It must be observed that in the view I have taken of Ss. 4 and 14, it makes no difference whatsoever whether the first Court alone is closed as happened in *Mira Mohidin Rowther* v. *Nallaperumal Pillai*(2) or whether the first and the second Courts are both closed.

If a plaintiff, after the expiration of the full period of limitation, on account of the intervening of the holiday, files a suit on the re-opening day in a wrong Court, S. 14 can never be of any avail to him and afford to him no help whatsoever. The defendant has contended that we must construe the sections liberally. If two constructions were possible the more liberal one might be adopted but I am clearly of the opinion that the view I have taken is the only possible view to take of the law as it stands, and I therefore entirely concur in the Judgment delivered by my learned brother.

Appeal allowed and suit remanded.

1923 Madras. 120.

SCHWABE, C. J.

Kuttuva Meenatchi Ayyan ... Appellant.

v.

Darmiah Ranga Charlu and another ...Respondents.

F. A. No. 124 of 1921 dated 3rd May 1922 against the decree of Subordinate Judge, Madura in O. S. No. 53 of 1917.

(a) *Hindu Law—Joint family—Alienation by father—Partition.*

A minor through his mother as next friend sued his father for partition of the joint family property. The father had sold certain family property. The sale consideration was Rs. 500 but only Rs. 320 was actually paid. The minor sought to set aside the sale and the question was to what relief the minor was entitled. The two judges disagreeing, the matter was referred to the Chief Justice. *Held* in such matter the fair thing to do was to sell the property and divide the proceeds in proper shares to which the parties were entitled.

(b) *Hindu Law—Joint family—Partition suit—Alienation—Mesne profits before suit.*

It is not usual to allow mesne profits before suit in suits for partition against managers of joint families and unless it is shown that there was no necessity for the sale as a whole, the purchaser from the manager should not be made to account for the profits which the family might have received if they had retained possession of the property.

C. V. Ananthakrishna Aiyar—for the Appellant.

K. S. Jayarama Aiyar—for the Respondents.

SPENCER, J.:—This suit was brought by a minor through his mother and next friend to effect a partition of his share of family property from his father (1st defendant). In appeal the points which have been argued relate to the sale of a house and site under Ex. 15 and to two mortgages Exs. 20 and 21.

The Subordinate Judge disallowed two sums of Rs. 112-8-0 and Rs. 67-8-0 which went to make up the consideration for the sale at a price of Rs. 500-0-0, for the reason that the 2nd defendant (appellant) did not produce his accounts in Court. The appellant's explanation that he had produced his accounts 3 days previously in the Collector's Office was not a sufficient explanation for not producing them in Court, and as the *onus* rested on him to prove that these sums were actually paid, I think that the Subordinate Judge acted rightly in taking nothing for granted and in regarding Rs. 180-0-0 as not proved to have been spent for the benefit of the minor. But it is not usual to allow mesne profits before suit in suits for partition against managers of joint families, and unless it is shown that there was no necessity for the sale as a whole, the purchaser should not be made to account for the profits which the family might have received if they had retained possession of the property. The Subordinate Judge after stating that the ordinary course would be different in this case has deducted the value of a moiety of the property from the amount for which he has found consideration to exist and then setting off the balance against the mesne profits, without any calculation of the amount of income which a moiety of the house may be reckoned to have brought in to the 2nd defendant between the date of sale (22nd November, 1909) and the date of suit (19th January, 1917), has given the plaintiff a decree for the unconditional recovery of a moiety of this item. This cannot be supported. Fraud or collusion on the part of 2nd defendant has not been established. Where a major portion of the consideration for a sale is found to be binding, the usual procedure is to uphold the sale (See *Krishnan* v. *Govindan* (1),) and the cases quoted therein, to which may be added *Seshamma* v. *Venkatakrishnarayanim Garu* (2), and *Viswanatha Sastrigal* v. *Valambal Ammal* (3).

In *Seetharam Naidu* v. *Balakrishna Naidu* (4), where the alienee was allowed to retain the vendor's one-third share and to have charge upon the shares of the other co-parceners for two-thirds of the amount advanced for purposes binding on the family, less than half of the sale price was held to be so binding, and in *Vadivelam* v. *Natesam* (5), where the decree provided that plaintiff should pay a moiety of the amount held to be binding on the family before recovering the half share claimed by him, the portion of the consideration found to be binding was exactly half of the whole sum for which the property was sold.

1. (1921) 14 L. W. 539=41 M. L. J. 381.
2. (1916) 3 L. W. 413.
3. (1922) 30 M. L. T. 14.
4. (1914) 26 M. L. J. 604.
5. (1914) 37 Mad. 435.

In the present case it was argued that the first defendant had not been shown to be under any pressure to sell a portion of the ancestral estate and that he might have discharged the family liabilities by mortgaging more deeply the property already mortgaged. I think it was clearly advantageous to clear off debts bearing interest at 12 per cent. even by means of selling a small portion of the family's immoveable property rather than allow the load of interest to mount up until the mortgagee chose to sue upon his mortgage (Ex. 10) and so cause a forced sale which would have swallowed up the whole property for principal, interest and costs. The plaintiff's father had purchased this house only 10 months previously from his sister under Ex. 16 for the same price (Rs. 500) for which he sold it under Ex. 15 to second defendant his cousin. The plaintiff had no interest in this property at his birth as he was born before it was purchased. It may not have been convenient to keep in the family an unoccupied house which would entail expenditure for keeping it in good repair. I can find no indications of fraud about the sale under Ex. 15. Nothing was elicited in cross-examination of 2nd defendant to justify suspicions being entertained of the *bona fide* of his conduct in this transaction. His failure to produce legal proof of Rs. 180 out of the consideration having been paid, when the burden of proof lay on him, does not involve a positive finding that the recitals in the sale-deed are to that extent false.

In modification of the lower Court's decree, I would under the above circumstances direct that the 2nd defendant be allowed to return the 7th item on condition of his paying within 3 months from this date a sum of Rs. 90 to the plaintiff with interest at 6 per cent from date of suit till date of payment and in default that the property be sold in execution.

As regards the two mortgages, one being usufructuary and the other hypothecatory, under Exs. 20 and 21, the Subordinate Judge allowed partial redemption of a moiety of the item mortgaged under Ex. 20 on payment of Rs. 469-2-10, which sum he arrived at by crediting to plaintiff's share alone a sum of Rs. 973-14-2 received by the mortgagee as compensation awarded by Government for a portion of this item acquired under the Land Acquisition Act. He fixed no date for redemption. The respondent's pleader is unable to justify the placing of the whole sum obtained from the Government to the plaintiff's credit.

The mortgage-debt secured by Ex. 20 is Rs. 3,000. Setting off Rs. 973-14-2 against this sum, the balance left is Rs. 2,026-1-10 and Rs. 2,886-2-0 have been found to be binding on the plaintiff. In modification of this portion of the lower Court's decree, the plaintiff will be given a decree declaring that he is entitled to redeem the portion of item 1 not acquired by Government and items 2 and 3 on payment of Rs. 2,026-1-10 and that upon redemption he will be entitled under S. 95 of the Transfer of Property Act to recover Rs. 1,013-0-11 being a moiety of the cost of redemption plus Rs. 113-14-0 which was held to be not binding on the family, (total Rs. 1,126-14-11) by a charge upon 1st defendant's share, and be put in possession of a moiety of this item free of encumbrance after partition by metes and bounds.

The Subordinate Judge has found the whole of the debt secured under Ex. 21 to be binding on the plaintiff and there is no Memorandum of Objections. The decree must be modified by declaring the plaintiff's right of redemption of the whole of item 4 upon payment of the amount due calculated up to the date of redemption, and for partition, and for the recovery of a moiety of the cost of redemption by a charge upon 1st defendant's share.

The appellant is in my opinion entitled to his costs in appeal upon item 7 to the extent to which he valued his relief. Each party will bear his own costs in appeal upon the other two items. The lower Court's order as to costs and payment of Court-fees will stand.

As my learned brother differs from me as to the proper decree to be passed in respect of the sale under Ex. 15 we direct under S. 98 (2) proviso that our judgments be placed before the Chief Justice for a direction that one or more other Judges may hear and decide the question whether the sale should be set aside or not, and what is the proper decree that should be passed under the circumstances of this case.

DEVADOSS, J.:—This is an appeal against the preliminary decree of the Subordinate Judge of Madura in a suit for partition by the plaintiff who is the minor son of the 1st defendant. The plaint allegation is that the family of the plaintiff and the 1st defendant was possessed of considerable property, the 1st defendant contracted debts for immoral and illegal purposes, wasted the family property and neglected to maintain the plaintiff and his mother. The other defendants are the alienees of the family property. This appeal is only by the 2nd defendant who is an alienee of the family property under 3 separate documents, Exs. 15, 20 and 21. Ex. 15 is a sale in favour of the 2nd defendant by the 1st defendant. Ex. 20 is a usufructuary mortgage deed; and Ex. 21 is a hypothecation-bond. The Subordinate Judge has set aside the sale under Ex. 15 on the ground that a portion of the consideration has not been proved to have been paid and that there was no necessity to sell the family property. The consideration for Ex. 15 consists of a sum of Rs. 112-8-0 paid in cash for discharging a promissory note debt, Rs. 67-8-0 said to have been due on accounts for purchase of dyes and of Rs. 320 the balance which went towards part payment of a mortgage debt due under Ex. 10. The Subordinate Judge has held that the amount of Rs. 320 was paid towards the debt due under Ex. 10, and that the rest of the amount, Rs. 180, was not paid. I think the Subordinate Judge has come to a right conclusion on the evidence. The sum of Rs. 112-8-0 is said to have been paid in cash for the purpose of discharging a promissory-note due to one Perumal Aiyar by the 1st defendant, and one would naturally expect the 2nd defendant to be in possession of the promissory note. His explanation as regards his not being in possession of the promissory note is not satisfactory. It is said that he is in possession of the title-deed of the property which was pledged with Perumal Aiyar for securing the loan evidenced by the promissory note. It is unusual for persons in the moffussil to lend money on the security of title-deed alone, and unless there is some more satisfactory evidence as regards the pledge with Perumal Aiyar for securing the loan, it would not be safe to believe the story. Perumal Aiyar has not been called, nor is there any evidence as regards the loan by Perumal Aiyar to the 1st defendant. Rs. 67-8-0 said to be due on accounts has not been satisfactorily proved. The 2nd defendant is a trader paying an income-tax of Rs. 160. He says he is in possession of accounts and has not chosen to produce them, and he offers no explanation for the non-production.

I think it is a very strong circumstance going to show that the accounts, if produced, would not support his case. He was specifically cross-examined as regards the item of Rs. 67-8-0, and he was unable to give details. I therefore hold that the amount of Rs. 180 has not been proved to have been paid by the 2nd defendant to the 1st defendant.

The question is whether in the circumstances the sale under Ex. 15 should be set aside. It has been held in several cases that where a major portion of the consideration is found to be good and binding, the sale in favour of a *bona fide* purchaser should not be set aside at the instance of a person whose interest is sought to be bound by the alienation. Several cases have been quoted before us, *Krishnan* v. *Govindan* (1), *Banwari Lal* v. *Mahesh* (6), *Vadivelam* v. *Natesam* (5) and *Seetharam Naidu* v. *Balakrishna Naidu* (4). There can be no hard and fast rule in cases of this kind. No doubt the law favours a *bona fide* purchaser for value. Where he is able to prove that a major portion of the consideration was for family purpose, the Court is inclined to the view that the alienation should be supported. I do not approve of the contention that where three-fourths of the consideration is good and binding, alienations by managing members of Hindu families and widows as a rule should be upheld. Each case should be judged on its merits. In this case, the 2nd defendant is the first cousin on the mother's side of the 1st defendant. The 1st defendant who was at the time of the sale a young man was evidently entering upon a career of wastefulness. His father had died in 1907 and he married a second wife in 1908 and he began to alienate the family property in 1909. The 2nd defendant cannot be said to be unaware of the conduct of the 1st defendant. The property sold under Ex. 15 is a house in Madura town. Madura is a town of growing importance and house

6. (1918) 41 All. 63=45 I. A. 284 (P. C.).

property has been steadily rising in value. The house was purchased by the 1st defendant from a sister of his for money due to the family for Rs. 500. The 2nd defendant had already advanced money to the first defendant under Ex. 10. On the date of Ex. 15 there was no pressure on the estate and the 1st defendant could very well have raised money by usufructuary mortgage. There was no necessity to execute Ex. 15 to pay off a portion of the consideration under Ex. 10 which had been executed only a few months before. In the light of these facts, the *onus* is strongly on the 2nd defendant to prove that the sale was for purposes which could bind the minor plaintiff. The majority of the cases quoted are cases of reversioners suing to set aside alienations by widows. Though in the case of alienations by a widow the *onus* is upon the alienees to prove the binding nature of the debt on the estate, yet there is an under current of feeling that a reversioner is more or less an adventurer. But in the case of a father alienating the property belonging to himself and his minor son, I think, one should look more closely into the circumstances which necessitated the sale, and where there are no circumstances which could justify the sale, the mere fact that a portion of the consideration was good is not a sufficient ground for upholding the sale. My learned brother has taken a different view of the facts, and I regret that I am obliged to differ from him with regard to Ex. 15. Where an alienee has not paid a portion of the consideration for the alienation he cannot be said to be a *bona fide* purchaser for value. I hold that the 2nd defendant has not paid Rs. 180 part of the consideration for the sale evidenced by Ex. 15. After a careful consideration of all the circumstances I am of opinion that the sale under Ex. 15 could not be supported. The Subordinate Judge's decision that the sale should be set aside is correct. But he has directed that half the property should be handed over to the plaintiff unconditionally. I think that that direction is not right. Though the 2nd defendant purchased the property worth Rs. 500 for only Rs. 320 and though he had the benefit of the income of the whole property worth Rs. 500 yet the managing member is entitled to use the income of the property as he likes and no member can call the managing member to account. Even if the first defendant had allowed the 2nd defendant to be in possession of the property and to enjoy the income for some years without receiving any consideration, yet the plaintiff could not call upon the 2nd defendant to account for the profits or income of the property. I think the order of the Subordinate Judge that half the property should be surrendered unconditionally to the plaintiff should be set aside, and the plaintiff should be directed to pay half of Rs. 320, that is Rs. 160, before recovering possession of half the property.

The second point urged by the appellant is that the Subordinate Judge has erred in holding that consideration for Ex. 20 was good to the extent of only Rs. 2,886-2-0. The document is for Rs. 3,000. Where an alienee is able to prove that the whole of the consideration has been paid and that more than nine-tenths of it is good and binding, it can be safely presumed that the small balance was also for purposes binding upon the estate. I hold that the alienation under Ex. 20 is binding upon the plaintiff. The 2nd defendant has received Rs. 973-14-2 on account of acquisition by Government of a portion of the property mortgaged to him with possession. The plaintiff should therefore be directed to pay for his share half of Rs. 2,026-1-10 to the 2nd defendant for redemption of the mortgage. It is contended for the appellant that the redemption of half of the mortgaged property should not be allowed as the mortgagor is not entitled to split up the equity of redemption and redeem only a portion of the mortgaged property. Mr. Jayarama Aiyar who appears for the plaintiff does not oppose this contention. The order of the Subordinate Judge in allowing redemption of half of the mortgaged property is wrong. The plaintiff should pay Rs. 2,026-1-10 for redeeming the property mortgaged under Ex. 20. The consideration for Ex. 21 has been found to be good and for purposes binding on the plaintiff. Plaintiff should pay the amount due before redeeming the property covered by Ex. 21. With these modifications I confirm the decree of the Subordinate Judge and dismiss the appeal. The 1st defendant should pay the costs of the plaintiff in

this Court as regards item 7. I make no order as to costs as regards items I to IV.

[This Appeal came on for hearing under the provisions of S. 98 of the Code of Civil Procedure, before his Lordship the Chief Justice.]

JUDGMENT :—This is a partition suit and the matter has been referred to me as to one item of property in respect of which Spencer and Devadoss, JJ., differed. They differed as to what the right practice was where a part of the consideration had been paid by the purchaser on a sale by the managing member of a Hindu family and part had not been paid. One of the learned Judges took the view that the purchaser should retain the property and pay to the family the unpaid part of the purchase price, or rather a portion of it by reason of the fact that the purchaser had purchased the managing member's half share. The other learned Judge took the other view *viz.*, that half of the property should be handed to the family, they paying the purchaser a sum equal to what he must be taken to have paid in respect of that half. In this case the matter is complicated by the fact that there is a large rise in the value of the property since the date of the purchase. There is no doubt that there is power in the Court to order part of the property to be handed over to the family on payment of a fair sum. There is also undoubtedly power in the Court to order the property to be retained by the purchaser, he making compensation to the family. In the various cases cited to me, the amount which had to be paid by one or the other always depended upon the original purchase price and was measured by it, and there does not seem to have been a case reported where there has been such a large rise in the value of the property that either course must work injustice to the one party or other.

As to which principle should be applied, namely, the setting aside of the sale or the retention with compensation of the property by the purchaser, the Courts have expressed various views. It has been said where two-thirds of the purchase-money is proper expenditure of the managing member and one-third is not, the case is on the border line. That was stated in an unreported case S.A. No. 743 of 1916. In a previous reported case in *Rukmani Sundarammal* v. *Muthu Ammal* (7) where Rs. 762 of the purchase-money was good and Rs. 663 was bad, the sale was set aside. In two cases in the Privy Council *Banwari Lal* v. *Mahesh* (6) and *Gur Narayan* v. *Sheo Lal Singh* (8) the sales were set aside apparently without the point being argued. In respect of one sale set aside, the proportion of the consideration which was treated as unpaid was a very small proportion. I think I am justified in saying that there has been no uniformity of practice but it has always been recognised that the Court in this matter acts on equitable principles, taking that term to mean doing what is fair to the parties ; in case of misconduct of either party, the Court can take into account fraud, the fact that the original purchase was at a gross undervalue, and things of that kind. But in this case there does not appear to be anything of that sort.

The Subordinate Judge was not satisfied that about one-third of the consideration had been paid at all. One of the learned Judges of the Referring Bench attached very little importance to that, and the other attached great importance to it. When the matter comes before me, I have to consider what is the right thing to do. I am satisfied that justice cannot be done between these parties unless we take into consideration the fact that there has been a very large rise in the value of this property, between the date of the purchase and the present time, because, if I give to the family half upon payment by them of Rs. 180, they would benefit very much at the expense of this defendant. On the other hand, if I allow this defendant to retain the purchased property paying only on the basis of what he had, if I may use the expression, not paid for, he would get a large advantage at the expense of the family. I think in such cases the only fair thing to do is what the parties very sensibly have agreed now before me should be done, namely, this property should be sold, and that having been sold, the proceeds should be distributed in the shares to which the parties are properly entitled. Now the 2nd defendant bought property then valued at Rs. 500 for Rs. 320 and he has got by reason of the

7. (1915) M. W. N. 8.
8. (1919) 46 I. A., 1 ; 46 Cal. 566 (P. C.).

purchase of the managing member's share, the managing member's half share of the property. That he keeps. Distributing the purchase price over the two halves, we must take it that the price of the other half ought to have been Rs. 250 but in fact was only Rs. 160 and therefore that he ought to be entitled to the proportion of the proceeds of this half in that ratio. The result will be that he will have half, and of the other half he will have 16/25, while the plaintiff will get 9/25. I make no order as to costs. The direction for sale of this property and this distribution of the proceeds will form part of the order in the partition suit. This defendant will get—41/50 of the whole and the plaintiff—9/50.

Decree varied.

1923 Madras. 125.

OLDFIELD AND SPENCER, JJ.

Alagappa Chetty ... Petitioner.

v.

Nachiappan alias *Kirukan and others* ... Respondents.

Civ. Mis. Nos. 229 to 235 and 237 to 254 of 1921 dated 26th April 1922 against the decree of High Court in S. A. Nos. 1759 to 1765, 1767, 1771, 1773 and 1775 to 1787 of 1916.

(a) *Civil P. C., S.* 109 (c)—*Leave to appeal—Question of general importance.*

The petitioner for leave to appeal to His Majesty wanted to raise the question whether or not the decision of the Inam Commission in 1865 and that of Deputy Superintendent of Survey 1876 as regards the surveys made in the private estates were binding on the owners of those estates and of the adjacent lands. *Held* neither of these questions has affected or is likely to affect any large number of persons. The case does not involve any question the decision of which might result in a precedent governing numerous other cases or in which the right in dispute is of great public or private importance.

(P. 126, Col. 2.)

(b) *Civil P.C., S.* 110, *Cl.* 2—*Leave to appeal.*

The judgment involved decision that a certain boundary line passed through or on one side of the different suit plots. The petitioner's contention was that the determination of the whole length of the boundary line involved a determination against his right to the remainder of the larger extent which that line was intended to ascertain and hence the conditions satisfied the provisions of S. 110, Cl. 2. *Held* when the question is in the words of the section of a decree or final order involving indirectly a claim or question, no exact or rigid construction of the word 'indirectly' can be given. It must inevitably be a question of degree whether the relation between the decree or order and the claim or question is established with sufficient closeness to be in an indirect relation. In this particular case there was no more than an incidental finding in the judgment of High Court as regards the boundary line except in so far as it determined the ownership of the plots which were directly in dispute; and because of such a mere incidental finding the decree or final order cannot be said to involve indirectly any question regarding the larger extent.

(P. 126, Col. 2.)

(c) *Civil P. C., S.* 110—*Suit undervalued—Real value more than* 10,000—*Leave to appeal.*

The plaintiff having deliberately undervalued his suit in the Court of first instance and having thus obtained the decision of three Courts in this country upon his claim, cannot be allowed to repudiate his valuation fixed upon the market value of the property, for the purpose of obtaining the decision of a fourth tribunal.

(P. 129, Col. 1.)

L. A. Govindaraghava Aiyar, C. V. Anantakrishna Aiyar and P.S. Narayanaswami Aiyar—for the Petitioner.

T. Rangachariar—for the Respondents.

OLDFIELD, J.:—These 25 petitions are for orders under S. 110 and O. 45, Rr. 3 and 8 to enable the petitioners to appeal to His Majesty in Council against the 25 decrees passed by this Court in Second Appeals. The suits were instituted in the Court of the District Munsif, who dismissed them. First appeals were allowed by the District Judge, and in the cases before us this Court allowed the Second Appeals, setting aside the District Judge's decrees.

The circumstances are that the plaintiff sued for possession of certain plots of land under a title to a larger extent, in which they were alleged to be included in the village of Sekkalakottai. Some of the defendants in each suit were impleaded as trespassers in actual occupation. Sixth to ninth defendants who were subsequently impleaded, set up that the plots were part of their inam village of Kalanivasal and that the other defendants just referred to were holding under them. The dispute was therefore whether the suit plots were in the Sekkalakottai village or Kalanivasal; that is where the boundary line between the two villages ran with reference to the suit plots. Three questions were formulated in the judgment of Spencer, J., and were dealt with by both the learned Judges. Of those three questions two are at present material; the second: whether the Inam Commissioner's decision in 1865 is binding on the parties to this suit and decisive of the questions of title involved?

and the third: whether the decision of the Deputy Superintendent of Survey, Mr. Gompertz, in 1876 was conclusive against the Zamindar and the plaintiff, who claims under him, and whether according to that decision the lands in dispute belong to Kalanivasal?

The suits were valued in the District Munsif's Court with reference to Court Fees Act, S. 7 (5) (*d*) and (*e*) on the market value of the land in dispute; and the aggregate value of the lands concerned in the 25 suits, with which we have to deal, is only Rs. 2,800. It is said that even assuming that these suits can be consolidated for the present purpose, the condition as to the value of the subject-matter postulated in S. 110, Civil Procedure Code, is not complied with.

The first argument by which the petitioners propose in these circumstances to justify the grant of leave is that, independently of the value of the properties, the suits raise questions of general importance and that therefore leave should be given and that the applications for leave in respect of them are covered by S. 109 (*c*). This is alleged in respect of the second question just set out and also of the third in so far as it raises the issue whether the surveys made similarly with the survey by Mr. Gompertz therein referred to in private estates are binding on the owners of those estates and of the adjacent lands. We have not been shown that either of these questions has affected or is likely to affect any large number of persons, and we cannot do better than borrow the language used in *Hirjibhai* v. *Jamshedji* (1) and say that in this case there is not involved any question the decision of which might result in a precedent governing numerous other cases or in which the right in dispute is of great public or private importance. This argument on behalf of the petitioners fails.

I come next to a more substantial and difficult contention that these cases come within Cl. (2) of S. 110 because the decree or final order in each of them involves indirectly a claim or question to or respecting property of the value of Rs. 10,000. The contention is supported in this way. In the judgment of this Court it was decided that the line laid down by Mr. Gompertz passes through or on one side of the different suit plots. That line, however, had to be arrived at for the purpose of these cases with regard to various indications as to its direction and length given in Mr. Gompertz's award. It is said that this Court's determination of the whole length of that line involves a determination against the plaintiff's rights to the remainder of the larger extent, which that line was intended to ascertain. It is true that in the judgment of Spencer, J., there are references to points in the line referred to as B, B1, B2, etc., and, if the position of the larger extent just mentioned had been in issue, it might be said that it was explicitly or impliedly ascertained by these findings. But there was no issue as to that larger extent. In fact the plaintiff, avoided raising any such issue. For, when he joined 6th to 9th defendants and found that they disputed his ownership of the whole extent, he did not make any attempt to amend his plaint and claim a declaration or other relief appropriate to their claim; nor did he attempt to have any issue decided, which necessarily involved its discussion. To turn to authority, it is to be observed first that, when the question is in the words of the section of a decree or final order involving indirectly a claim or question, no exact or rigid construction of the word 'indirectly' can be given. It must inevitably be a question of degree whether the relation between the decree or order and the claim or question is established with sufficient closeness to be in an indirect relation. The authorities relied on by the petitioners are *Bhagwat Sahai* v. *Pashupati Nath Bose* (2), *Sri Kishan Lal* v. *Kashimiro* (3), *Jamadar* v. *Imam Bakhat* (4), *Khajah Ashanulla* v. *Karoonamoyi Chowdhry* (5), and *Joogul Kishore* v. *Jotendro Mohun Tagore* (6). Of these decisions the two last-mentioned may perhaps be explained with reference to the Court's exercise of the power of consolidation, which at that time was no doubt not recognised by statute, but which was generally resorted to. As regards the others, the first related to a partition, the second to an award and the third to a gift deed; and in all of them the whole of the property together

1. (1913) 15 Bom. L. R. 1021.

2. (1906) 3 C. L. J. 257=10 C. W. N. 564.
3. (1911) 35 All. 445.
4. (1912) 16 I. C. 431.
5. 4 C. L. R. 125.
6. (1882) 8 Cal. 210.

with the appellant's right in it either really was or at least was held by the Court to be affected, and there was no question, as there is here, of property or a right, which was not the subject of the litigation. Reference may next be made to a decision of the Judicial Committee, on which considerable reliance has been placed, *Macfarlane* v. *Leclaire*. (7) Leave was no doubt given there, because the effect of the judgment of the Court of Appeal of Lower Canada was to place in jeopardy the whole of the goods contained in the certificate of assignment and the property became immediately liable to satisfy the claims of creditors of the original defendant to an uncertain and indefinite amount. What however is relied on is the next statement of their Lordships:

"It may turn out in the result that the petitioners are the sole creditors of Delesderniers, and therefore, that the goods in possession of the appellants may have to bear no greater liability than the amount of the debt due to the petitioner. But all this was contingent at the time of the judgment, and it is the immediate effect of the judgment which must be regarded as the right to appeal arises as soon as it is pronounced."

Emphasis is laid by Mr. Govindaraghava Aiyar on behalf of the petitioners on the fact that the leave was given on considerations, which were merely contingent at the time of the judgment. It seems to me however that the circumstances in that case differ greatly from those in the cases before us. Attention is necessary to the conclusion of the sentence, in which the contingent effect of the judgment is referred to, and the reference in it to the judgment as its immediate effect is the matter to be regarded. The immediate effect of the judgment was to bring the right to the whole property in question, because it opened the gates to claims to rateable distribution by the other creditors, and to deprive the appellants of what they alleged to be their exclusive right to the property in their hands for the realisation of their debts. The rule really applicable to the present case is in my opinion to be found in two Indian decisions, namely *Hanuman Prasad* v. *Bhagwati Prasad*, (8) and *Rajah of Ramnad* v. *Kamith Ravuthan*, (9) in which that decision is referred to with approval. The ground of the decision in those cases was that the question whether a decree involves indirectly a claim or question within the meaning of the section must be decided with reference to actual circumstances at the time and not to circumstances, which are remote, and not in particular to a mere possibility that future suits as to all are part of the larger extent of the property alleged to be concerned may be instituted at some time in the future. It is true that in both the cases last mentioned there were such future suits to be apprehended from persons, whose existence and whose claim to a legal character enabling them to sue was not disputed, whilst here we have no knowledge, and in fact the petitioners deny, that there are any other persons in possession of any part of the larger extent now at stake, who could possibly bring suits in the future and take advantage of this judgment. I do not however think that any material distinction can be founded on this, especially as the mere contingency of possible future suits was the ground of decision relied on in these authorities and the existence of persons, who might be interested to bring such suits, was merely mentioned in the statement of facts and not referred to afterwards as a ground of decision.

As for the possibility of this decision being *res judicata* against the plaintiff in any future proceedings, it may be mentioned that defendants 6 to 9 in opposing the petition disclaimed any possibility that it could be so relied on. It may be added that, as Jenkins, C. J., laid down in *De Silva* v. *Silva* (10) that decision being followed in *Gosani Bhaunath Gir* v. *Bihari Lal* (11), it is the decree that has to be looked at as it affects the interests of the parties prejudiced by it. The second sentence in S. 110 refers to the decree or final order as involving indirectly some claim or question to the property concerned, and it may be doubted whether the decree, as opposed to the grounds of decision, can be said to do so, when such claim or question is merely involved in an incidental finding. There is in my opinion no more than an incidental finding in the judgment of this Court as regards the Gompertz line, except in so far as it

7. 15 Moo. Pri. C. Cases 181.
8. (1902) 24 All. 286.
9. 1922 Mad. 34=42 M. L. J. 78.
10. (1904) 6 Bom. L. R. 403.
11. (1919) 4 Pat. L. J. 415.

determines the ownership of the plots which were directly in dispute; and I do not think that because of such a mere incidental finding the decree or final order can be said to involve indirectly any question regarding the larger extent.

The next argument attempted is that, although the aggregate market value of the plots actually in question in these suits is only Rs. 2,800, the petitioners should have an opportunity to prove that it is really far larger and is over Rs. 10,000 as required by S. 110. It is clear that this contention must be scrutinized closely. For the petitioners in effect desire to repudiate the declaration, which they appended to their plaints and on which they were allowed to institute their suits on a Court-fee lower than they otherwise on their present showing would have been bound to pay and further there is really very little to support their allegation as to the fact of their mistake. It is for instance stated in the affidavits simply that the information on which the petitioner acted was imperfect and incorrect and the petitioner finds that the sites have always been more valuable (that is at the time when the suits were instituted) and that the aggregate value of the sites and buildings together with mesne profits at the time of the suit was more than Rs. 10,000. There is nothing, it is to be noticed, to explain how the petitioner came to adopt market value of the property, on which his valuation had to be made, at a figure in the aggregate of Rs. 2,800. There is nothing as to the details, by which he now proposes to arrive at the higher figure he contends for. There should, in my opinion, be much stronger reason before a fresh enquiry into a matter on which the petitioner has already put forward his estimate can be allowed at this stage. We may further refer to the decision of the Judicial Committee in *Kristo Indra Saha* v. *Hurnomonee Dassee* (12). In that case no doubt the question was of a respondent being debarred from repudiating the value given by the petitioner, after that respondent had relied on that value in order to obtain consideration of the facts of the case in appeal by the High Court, instead of by the District Judge, and here the case is different, because the petitioner claims the right to repudiate the valuation, for which he is himself responsible. But *a fortiori* the conclusion should be against his right to do so. We have been referred as authority for a different view to the judgment of Sanderson, C. J., in ***Surendra Nath Roy*** v. *Dwarka Nath Chakravarthi* (13). But it is not necessary to read the portion of the judgment in question as embodying more than the principle that valuation for the purpose of the Court Fees Act is not necessarily inconsistent with the adoption of a higher value of the property for the purpose of appeal to His Majesty in Council. For in that case the very low valuation for Court Fees was the valuation in accordance with S. 7 (4) of the Court Fees Act and it was not identical, as the valuations in the suits before us are, with the market value. There is nothing accordingly in the judgment of Sanderson, C.J., to support the view that a party is entitled to repudiate the valuation he has already made on the market value and to claim a reascertainment of the market value, unless special circumstances (of which there are none in this case) are available. It may be added that the other learned Judge who was a party to that case, Mookerjee, J., did not refer to the point. In these circumstances, I think that the evidence as to the market value in the suits is clear and, as it consists in the petitioners' own statement, there is no sufficient reason for supposing that the valuation was reached owing to any mistake. Petitioners have no right to repudiate it and must abide by it now, when they ask for leave to appeal, as they did when they desired to ascertain what stamp duty they were to pay and in what Court they were to sue and how many appeals they would be able to secure. This ground also fails.

The result is that the petitions are dismissed with costs. The petitioners will pay the respondent's costs; vakil's fees in each petition being Rs. 20.

SPENCER, J.:—On the first point I agree with my learned brother that this is not a case in which we can certify under S. 109 (*c*), Civil Procedure Code, that the decree is a fit one for appeal to His Majesty in Council as being one of very wide, public or private concern.

12. (1873) 1 I. A. 84=3 Sar. 317.

13. (1916) 44 Cal. 119.

I also agree on the third point that the plaintiff, having deliberately undervalued his suit in the Court of first instance and having thus obtained the decision of three Courts in this country upon his claim, cannot be allowed to repudiate his valuation fixed upon the market value of the property for the purpose of obtaining the decision of a fourth tribunal. I do not wish on these two points to add anything to the reasons given by my learned brother.

On the second point, which presents some difficulty, it is stated by the petitioner's learned vakil that there are other lands, at present, I understand, unoccupied lands, about which disputes may hereafter arise between the plaintiff in these suits and the Kalanivasal Inamdars or their assignees and tenants, and that the award of Mr. Gompertz will affect the determination of such disputes. But I find no statement in the petitioner's affidavit that any such dispute at present exists or is likely to arise in the near future. When it does arise and if the parties eventually come again to Court, it will depend partly on the question how far Mr. Gompertz's award can be applied upon the ground to that portion of the boundary line then in dispute, and upon other questions, such as whether either side has got a title by prescription, whether the plaintiff or the defendant succeeds in that litigation. The only question that is likely to be regarded as *res judicata* in consequence of our decision is the finding that Mr. Gompertz had authority under the Survey Act to finally determine the boundary line in 1876 when he made his award. Can it then be said that our judgment in second appeal directly or indirectly involves a claim or question to or respecting property exceeding Rs. 10,000? The claim that was before us was not a claim of such value. What may be the extent and value of any future claim is purely a matter of conjecture. There may never be any further substantial claim made in Court. Though one result of our decision may be that an idea is put into the head of one of the parties to advance a claim to property not now in his possession, the fact remains that no dispute is now in existence, and it can hardly be said that S. 110 was intended to provide for all possible claims and questions that might conceivably arise in the future. If a claim of that description should happen to come before a Civil Court at some future date, it will not necessarily comprise the whole of the lands west of Mr. Gompertz's line; so that we should be going too far if we were to ascertain the market value of that whole extent and base our certificate on that value. I therefore think that the petitions for leave to appeal should be dismissed with costs.

Petition dismissed.

1923 Madras. 129.

KRISHNAN AND VENKATASUBBA RAO, JJ.

Ramaswami Pillai ... Petitioner—Appellant.

v.

Janaki Ammal and another ... Respondents.

F. A. No. 314 of 1921 dated 23rd August 1922 against the order of Sub. J., Negapatam, in I. A. No. 281 of 1921 dated 1st March 1921.

(*a*) *Civil P. C., O.* 40, *R.* 1 (*b*)—*Appeal when lies—Remedies of aggrieved party.*

Where the Court refused to direct its officer, the Receiver not to interfere with the appellant's possession of the crops, it in effect removed him from the possession or custody of the property. *Held* an appeal lies. When property of a third party is interfered with by an officer of the Court like the Receiver, the party has ordinarily two remedies. He may apply to the Court for a summary order restraining the Receiver from interfering or he may ask leave of the Court to permit him to sue the Receiver and restrain him from interfering and for any other appropriate relief. 36 Cal. 713; 3 Pat. L. J. 573 Foll.

[P. 130, Col. 2.]

(*b*) *Civil P. C., O.* 40, *R.* 1 (2)—*Inquiry.*

Where the Court without inquiry held that the sale by the defendant to a third person was not one likely to be entered into by any prudent person and refused to direct the receiver to desist from dispossessing the stranger vendee. *Held* that the action was very summary and unjustified.

[P. 130, Col. 2.]

S. T. Srinivasagopalachari—for the Appellant.

T. V. Muthukrishna Aiyar—for the Respondents.

KRISHNAN, J.:—In thiscase one Rangaswami Naidu died leaving an estate behind him and the present rival claimants to the estate are his mother claiming under an alleged Will of his and his widow claiming a widow's estate. The mother brought a suit against the widow to recover possession of the estate from her

and she applied to have a Receiver appointed for the purpose of taking possession of the properties belonging to the estate. What we are concerned with in this appeal is the crops standing on about 200 acres of the land which the appellant before us says has been sold to him by the widow by a registered sale-deed. He alleges that he removed crops on a portion of the land and when he was going to remove the crops on the remaining portion, the Receiver appointed in this case came up and prevented him from doing so. It may be noted here that this sale was prior in date to the filing of the suit and of course prior to the appointment of the Receiver. He thereupon filed an application to the Court asking that the Court should direct its Receiver not to interfere with his rights in the crops and not to obstruct him in cutting and removing the crops which he had purchased. He filed an affidavit in support of his application in which he asserted his right under the alleged sale which he had obtained from the widow and also produced the sale-deed in Court. The lower Court without taking any evidence on the matter and without even giving an opportunity to the other side to file a counter-affidavit 'dismissed his application holding that *prima facie* the sale was not one likely to have been entered into by a prudent man when there was a certainty of a prolonged and costly litigation resulting from it and his application was refused. It is against that order that the appeal before us, C. M. A. No. 314 of 1921 has been filed.

A preliminary objection is raised by the Respondents' vakil that no appeal lies. The right of appeal is sought to be supported by the other side under the O. 43, R. 1, Cl. (*s*) which says "that an appeal shall lie from an order under R. 1 or R. 4 of O. 40" so that if the present order appealed against is an order under R. 1, there is clearly a right of appeal granted by that rule. Cl. (*b*) of O. 40, R. 1, says:—

"The Court may by order remove any person from the possession or custody of the property."

It is urged that when the Court refused to direct its officer, the Receiver, not to interfere with the appellant's possession of the crops, it in effect removed him from the possession or custody of the property and that an appeal lies. We think this argument is correct; for clearly the effect of the order is what is mentioned in Cl. (*b*). When property of a third party is interfered with by an officer of the Court like the Receiver the party has ordinarily two remedies. He may apply to the Court for a summary order restraining the Receiver from interfering or he may ask leave of the Court to permit him to sue the Receiver and restrain him from interfering and for any other appropriate relief. In this case the party has adopted the summary remedy and we think that the order passed by the Court is clearly an order falling under Cl. (*b*). This view is supported by the ruling of a Bench of the Calcutta High Court in *Hudson* v. *Morgan* (1), where the matter was considered at length and also by a ruling of the Patna High Court in *Agabeg* v. *Musamat Sundari* (2), where the Calcutta case has been quoted and followed. We must therefore overrule the objection that no appeal lies and proceed to hear the appeal.

On the merits of the case, it seems to be clear that the order of the Subordinate Judge is opposed to Cl. 2 of O. 40, R. 1. The sale to the appellant was, as already stated, before the suit was brought and therefore it could not be attacked as a sale *pendente lite*. If on evidence adduced by the plaintiff the Court could come to the conclusion that the sale was only a nominal transaction and was not intended to pass the property, it would no doubt be a case falling under the exception in Cl. 2, because in that case the property will be one from the possession of which one of the parties would have a present right to remove the appellant, otherwise we think that the present case falls under the main Cl. 2, for by the registered sale, if it is a good sale, the defendant will be bound and so far as the plaintiff is concerned, it cannot be said that she has got a present right to remove the appellant from possession because her right has yet to be established in the suit; and it is only when it is proved that she and not the widow has a present title to the property that she can have any right whatever to remove the appellant from possession. The case has been disposed of very summarily by the lower Court and as the respondent here asks for an

1. (1909) 36 Cal. 713.
2. (1918) 3 Pat. L. J. 573.

opportunity to show that the sale is a nominal transaction and was not intended to pass property at all, we cannot dispose of the matter at once.

We therefore set aside the order of the lower Court and send the case back to that Court to have the question tried as to whether the sale is a nominal transaction or not and to dispose of the application according to law.

Costs will follow the result.

1923 Madras. 131.

AYLING AND ODGERS, JJ.

L. S. Rajamanikam ... Defendant—Appellant.
v.
W. H. Farrar ... Plaintiff—Respondent.

Appeal against Order No. 359 of 1921 dated 19th April 1922 against the order of the District Court, North Arcot, at Vellore in O. S. No. 62 of 1920.

(a) *Succession Act, S. 105—Caveator must have interest in estate.*

Before a person can be permitted to contest a Will, the party propounding it, has a right to call upon him to show that he has some interest. A bare possibility is sufficient provided it rests on existing facts, but the possibility of filling a character which would give the party concerned an interest is not sufficient, there must be a possibility of having an interest in the result of setting aside the Will.

(P. 131, Col. 2.)

(b) *Probate—Grounds of refusal—Effect of.*

The fact that deceased was incapable of disposing of some or all of her property by Will was no ground for refusing probate. Probate is only conclusive as to the appointment of executors and the validity and contents of the Will. It is not the province of the Court on the application for probate to go into the question of title with reference to the property which the Will purported to dispose of or the validity of such diposition.

(P. 133, Col. 1.)

P. Chenchiah—for the Appellant.

S. Jagadesa Aiyar—for the Respondent.

ODGERS, J.:—This is an appeal under S. 263 of the Succession Act against the order of the District Judge of North Arcot granting probate of a Will and codicil of Rev. E. C. Scudder deceased. The Will and codicil are respectively Exs. A and B. Probate was opposed by one Rajamanikam on several grounds. The only one argued before us on the evidence was that of undue influence. This is said to have come from members of the American Arcot Mission. It is sufficient to say that there is not a trace of any such undue influence in the evidence. The fact seems to be that Rajamanikam claims to be the adopted son of the deceased and to have had (either justifiably or not) expectations from him (*see* the letter written to him by deceased in 1910 or 9 years before his death. Ex. III). Under the Will executed in 1918 Rajamanikam got nothing, by the codicil executed just before the death of the testator in 1919, he is allowed to choose certain personal effects of the deceased excluding his insurance policy. The words " and excluding my insurance policy " were interlineated in the codicil and it is this interlineation which is said to have been brought about by undue influence. As already stated there is absolutely nothing to support this in the evidence and I have no hesitation in agreeing with the learned Judge on this point.

The Learned Judge raises but does not decide the point of the *locus standi* of the caveator Rajamanikam to contest this Will at all. True he is a legatee under the codicil, but that clearly gives him no right to either denounce the Will or call for proof of it in solemn form : *Rahamtullah Sahib* v. *Rama Rau* (1). If it is answered that Rajamanikam claims to be the adopted son of the deceased, it is very doubtful if such an adoption would be recognised by the law of the deceased's domicile which is said to be the United States of America. But for the alleged adoption, he would have no interest in the estate in the event of an intestacy. As to his contention that the law of the United States of America would in such an event make him heir to the property of the deceased, the learned Judge says Rajamanikam has not shown him any authority for this view. In *Rahamtullah Sahib* v. *Rama Rau* (1) already cited it was held adopting the law as expounded by Sir C. Cresswell in *Hingeston* v. *Tucker* (2) that before a person can be permitted to contest a Will, the party propounding it has a right to call upon him to show that he has some interest. A bare possibility is sufficient provided it rests on existing facts, but as these pointed that, it was held by Sir C. Cresswell in *Crispin* v. *Doglioni* (3) that the possibility of filling a character

1. (1894) 17 Mad. 373.
2. (1861) 2 Sw. and Tr. Rep., 596.
3. (1860) 2 Sw. & Tr. 17.

which would give the party concerned an interest is not sufficient, but that there must be a possibility of having an interest in the result of setting aside the Will. It appears to me probable that the caveator would fall under the former clause as only possessing the possibility of filling a character which would give him an interest and that therefore the caveator ought to have been held to have no *locus standi*. The learned District Judge has however admitted the caveat and has disposed of it on the footing that the caveator has no interest. This was argued before us and I do not therefore rest my decision on this ground.

The most serious argument advanced was that taken by the defendant (caveator) in paragraph 6 of his objections. This is to the effect that the provisions of S. 105 of the Succession Act have not been complied with and that probate should therefore be refused. That section enacts :—

"No man having a nephew or niece, or any nearer relative, shall have power to bequeath any property to religious or charitable uses, except by a Will executed not less than twelve months before his death, and deposited within six months from its execution in some place provided by law for the safe custody of the Wills of living persons."

Paragraph 4 of the Will (Ex. A) runs as follows :—

"I give and bequeath to the American Arcot Mission all property, real and personal, of which I die possessed with the exception of the provisions hereinafter made in this Will, to be held as a trust-fund by the said Mission for the purposes hereinafter mentioned and to be known as 'The Minne and Mabel Trust Fund.'"

It may therefore be that this constitutes a bequest to a religious or charitable use though I must not be taken to be so deciding. The question has never yet been raised as to the character of the bequest to the Mission. In the absence of any evidence, I cannot say whether or not the bequest would fall within the mischief of the section. But I will assume for the purposes of this judgment only and under the circumstances to be presently adverted to that it does so fall. Both sides were unwilling to raise the point before us. Mr. Chenchiah for the defendant because he was, I take it, unprepared to satisfy us that this alleged adoption was valid by American Law even if he were entitled to endeavour to do so on the state of the record; the plaintiff as he had had the point decided in his favour. It arises thus: if the bequest to the Mission is a religious or charitable use within S. 105 of the Succession Act and if the defendant should establish (assuming he is at liberty to do so) that he is entitled to recognition as the adopted son of the deceased, then the deceased may have died leaving a "nearer relative" within the words of the section and he therefore would not have the power to bequeath to the Mission as admittedly the Will, though executed more than 12 months from his death (the codicil was not) was not deposited as required by the section. All this as above stated is on the large assumption that the caveator can establish his adoption according to the law and testator's domicile and his right to succeed on that title to his property in the case of an intestacy. It may here be noted that succession to immoveable property in British India of a person deceased is regulated by the Succession Act whatever his domicile at the time of his death, but succession to his moveable property is regulated by the law of his domicile. (S. 5 of the Succession Act)

Now assuming all this *i.e.*, that the defendant might hereafter establish *locus standi* to impeach the disposition of the testator in favour of the American Arcot Mission the question arises 'can he on that ground be heard to oppose the grant of probate'. If he can, it might be that the question of the fact and validity of his alleged adoption would have to form the subject of an inquiry; if he cannot, his objection on the score of S. 105 goes and the objection on the ground of undue influence having been overruled the probate must be confirmed. I should have noted that the District Judge was right in disregarding the bequest to the wife in paragraph 6 of the Will. A wife is no relative, *Administrator-General of Madras* v. *Simpson* (4). His finding is that there being no proof of the existence of a nephew or niece S. 105 has no application. It is first to be observed that S. 105 says "no man having.....shall have power to bequeath, etc.," it is contained in part XII of the Act which is headed 'Of Void Bequests.' It does not say that a Will containing such a bequest is for that

4. (1903) 26 Mad. 532.

reason invalid. In *Boncha* v. *Boncha*, (5) the question arose as to whether a decree of the Probate Court pronouncing for the validity of the Will and finding that deceased was a domiciled Englishman at the date of the Will and at his death and decreeing probate to the executors was conclusive *in rem* as to domicile. The opinion of Lord Cramworth in *Whicker* v. *Hunu*, (6) as quoted by Lord Herschell, L. C., (quoted at page 551) that a probate is conclusive evidence that instrument proved was testamentary according to the law of the country. But it proves nothing else. Lord Blackburn at page 563 says that as regards personalty the Court of Probate is not a Court of distribution. In *Barot Purshotam Kalu* v. *Bai Muli*, (7) it was objected that probate should be refused on the ground that the Will was invalid as deceased was not competent to dispose by Will of property inherited from her husband. The Court held that the fact that deceased was incapable of disposing of some or all of her property by Will was no ground for refusing probate. Again in *Hormusji Naoroji* v. *Bai Dhanbaiji Jamsetji Dosabhai* (8) it was held that probate was only conclusive as to the appointment of executors and the validity and contents of the Will. It is not the province of the Court on the application for probate to go into the question of title with reference to the property which the Will purported to dispose of or the validity of such disposition. Further in *Behary Lall Sandyal* v. *Juggo Mohun Gossain* (9) it is said that the grant of probate only perfects the title of the executor to the property which did belong to the testator and over which he had a disposing power. It appears therefore that the caveator has no right to agitate the matter of S. 105, Succession Act in the proceedings for probate. He may hereafter be able to establish his right to call in question the validity of some or all the bequests made by the testator; that as shown by the authorities above is no ground for refusing probate of the Will and codicil of the deceased. The District Judge should have refused to entertain this objection. The grant must be confirmed and the Civil Miscellaneous Appeal dismissed with costs.

The question was raised as to the fees allowed to the pleader for plaintiff (appellant) in the lower Court. The amount allowed was Rs. 450 "on Rs 20,421" which is something under 2½ per cent. Reference is made to *Siddiah Chetty* v. *Venkataroya Chetti* (10), that was a question of fees in a Probate Appeal in the High Court and has no authority with regard to fees in the mofussil which are stated by the learned Judges to be there admittedly on the *ad valorem* scale. I do not understand that it was the intention of the Judges in that case to make any alteration in the mofussil practice and I see no reason to do so. The fee awarded will stand. Vakil's fee in this Court Rs. 75.

AYLING, J. :—I agree.

5. 11 A. C. 541.
6. (1858) 7 H. L. C. 124.
7. (1894) 18 Bom. 749.
8. (1888) 12 Bom. 164.
9. (1879) 4 Cal. 1.
10. (1920) 37 M. L. J. 659=10 L. W. 555.

1923 Madras. 133.

KUMARASWAMI SASTRI, J.

Thirumal Reddy, In re ... Petitioner (Accused).

Cr. Rev. Nos. 707 and 576 of 1921 dated 27th January 1922 revising the judgment of Sub-Div. Magistrate of Koilpatti in Cr. A. No. 47 of 1921 dated 20th July 1921.

Criminal P. C. (V of 1898) S. 106 (3)—When appellate Court may take action under it.

The appellate Court is wrong in directing accused to enter into a bond under S. 106, Cr. P. C., when there is no finding that any breach of peace occurred. 29 M. 190 ; 37 M. 153 Ref. (P. 133, Col. 2.)

K. S. Ramabhadra Ayyar—for the Petitioner.

M. H. Hakim for the Public Prosecutor—for the Crown.

ORDER :—There is no finding that any breach of the peace occurred. Following *Muthiah Chetti* v. *Emperor* (1) which has not been overruled so far as this part of the case is concerned by the case of *Re Solai Gounden* (2), I am of opinion that the appellate Court was wrong in directing accused to enter into a bond under S. 106 of the Code of Criminal Procedure.

The order under S. 106 is set aside.

1. (1905) 29 M. 190.
2. (1913) 37 M. 153.

1923 Madras. 134 (1).

OLDFIELD AND RAMESAM, JJ.

Krishna Pillai and others ... Petitioners.

Cr. Rev. No. 802 and Cr. Rev. Pet. No. 656 of 1921 dated 17th July 1922 revising the order of Dt. Magistrate, Ramnad, at Madura in Cr. Rev. No. 39 of 1921.

Criminal P. C., S. 437—Order for further enquiry—Lapse of considerable time since the occurrence—Points to be considered before directing further enquiry.

In the case of a petty riot in which no injuries of any gravity were inflicted and there was no question of any loss of any valuable property, the District Magistrate ordered a further enquiry. His order was based on the criticisms of the reasoning in the order of discharge. *Held*, the District Magistrate failed to consider the essential matter *viz.*, the prospect of any public advantage from the case being re-opened. In view of the period of two years which elapsed since the occurrence, its comparatively insignificant character and the nature of the evidence available. *Held* the order of the District Magistrate, passed without regard to what is really the material consideration in cases of this kind was passed without jurisdiction.

(P. 134, Col. 2.)

Swaminadhan and T. Rangachariar, S. Subramania Aiyar and A. N. Krishnaswami Aiyangar—for the Petitioners.

The Public Prosecutor—for the Crown.

ORDER:—The order before us is one passed by the District Magistrate under S. 437, Criminal Procedure Code, ordering further enquiry into a case in which the petitioners were discharged. The occurrence in question in this case took place on 26th July, 1920. It is unnecessary to go in detail into the subsequent progress of the proceedings. The petitioners were once convicted and on their conviction being set aside by the Sessions Judge, were re-tried. That re-trial ended in an order of discharge, which the District Magistrate has set aside in the order before us.

The facts for investigation amounted to a petty riot between the members of two factions in a village in the Madura District. In the course thereof a certain amount of violence seems to have been used and stones were thrown; and no injuries of any gravity were inflicted and so far as appears, there is no question of any loss of valuable property. The evidence so far as we can judge of it from the records before us was of the kind usual in such cases and of no special strength. The District Magistrate's order is based on criticisms of the reasoning in the order of discharge, which are very possibly well founded. But he has entirely failed to consider the essential matter, the prospect of any public advantage from the case being re-opened. That prospect in our opinion is exceedingly small. In view of the period of two years, which has elapsed since the occurrence, its comparatively insignificant character and the nature of the evidence available, we think that the order of the District Magistrate, passed without regard to what is really the material consideration in cases of this kind was passed without jurisdiction.

We therefore set it aside in the exercise of our powers of revision.

1923 Madras. 134 (2).

DEVADOSS, J.

V. E. N. K. R. M. A. Venkatachalam Chettiar ... Petitioner.

v.

Krishnaswamy Thewan ... Respondent.

Civ. Rev. No. 856 of 1921 dated 3rd May 1922 revising the order of Sub.-Judge, Kumbakonam, in I. A. No. 406 of 1921.

Civil P. C., S. 115—Revision—Suit for recovery of possession of immoveable property—Alleged gross under valuation—Court's refusal to frame issue—Order can be revised.

When the valuation put upon by the defendant is out of all proportion to the valuation given in the plaint by the plaintiff, it is a material irregularity for the Court to refuse to frame an issue and decide it. The High Court can set aside the order in revision.

(P. 135, Col. 1.)

K. Krishnamachariar and N. R. Govindachari—for Petitioner.

S. Rangaswami Iyengar—for the Respondent.

JUDGMENT:—This is an application under S. 115 of the Code of Civil Procedure to revise the order of the Subordinate Judge of Kumbakonam refusing to admit an additional written statement of the first defendant. The suit is one for recovery of property from the first defendant and for possession. In his written statement the first defendant raised a contention that the suit properties were undervalued and that they should be properly valued and a proper Court-fee paid. At the time of the issues the

Subordinate Judge passed this order: "Objection is also raised in the first defendant's written statement as regards the valuation of the properties" and refused to frame any issue on the point. This is not a proper way of disposing of an objection as to the valuation of the properties If the valuation put upon by the first defendant required particulars the Subordinate Judge should have called upon the first defendant to furnish particulars and if he refused or was unable to furnish particulars he could have then objected to raising the issue. Subsequent to settlement of this issue the first defendant wanted to raise the same contention by filing an additional written statement which the Subordinate Judge refused to allow him to do. As the valuation put upon by the first defendant is out of all proportion to the valuation given in the plaint by the plaintiff, I think the Subordinate Judge has acted with material irregularity in refusing to raise an issue and decide it. Though this petition comes in very late I think in the interests not only of the parties but in the interests of the general tax-payer it is the duty of a Court to insist upon Court-fee being paid on a proper valuation of the suit properties. In these circumstances I think that the Subordinate Judge ought to have raised an issue and decided it. I set aside the order of the Sub.-Judge and direct him to raise an issue as regards the value of the properties and decide it and proceed according to law. But this order is conditional on the first defendant paying into Court all the costs incurred by the plaintiff up to date in the lower Court from the date when the issues were settled and if he does not pay within one month from the re-opening of the lower Court this Civil Revision Petition will stand dismissed with costs. But if he does pay within that time the Sub.-Judge will raise the issue and dispose of it according to law.

The costs of this application will abide the result of the decision of the issue to be framed.

1923 Madras. 135.

OLDFIELD AND RAMESAM, JJ.

O. S. N. Raghunathaswami Iyengar and another ... Petitioners.

v.

S. Gopaul Rao and others ...Respondents.

Civ. Mis. No. 3514 of 1921 dated 1st September 1922 against the judgment and decree of High Court in A. S. No. 377 of 1919 dated 31st August 1921.

Civil P. C., S. 110—Construction—Interest from plaint to decree.

Interest from the date of the plaint to the decree can be included for the purposes of S 110. The proper construction to be placed on S. 110 must be taken to be the amount of value which the plaintiff either obtained, or, had he been successful, would have obtained in his suit at the date when the decree was passed. 60 I. C. 523 Foll.

(P. 136, Col. 1.)

K. Bashyam Aiyangar and N. C. Vijayaragavachari—for the Petitioners.

A. Ganesa Aiyar—for the Respondents.

ORDER :—This is an application for leave to appeal to the Judicial Committee against an affirming judgment. We have then to see whether the requirements of S. 110, Civil Procedure Code, are satisfied, both as to the value of the subject-matter and as to there being some substantial question of law for disposal.

As regards the subject-matter, the suit, one for recovery by sale on a mortgage, was brought for the principal amount of Rs. 9,942-4-9 and also for subsequent interest, including, in the ordinary use of that expression, both interest up to and subsequent to the decree. The argument for the petitioner is that, if to the principal amount be added interest up to the decree, the necessary Rs. 10,000 will be made out. It is not disputed that this would be so. This contention is opposed on the ground that the amount of interest between plaint and decree cannot be thus taken in calculation. It seems to us that, although interest between plaint and decree is not ascertained in the plaint and although the total amount claimable on account of it cannot be ascertained until the decree, still it is certainly part, it may be a very substantial part, of the amount claimed in the suit, and it comes then within the description of one of the classes of suits referred to by Lord Shaw in *Radhakrishna Ayyar* v. *Sundaraswamier* (1) of which he said that for the purpose of ascertaining the value of the subject-matter, the interest between plaint and decree must be regarded as part of the sum of money actually at stake. We have not been shown any distinct autho-

(1) 1922 P. C. 257=45 Mad. 475=16 L. W. 18.

rity against this view. Amongst other cases we have been referred to *Subramania Ayyar* v. *Sellammal* (2). There the learned Judges, for the purpose of their decision, did not find it necessary to distinguish between interest before and interest subsequent to the decree. In *Moti Chand* v. *Ganga Prasad Singh* (3), Lord Davey said:

"In the present case the amount or value of the subject-matter of the suit in the Court of First instance, construing that in the manner most favourable to the proposed appellant, was at the outside the amount for which he recovered his decree."

The question in that case was whether not merely interest before decree but also interest after decree could be included in the subject-matter. But it is significant that for the purpose of argument nothing was said which would preclude the inclusion of the former. Lastly there is a case in *Mathura Prosad Singh* v. *Ram Prosad Tewary* (4) in which the Patna High Court held that the proper construction to be placed on S. 110 must be taken to be the amount of value which the plaintiff either obtained, or, had he been successful, would have obtained in his suit at the date when the decree was passed. The question then under decision was that which we have now to decide and following this authority we hold that the requirements of S. 110 are satisfied as regards the value of subject-matter.

We hold further that the appeal involves a substantial question of law, since our judgments deal with questions relating to legal representation and to Court sales, regarding which there is difference of opinion between the Courts in this country.

We therefore certify that the case is, under S. 110, Civil Procedure Code, a fit case for appeal to His Majesty in Council.

2. (1915) 39 Mad. 843=2 L. W. 1057.
3. (1902) 24 All. 174=29 I. A. 40.
4. (1921) 2 Pat. L. T. 340=60 I. C. 523.

1923 Madras. 136.

(FULL BENCH.)

SCHWABE, C. J., OLDFIELD AND COUTTS-TROTTER, JJ.

K. V. Muniswamy Mudaliar ... Plaintiff-Appellant.

v.

Rajaratnam Pillai and others Defendants—Respondents.

O. S. A. No. 25 of 1922 dated 5th May 1922 from the order and judgment of Phillips, J. dated 21st December 1921.

(a) *Criminal P. C., S.* 195 (1) (c)—*Sanction to prosecute—"Produced or given in evidence."*

The words "produced or given in evidence" do not include production of the document for inspection in the sanction proceedings or for translation.

(b) *Criminal P. C., S.* 195 (1) (b)—*Court granting sanction—Judicial discretion of—Prima facie case—Powers of Appellate Court.*

Under S. 195 (1) (b) the exercise of the Court's discretion will be judicial only if it considers whether with reference to the evidence available and the other circumstances, a prosecution is desirable in the public interest, and not, if it merely satisfies itself that "*a prima facie* case" has been made out.

PER OLDFIELD, J.—Firstly, the duty of the Court granting sanction is discharged if it exercises a judicial discretion; and similarly the duty of the Appellate Court, if it satisfies itself whether such a discretion has been exercised. The former Court must therefore be required, whatever the extent to which the investigation undertaken for its own satisfaction has been carried, to put on record sufficient to demonstrate to the latter that its exercise of discretion has been judicial. In the next place it may be said at least that the Court cannot be regarded as having exercised a judicial discretion in granting sanction, when it has satisfied itself only that a *prima facie* case has been made out, if by that is meant only that formal evidence of the ingredients of the offence is available, without reference to defects which may deprive that evidence wholly or to a material extent of value.

PER COUTTS-TROTTER, J.—It is, to my mind, vital that it should be recognised that a Court in sanctioning a prosecution arising out of facts which have come before it during the trial of a civil case should not be supposed to be discharging that which is the task of the Committing Magistrate at a later stage and usurping his functions by explicitly or tacitly pronouncing that there is a *prima facie* case. Where it is shown that the learned Judge exercised his discretion on a mistaken view of the facts, he may be treated as not having exercised a judicial discretion at all, and the appellate tribunal may be considered as thereby invested with an unfettered discretion to act on the true facts.

(c) *Letters Patent (Madras) Cl.* 15—*Order to prosecute under S.* 195, *Cr. P. C. by Judge sitting on Original Side.*

An order by a single Judge sitting on the Original Side of the High Court sanctioning prosecution under S. 195, Cr. P. C is a judgment within the meaning of Cl. 15 and as such is appealable.

Nugent Grant and M. P. Sundararaja Aiyar—for the Appellant.

C.P. Ramaswami Aiyar (The Advocate-General) and *N. Swaminatha Aiyar*—for the Respondents.

SCHWABE, C. J.:—I have had the opportunity of reading the judgments of my learned brothers who are more familiar with the practice of this Court than I am and with those judgments in general I agree. I have little to add.

I think it should be made clear that the fact that this Court sanctions a prosecution is no intimation to the Magistrate that this Court thinks that there is a case to go to a jury, or that he thereby is in any way relieved from his duty of considering whether the accused ought to be committed for trial or not. This view is not at all inconsistent with the duty of this Court to refuse sanction, if it is clearly of opinion, on the evidence before it, that no reasonable jury should convict.

There is one matter in the judgment of my brother Coutts-Trotter, J., on which I wish to reserve the expression of my view until the matter directly arises, namely, whether the learned Judge was justified in ordering the document in question to be brought into Court on the application for sanction, and I must not be taken as expressing assent to the view that, in so doing, he was acting without jurisdiction.

On the question of costs, this case might involve the consideration of the vexed question whether it is a criminal or civil matter and whether there is power to grant costs. Under all the circumstances of this case, we think that it is not necessary to consider that question as, in our view, it is a case in which each party should bear his own costs.

OLDFIELD, J.:—This application is for the revocation of a sanction granted by Phillips, J., under S. 195, Criminal Procedure Code for the prosecution of the petitioner for offences punishable under Ss. 193, 465, 467, 474 and 109, Indian Penal Code.

Petitioner occupied shops as respondents' tenant. They gave him notice to quit and moved for his ejectment under S. 41, Presidency Small Cause Courts Act. He sued for damages under S. 47, obtaining stay of the ejectment proceedings, and in his suit set up an agreement to lease to him for a term of five years in consideration of a payment of Rs. 1,000, pleading that certain sums aggregating Rs. 265 were actually paid to respondents through 6th respondent towards this amount. In his affidavit of documents he mentioned an account book on one page of which payments to 6th defendant are shown, consistently with the statement in his plaint; and, after his suit had been withdrawn before the trial began, his prosecution was sanctioned, as stated above, on respondents' application with reference to this book.

The provision, under which sanction was granted in respect of the offences under Ss. 465, 467 and 474, Indian Penal Code, is S. 195 (1) (*a*), Criminal Procedure Code; and it is urged first that this provision is inapplicable, because the book was neither "produced" nor "given in evidence," as it requires. It is not contended that the book was given in evidence, but only that it was produced, because it was mentioned in petitioner's affidavit or in the alternative because it was filed in the Court Translator's Office for translation in accordance with the rules. But the affidavit, which is in the ordinary form, merely discloses the documents in petitioner's possession relating to the matters in issue; and neither it nor the filing in the Translator's Office amounts to what is required, actual production in Court. In fact the learned Judge relied on neither, as constituting production. What he relied on, as the reference in the last sentence of his order to 'the account book which has now been filed' shows, was that petitioner filed it, not in the suit, but after its termination, on being required to do so by the Court on the application of respondents dated 9th December, 1921, in the course of the proceedings, in which the sanction was given. With all respect, the proceeding, in which sanction was asked for, was distinct from the suit, the proceeding, to which petitioner was a party and in which he was alleged to have committed those offences; and his production of the account book in the former cannot be regarded as the production in the latter, which S. 195 (1) (*c*) requires. The learned Judge in these circumstances had no right to give and respondents no duty to obtain sanction in respect of the offences under Ss. 465, 467 and 474, Indian Penal Code, if indeed sanction need be given in respect of the last mentioned.

This is material, because we have further to deal only with the remaining offence specified in the learned Judge's order, that punishable under S. 193; and there is nothing in the order to show that any difference between the considerations arising under S. 195 (1) (*b*), Criminal Procedure Code, and those under S. 195 (1) (*c*), was present to the learned Judge's mind or influenced the judicial use of his discretion. That the relevant considerations are different is clear. For under the former provision the offence may be alleged as committed, not only in, but more remotely, "in relation to" a proceeding, whilst under the latter it must be committed "in respect of a document produced or given in evidence;" that is in connection with a trial, which has begun and therefore in direct and public prejudice to the reputation of the Court and its administration of justice. Here and in other cases under S. 195 (1) (*b*), when no question of such prejudice can arise the exercise of the Court's discretion will be judicial, only if it considers whether with reference to the evidence available and the other circumstances, a prosecution is desirable in the public interest, and not,if it merely satisfies itself, as the learned Judge statedly did in the order before us, that "a *prima facie* case has been made out."

The latter is the view of the Court's duty and of the test to be applied by the appellate Court advocated on behalf of respondents; and the judgment of Napier, J., in *Kistnamma* v. *Chitturi Chinna Perraju* (1) and that of the High Court of Calcutta in *In re An Attorney* (2) are relied on as generally in accordance with it. But it is difficult to deduce from them or other authorities cited, *Palaniappa Chettiar* v. *Ramasami Chettiar* (3) and *In re Hajee Mahomed Habibulla Badsha Sahib* (4), any such rigid general rule as respondents contend for; and necessarily so, since such decisions are naturally worded with reference to the circumstances of the cases under disposal and give prominence to the considerations which assumed importance in them. I accordingly restrict myself to a statement of what I believe to be the law on the points at present material and in doing so aim rather at a general adherence to the effect of the authorities than a detailed reconciliation of the apparent differences between them.

Firstly, the duty of the Court granting sanction is discharged, if it exercises a judicial discretion; and similarly the duty of the appellate Court, if it satisfies itself whether such a discretion has been exercised. The former Court must therefore be required, whatever the extent to which the investigation undertaken for its own satisfaction has been carried, to put on record sufficient to demonstrate to the latter that its exercise of discretion has been judicial; and it is undesirable in fairness to the accused that it should do more. In case it does less, the appellate Court will have no choice but to follow the course indicated in the judgment of Ayling, J., in *Palaniappa Chettiar* v. *Ramasami Chettiar* (3) with which I am in general agreement, and to ascertain the necessary facts for itself and base its conclusions on them.

In the next place it may be said at least that the Court cannot be regarded as having exercised a judicial discretion in granting sanction, when it has satisfied itself only that a *prima facie* case has been made out, if by that is meant only that formal evidence of the ingredients of the offence is available, without reference to defects which may deprive that evidence wholly or to a material extent of value. Further, apart from the considerations to be referred to and the interest of the accused, it will promote the mischief deprecated by Coutts-Trotter, J., in *In re Hajee Mahomed Habibulla Badsha Sahib.* (4) "The frivolous abuse of the powers of the criminal Court" to authorise a prosecution, which has not, in the words of Ayling, J., in the case already referred to, even "a fair chance of success."

There remains the more difficult class of cases, of which on the assumption most favourable to respondents, the case before us is one in which there is some evidence deserving consideration at a trial; and of course the requisites for the case of a judicial discretion in connection with them can be indicated only in the most general terms. But it is here that the prospects of further proceedings, serving any public purpose, on which all the authorities insist, become material. It is

1. (1915) 17 M. L. T. 15.
2. (1914) 41 Cal. 446.
3. (1917) 4 L. W. 615.
4. (1920) 43 Mad. 1.

so, with all deference to the opinion of Seshagiri Aiyar, J., in *Palaniappa Chettiar* v. *Ramasami Chettiar* (3) not wholly or principally out of respect for the rights of the accused or the liberty of the subject. For if that were the justification for the sanction procedure, there would be no reason for applying it only to cases, in which the offence is alleged in relation to legal proceedings, and for maintaining the ordinary rights of the complainant in connection with those offences, when they are not alleged as so related. The procedure is necessary, as Ayling, J., observed, in order "to avoid the risk of frivolous or vexatious charges designed, not to vindicate justice, but to harrass and annoy the person against whom they are directed," since "without some such safeguard the Criminal Courts of this country would be flooded with useless prosecutions." Unless this has been borne in mind, the Court's use of its discretion cannot be regarded as judicial; and it follows that, the remoter the prospect of any public purpose being served the greater the decree, to which the Court should insist on ordinary evidence in support of the charge.

In the present case it is sufficient that, whilst the evidence against petitioner, with which the order before us is exclusively concerned, is at least of no special strength, no prospect of a prosecution serving any public purpose whatever is disclosed by the record. In fact the petitioner's conduct, if respondent's case is accepted, secured him no advantage, since his suit was withdrawn, before his alleged forged document could be used. It appears from the latter's affidavit, to which the learned Judge has not referred, that petitioner gave evidence in respondents' family quarrel, as we were told by their learned Counsel, three years back with the result that two of them were imprisoned and that they still intend to dispute the new title, under which he now claims the property, for which he sued. In these circumstances the prosecution contemplated by respondents can only be regarded as vindictive and coercive; and the evidence is too weak to justify the grant of sanction for it.

I would allow the appeal and revoke the sanction.

COUTTS-TROTTER, J.:—The plaintiff brought a suit in which he alleged that he had an option to an extension of his lease of the suit premises for five years on payment of an advance of Rs. 1,000 and in paragraph 5 of his plaint he set out certain sums which he alleged he had paid towards the Rs. 1,000 ranging in date from the 12th of April to the 22nd of July, 1920. In his affidavit of documents he included a rough chitta book which was said to contain an entry recording the payment of these sums in all Rs. 265, which entry was alleged to be signed by the 6th defendant. He did not produce the rough chitta book for inspection by the opposite party for a considerable time and only did so in the end under an order of the Court. When the suit came on for trial, it was withdrawn, the plaintiff having meanwhile got what he wanted by attornment to the persons, who he was satisfied could give him a better title than the defendants. After the withdrawal of the suit an order was made upon the plaintiff by the learned Judge to produce this chitta book in connection with an application for sanction to prosecute him, under various sections of the Indian Penal Code, the allegation being that the material entries in the rough chitta book were fabricated for the purposes of manufacturing false evidence, and only came into existence after the signature of the 6th defendant had been obtained.

I do not wish to go into the fact in detail, for, they are really not material to the point which we have to decide. It is sufficient to say that in my opinion this is a case in which no jury would be likely to convict on the materials which were before the learned judge, although it is clear that there was some evidence which, if put before the jury and accepted by them, would justify a conviction; in other words, there appears to be what is called a *prima facie* case. The questions which I consider to be important in this case relate to the general position first of a Court whose sanction is sought for a prosecution and secondly of an appellate tribunal on an appeal from the order granting or refusing sanction passed by the Court below.

In my opinion, entirely different considerations arise when a Court grants a sanction and when it refuses it. In *In re Hajee Mahomed Habibulla Badsha Sahib* (4) I expressed an opinion, to which I adhere, as to the considerations proper to guide a Court in granting a sanction and the

inference proper to be drawn from the granting of such a sanction. The Code provides for the granting of sanction as a preliminary not merely to a trial but, in many cases, to the taking of the case before a Magistrate who has jurisdiction either to commit for trial to a higher tribunal or to refuse to do so. It is, to my mind, vital that it should be recognised that a Court, in sanctioning a prosecution arising out of facts which have come before it during the trial of a civil case, should not be supposed to be discharging that which is the task of the Committing Magistrate at a later stage and usurping his functions by explicitly or tacitly pronouncing that there is a *prima facie* case. I adhere to the view that such a conception of the functions of the sanctioning Judge would turn what is intended to be an additional safeguard to accused persons into a weapon prejudicial to their interests. I do not think that a Court which allows sanction does more than say that, on the materials before it, it is not apparent that a prosecution would be against the public interests or a mere indulgence of private spite. On the other hand, a Court which refuses sanction, to my mind, does no more than express the opinion that the public interest would not be served by such a prosecution and it is not, as I conceive the matter, debarred from acting upon that view even where there is a strong *prima facie* case. It is apparent that if this be the true conception of the functions of a Court on an application made for sanction, they are of such a nature as necessarily to invest that Court with a very wide discretion, and one with the exercise of which an appellate Court should be extremely slow to interfere. The trial Judge is vested with the functions for granting or refusing sanction precisely because he has had the parties and witnesses before him and has the best opportunity of judging whether such a prosecution would serve any useful purpose or not.

The sanction granted in this case was for a prosecution for offences punishable under three substantive sections of the Penal Code, Ss. 193, 467 and 474, the other two sections cited being ancillary. S. 474 has been given up because it is clear that no sanction is required for that and where no sanction is required it is obviously proper that none should be sought or granted. S. 467, forgery of a document purporting to be a receipt, does require sanction under S. 195 (1) (*c*) of the Criminal Procedure Code, when such offence has been committed by a party to any proceeding in any Court in respect of a document "produced or given in evidence in such proceedings." In this case the document was not produced or given in evidence, on the construction of those words, that I think to be the right one, in the civil suit at all. Inspection of it was given to the opposite side but it was not before the Court until after the civil proceedings had terminated and the plaintiff has withdrawn his suit. "Produced or given in evidence" to my mind, can only mean "tendered or admitted" in the course of the civil proceedings which ended with their withdrawal. I confine the expression "civil proceedings," for my present purpose to the actual trial of the suit up to the point when it was withdrawn, without expressing any opinion on the debated question whether the subsequent sanction proceedings are in their nature civil or criminal. But the offence under S. 193 stands on a different footing, for, the offence defined by that section is that of fabricating false evidence for the purpose of being used in a stage of a judicial proceeding and actual production or tender of the document to the Court is not a necessary ingredient of the offence. This, therefore, falls under S. 195 (1) (*b*) of the Code of Criminal Procedure and is not obnoxious to the objection formulated to the other charges. I must, therefore, consider whether there is any good ground for refusing the sanction which the learned Judge in his discretion has granted. I think that there are two such grounds: The first is that, in my opinion, the whole proceedings were vitiated by the learned Judge ordering the plaintiff to produce the document for the sole purpose of considering whether or no a prosecution should be launched upon it. That was an order which I consider that the learned Judge had no jurisdiction to make and one which is absolutely repugnant to all those fundamental notions of fairness to a person accused or about to be accused of a criminal offence, which lie at the root of the criminal law of England and of India alike. He was never warned as to his

position, nor was it intimated to him what the consequences of producing the document might be. In my opinion, the plaintiff could have disobeyed that order with impunity and the fact that, from ignorance of his rights, he did not disobey it does not affect its irregularity. But there is an even more serious objection which appears on the face of the learned Judge's order. As I have pointed out, it is no necessary ingredient of an offence under S. 193 of the Penal Code that the evidence alleged to be fabricated should actually be produced in the antecedent judicial proceedings; but no one can doubt that, in considering the advisability of sanctioning a prosecution, its production or non-production in Court is a circumstance to which the learned Judge might attach very considerable importance, in weighing that which I have held to be the sole question properly before him, namely whether it was against the public interest to allow criminal proceedings to be instituted. It is clear that, at the time he passed this order, the learned Judge was under the impression that the impugned document had been filed in the course of the civil proceedings, and entirely overlooked the consideration that the document was only produced on his own order after the civil proceedings in the strict sense had terminated. To my mind, that misapprehension must have vitiated the learned Judge's exercise of the discretion he undoubtedly possessed and leaves us free, on a knowledge of the true facts, to differ from his view. Where it is shown that the learned Judge exercised his discretion on a mistaken view of the facts, it appears to me that he may be treated as not having exercised a judicial discretion at all, and that the appellant tribunal may be considered as thereby invested with an unfettered discretion to act on the true facts. Viewing the case in that light it appears to me that no useful purpose would be served by allowing this prosecution; not only because I think that, no jury would convict on the materials before us but also because I think it is clear that this prosecution was one which was projected not to satisfy the requirements of public justice, but to find an outlet for the anger of the defendants at being thwarted in their desire to get possession of this property.

I think that the appeal should be allowed.

Appeal allowed.

1923 Madras. 141.

KRISHNAN, J.

Budda Reddi and others ... Petitioners.

Cr. Rev. No. 59 and Cr. Rev. Pet. No. 59 of 1922, to revise the judgment of the Court of the Joint 1st Class Mag. of Madanapalle in Crl. A. No. 54 of 1921 preferred against the judgment of the Court of the 2nd Class Mag. of Punganoor in C. C. No. 95 of 1221.

(*a*) *Penal Code, S.* 430—*Intention to cause loss necessary.*

Where the accused bunded up a channel carrying water to the complaint's land. *Held*: No offence under S. 430 is committed, unless the complainant showed that he had some right to carry water to his fields through the channel. (P. 141, Col. 2; P. 142, Col. 1.)

(*b*) *Water course—Ownership.*

Where the ownership of the channel is not claimed, such right can be claimed only by way of easement or by contract. (P. 142, C. 1.)

E. Krishna Murthi—for the Petitioners.

The Public Prosecutor (*J. C. Adam*)—for the Crown.

ORDER:—The conviction in this case cannot be supported. The accused has been convicted under S. 430, Indian Penal Code which runs thus:

"Whoever commits mischief by doing any act which causes or which he knows to be likely to cause the diminution of the supply of water for agricultural purposes.....shall be punished with imprisonment of either description for a term which would extend to five years or with fine or with both."

To bring the present case under S. 430, Indian Penal Code, it is necessary to establish in the first instance that the accused's act amounts to mischief. What has been found in this case is that the accused bunded up a channel carrying water to the complainant's land. In order to constitute that act, an act of mischief, it is necessary under S. 425, Indian Penal Code, which gives the definition of the term *mischief*, to show that in doing so, he had the intention to cause or knew that he was likely to cause wrongful loss or damage to any person. It is not sufficient to show that his act resulted in loss, but it must be shown that the loss was wrongful loss. To establish that, it must be shown that his act amounted to an in-

fringement of some right resting in the person to whom the loss had been caused. In the present case the finding seems to be that the portion of the channel which was bunded was running in the accused's own land. A person is entitled to do whatever he likes with his own property provided he does not infringe the right of anyone in it. It is quite open to him to fill up the channel on his own land and unless the complainant showed that the had some right to carry water to his fields through the channel, there would be no wrongful loss caused to him by filling up of the channel. Where the ownership of the channel is not claimed, such right could be claimed only by way of easement or by contract. Neither of these conditions is established in the present case nor is there any finding of either Court on this point. In these circumstances I must hold following the ruling *In re Kondi Chetty* (1), that no actual wrongful loss has been proved and that therefore the accuseds' action in bunding up the channel does not constitute an offence under S. 430, Indian Penal Code. They are acquitted and the fines, if paid, will be refunded.

Petition allowed.

1. (1910) 8 I. C. 128.

1923 Madras. 142.

VENKATASUBBA RAO, J.

Peria Subba Goundan ... Petitioner.

v.

Sinna Subbayya Goundan and another ... Respondents.

(Counter-petitioners 1 and 7.)

Cr. Rev. No. 70 and Cr. Rev. Pet. No. 67 of 1922, to revise the order of the Court of Sub-Divisional 1st Class Magistrate of Dindigul in M. C. No. 9 of 1921 dated 1st of December 1921.

Criminal P. C., S. 145—Revision.

Where the Magistrate failed to decide as to which party was in possession on the date of the preliminary order the High Court can in such circumstances interfere on the ground that the Mag. has acted without jurisdiction. 16 Crl. L. J. 239, 7 Cr. L. R. 450, and 18 Mad. 41 Foll. (P. 143, Col. 2.)

S. Swaminathan—for Petitioner.

S. Panchapagesa Sastri—for Respondents.

Venkatachala Sastri—for the Public Prosecutor.

ORDER:—This dispute is concerning immoveable property and action was taken under S. 145, Criminal Procedure Code. The petitioner claimed to be in possession of the property and the rival claimant was the 7th counter-petitioner. The Magistrate held an enquiry, and under Cl. 6 of S. 145 issued an order declaring the respondent to be entitled to possession until evicted in due course of law. Magistrate has written no judgment and has recorded no findings. The order is short and is in the following terms:—

"7th counter-petitioner is declared to be put in possession of the land described hereunder. Fill up schedule form accordingly."

Magistrates are apparently supplied with printed forms prepared under the code for ministerial purposes to suit the requirements for S. 145, and in this instance, one such form was issued. It is in truth a Tamil rendering of Form No. 22 of Sch. 5 of the Criminal Procedure Code. The Magistrate has purported to act under Cl. 6, but it is obvious that his order contravenes its provisions. Under that clause it is obligatory upon him to decide which of the parties was in possession, and Cl. 4 enacts that the finding is to relate to actual possession on the date of the preliminary order. Cl. 6 runs thus:—

"If the Magistrate decides that one of the parties was in such possession of the said subject, he shall issue an order declaring such party to be entitled to possession thereof until evicted therefrom in due course of law, and forbidding all disturbance of such possession until such eviction."

The Magistrate issued an order declaring the respondent to be entitled to possession without deciding that the respondent was, on the date of the preliminary order, in actual possession.

It was contended for the petitioner that the Magistrate had no jurisdiction to make such a declaration as the declaration was not preceded by, and did not follow from a decision which complied with the provisions of the section. In other words it was said that the Magistrate ignored those provisions of the section which rendered a judicial determination necessary and that he merely contended himself with issuing a formal and ministerial order. Mr. Panchapagesa Sastri, on the other hand for the respondent, very strenuously contended that it should be assumed that the Magistrate arrived at a "mental decision," though he failed to

record it, and that the declaration in his order necessarily involved a decision in regard to actual possession. In the absence of a judgment and in the absence of findings, he urged, that the High Court should assume that the Magistrate did direct his mind to the question at issue and that he decided, as it was his duty to decide, that the party in whose favour the order was made was in actual possession on the date of the preliminary order.

Even in cases where the Magistrates have written judgments, their decisions have often been found to be erroneous on account of the fact that, whereas, under the section, they are to determine the question of possession with reference to the date of the preliminary order, the adjudications have had reference to a date either anterior to that point of time or subsequent to it. The argument of the learned vakil comes to this: When there is a judgment before you there are materials on which you can make up your mind and come to the conclusion that the Magistrate is wrong but, when there is no judgment at all, you must assume that the Magistrate applied his mind to the question and discharged the duty incumbent upon him under the section. The order of a Magistrate, who records reasons or gives findings, is liable to be set aside, but the High Court is powerless in regard to a Magistrate who dispenses with a judgment.

When this petition was taken up some time before the recess, the Public Prosecutor, who happened to be in Court, requested that he should be permitted to appear and state his view of the case, as it was apparent that, in the case of the Magistrate in question, he used printed forms referred to above and did not feel that he was under a necessity to write judgments. On behalf of the Public Prosecutor it is now stated that he does not support the order under consideration.

In *Bhuban Chandra Hazra* v. *Nibaran Chandra Santra* (1), the High Court set aside an order of the Magistrate on the ground that it was impossible to determine whether the Magistrate in making his final order, acted within or without his jurisdiction. In the words of the learned Judges who decided that case, the Magistrate gave a statement of reasons which were of a stereotyped nature applicable to any and every case. It was held that the High Court had power to interfere with the order which was accordingly set aside. It is unnecessary for me to rest my judgment on the ground that the Magistrate has not written a judgment, because in the present case the Magistrate has failed to decide as to which party was in possession on the date of the preliminary order and there is abundant authority for the position that the High Court can in such circumstances interfere on the ground that the Magistrate has acted without jurisdiction. In *Thumbalabad Hampanna* v. *Parisi Gangamma* (2) the learned Judge observes:

> "We must hold that he failed to exercise his jurisdiction as he has failed to give a finding as required by law regarding possession of both or either of the counter-petitioners on the date of the order".

The same view was taken in *Marudanayakam Pillai* v. *Syed Muhammed Rowthen* (3) and in *Agra Bank* v. *Leishman* (4).

As I observed, in the view I have taken it is unnecessary to go into the wider question as regards my power to interfere with the order of a Magistrate on the ground that there is no judgment in the case at all; but I would add that the practice, if it exists, of not writing judgments should be discouraged. I have, however, been told that this is the first instance that has come to the notice of this Court where the Magistrate has had recourse to a printed form which takes the place of a judgment in the case.

In the circumstances, I think, the proper order to make is an order similar to the one made in *Bhuban Chandra Hazra* v. *Nibaran Chandra Santra* (1) and accordingly I set aside the order of the Magistrate and direct him to re-hear the parties, and after recording a statement of reasons for his decision, to dispose of the matter in accordance with law.

Petition allowed: case remanded.

1. (1922) Cal. 382 (1)=49 Cal. 187.
2. 16 Crl. L. J. 239.
3. 7 Crl. L. R. 450.
4. (1895) 18 Mad. 41.

1923 Madras. 144 (1)

RAMESAM, J.

Varada Rajulu Pillai and another.
Petitioner—Accused.

Cr. Rev. Case No. 122 of 1922 and Cr. Rev. Pet. No. 113 of 1922 dated 5th May 1922, to revise the order of the 4th Presy. Magistrate, Egmore, Madras, in Cr. C. No. 329 of 1922.

Cr. P. C., S. 370—Reasons, Necessary.

Absence of reasons for the finding vitiates conviction.

K. V. Seshadri Aiyangar and T. Sundara Rao Naidu—for Petitioners.

The Crown Prosecutor—for the Crown.

ORDER :—In this case Mr. T. Sundara Rao Naidu, the learned vakil, who appeared for the accused before the Magistrate states before me, that he offered to examine some more witnesses for the defence and produce some documents; but the Magistrate would not allow the examination.

No reasons are given by the Magistrate for the finding as required by S. 370, Cl. (1) (See *Emperor* v. *Shankar* (1) *Maqsodd Alam* v. *Emperor* (2). Prosecution witnesses 3 and 4 contradict each other as to the dress of the accused 1. It is possible that prosecution witnesses 1 and 2 are mistaken as to the identity of the accused. Prosecution witness 1 contradicts himself in cross-examination. There is no doubt about the occurrence but I am not satisfied that the accused were properly identified. The soldiers who arrested the accused are not examined. I set aside the conviction and direct the accused to be set at liberty. The bail bonds will be cancelled.

Petition allowed.

1. (1915) 17 Bom. L. R. 890.
2. (1920) 1 Pat. L. T. 716.

1923 Madras. 144 (2).

DEVADOSS, J.

Fraser and Ross ... Petitioners.
v.
Krishnaswamy Aiyar and others
Respondents.

Civ. Rev. No. 323 of 1922 dated 5th May 1922 revising the order of Sub-Judge, Mayavaram in E. A. No. 130 of 1922

(a) *Civil P. C., O. 40, R. 1—No process against properties in Receiver's possession is valid.*

The mere fact that there is a mortgage on the property would not take the case out of the general rule that no process can be permitted in respect of the properties in the hands of the Receiver without the sanction of the Court which appoints him. 26 C. 127 Diss.

(P. 146, Col. 1.)

(b) *Civil P. C., O. 1, R. 10—Receiver is no new party.*

When a Receiver is appointed by a Court, he takes possession of the property on behalf of the Court and he is not a party in the sense in which O. 1, R. 10, is understood. The Court having taken possession of the properties, it appoints an officer to look after the properties on behalf of all the parties and a Receiver is not a legal representative of any party; nor is he a new party to the proceedings. But he represents all the parties for some purpose and his duty is that which is assigned to him by the Court. Considering the fact that the very object of the appointment of the Receivers is to safeguard the interests, it is the duty of the Court to make them parties even in the execution proceedings, for the sale itself is liable to be defeated for want of necessary parties and in any case possession of the properties sold by Court could not be obtained without the leave of the Court which appointed the Receivers.

(P. 146, Col. 2; P. 147, Col. 2.)

(c) *Civil P.C., S. 115—Material irregularity.*

Non-joinder of Receiver in execution proceedings for sale was treated as a material irregularity so as to justify revision.

(P. 147, Col. 2.)

S. *Doraiswami Aiyar*—for the Petitioners.

T. R. Venkatarama Sastri, A. Krishnaswami Aiyar and Sivaramakrishna Aiyar for the Respondents.

JUDGMENT :—This is an application under S. 115, Civil Procedure Code, of the Receivers appointed by the High Court in C. S. No. 655 of 1921 to revise the order of the Subordinate Judge of Mayavaram refusing to make the petitioners parties to execution proceedings pending before him in E. A. No. 130 of 1922. This petition came up for admission on 1st May, 1922, with an application for stay of proceedings. As the contesting respondent appeared in Court and offered to take notice, I directed the petition to be heard on 3rd May, 1922.

The facts of the case are that the plaintiff in O. S. No. 111 of 1916 on the file of the Kumbakonam Subordinate Judge's Court obtained a decree on a simple mortgage bond against the members of the well-known Nadar family of Tanjore on 12th April, 1917, and on 13th September, 1920, a final decree was passed in the suit and on 7th November, 1921, an order

for sale was made. The sale was fixed for 30th January, 1922, and it was adjourned to 20th March, 1922. Disputes having arisen between the members of the family, C. S. No. 655 of 1921 was filed in the High Court for a partition of the family property. The present petitioners were appointed Receivers on 27th January, 1922, and the order appointing them was appealed against and it came up before the Court of appeal on 16th February, 1922, and it is now settled that the Receivers should continue to be in possession of the properties. On 20th March, 1922, the Receivers applied to the Mayavaram Sub-Court for being made parties to the execution proceedings and the Subordinate Judge declined to make them parties. The sale too was proceeded with and was concluded on 27th March, 1922, and the mortgaged property was sold for Rs. 1,10,000 to 13th respondent hereto.

It is urged on behalf of the petitioners that the lower Court acted without jurisdiction in refusing to make them parties and as the properties of the Nadar family are all in the hands of the Receivers no sale could take place without their being on record. It is further argued that the Receivers could have paid off this debt or at least could have secured a better price for the properties which they value at Rs. 2,00,000. *Vide* paragraph 12 of the affidavit. The property now brought to sale by the Subordinate Judge's Court of Mayavaram is one of the items of properties which are the subject-matter of the suit now pending before the High Court.

Mr. Doraisami Aiyar who appears for the petitioners relies on *Mrs. Levina Ashton* v. *Madhabmoni Dasi* (1) and contends that it was the duty of the Court to make the Receivers parties to the execution proceedings. It may be taken as well settled law that there can be no attachment and sale of the property in the possession of a Receiver, in execution of a money-decree without leave of the Court appointing the Receiver. To quote the learned Judges of the Calcutta High Court:

"The general rule is well settled that property in the hands of a Receiver is exempt from judicial process, except of course to the extent permitted by the appointing Court, *Try* v. *Try* (2) *De Winton* v. *Brecon Corporation* (3), *Lane* v. *Sterne*. (4) It has even been affirmed that though an attachment was levied on property before the appointment of the Receiver, it is within the sound discretion of the appointing Court to refuse to permit a sale of the property thereunder. On this principle, it has been held that property in the hands of a Receiver, though subject to a paramount judgment, cannot be sold under execution without leave of Court. A purchaser of such property at an execution sale buys at his peril, and the sale may be cancelled upon an appropriate application to the execution Court."

It is unnecessary to examine the various authorities relied on by the learned Judges of the Calcutta High Court. The question here is whether a mortgagee-decree-holder is bound to apply to the Court appointing the Receiver for redress or whether he can proceed to sell the mortgaged property in execution of a decree for sale. The only authority that seems to support the contention of the respondent is the judgment of a single Judge of the Calcutta High Court reported in *Jogendra Nath Gossain* v. *Debendra Nath Gossain* (5) The facts of that case are that pending partition proceedings and after the appointment of the Receiver two of the co-sharers mortgaged their interest in the undivided properties; some of the mortgaged properties being within the jurisdiction of the Alipore Court, the mortgagee instituted his suit in that Court and sought to bring to sale the particular properties mentioned in the rule, some of which are situated in Calcutta. The judgment-debtors, after obtaining several postponements of the sale for the purpose of paying off the judgment-creditor applied to restrain the mortgagee from proceeding to a sale on the ground that to sell the mortgaged properties without the leave or sanction of the High Court would amount to contempt of Court. Mr. Justice Sale in discharging the rule observed as follows:—

"This is not a case where the judgment-creditor is proceeding to execute his decree by attachment. This Court does not permit and will not recognize attachment of the properties in the hands of its Receiver, under process issued without sanction or leave, by inferior Courts, the reason being that a proceeding by way of attachment is an interference with the possession of the Receiver. But as the element of interference with the possession of the Receiver is absent from the present case, there is no reason

1. (1909) 14 C. W. N. 560.

2. (1851) 13 Beav. 422.
3. (1860) 28 Beav. 200.
4. (1864) 3 Giff. 629.
5. (1899) 26 Cal. 127.

for restraining the sale. The case of *Hem Chunder* v. *Prankristo Chunder* (6) is distinguishable, inasmuch as the judgment-creditor in that case, if he had proceeded to execute his decree in the Moffussil Court, could have done so only by way of attachment and sale."

"Under the Transfer of Property Act no attachment is necessary and the reason for the course adopted in the former case does not now exist."

The reasoning of the learned Judge is that as no attachment was necessary in a mortgage suit, the sale could be proceeded with notwithstanding the fact that the property was in the possession of the Receiver. In that case only two of the co-sharers had mortgaged their interest. In the persent case all the sharers were parties to the mortgage and all their properties are in the hands of the Receivers. Moreover the Receivers were appointed for the purpose of safeguarding the interests of all the parties to the suit and if an inferior Court is allowed to sell the property merely because there is a mortgage-decree, the object of appointing a Receiver in a partition suit would become infructuous, and it cannot be the policy of the law to allow the property to be sold by different Courts when that property is in the hands of a Receiver. The mere fact that there is a mortgage on the property would not take the case out of the general rule that no process can be permitted in respect of the properties in the hands of the Receiver without the sanction of the Court which appoints him. Moreover after attachment and sale the possession of the property sold cannot be obtained by an auction-purchaser without applying to the Court which appointed the Receiver. That being so with very great respect to the learned Judge, it is difficult to follow the distinction which he makes between execution in respect of a simple money-decree and execution in pursuance of a mortgage-decree. The possession of the Receiver being the possession of the Court, no Court can interfere with that possession in any manner without the leave of that Court. The property being *in custodia legis* it would require very strong authority for holding that a mortgagee could set at nought the ordinary principle which prevents process being issued against the property in the hands of the Receiver without the leave of the Court appointing him simply because there is a mortgage in his favour. Mr. Venkatarama Sastri who appears for one of the members of the family relies upon various passages in Kerr on Receivers and High on Receivers, and it is unnecessary for me to refer to them. One passage from a well-known book is sufficient for the present purpose:

"Property in the possession of a Receiver is in the custody of the law and cannot be seized under a writ of attachment or execution. It is in the discretion of the Court to refuse to permit a sale of the property in its possession under a judgment though the levy was made before the Receiver was appointed."

Alderson on Receivers page 229.

It is argued by Mr. Krishnaswamy Aiyar who appears for the auction-purchaser that there is no provision of law for making the Receiver a party to execution proceedings and that O. I, R. 10 has no application to execution proceedings, that S. 141, Civil Procedure Code, cannot help the petitioners on the principle of the decision of the Privy Council in *Thakur Prasad* v. *Fakirullah* (7) and that S. 146 can have no application to the present case. The fallacy of this argument lies in the assumption that the Receiver is a new party. When a Receiver is appointed by a Court he takes possession of the property on behalf of the Court and he is not a party in the sense in which O. I, R. 10 is understood. The Court having taken possession of the properties, it appoints an officer to look after the properties on behalf of all the parties and a Receiver is not a legal representative of any party; nor is he a new party to the proceedings. But he represents all the parties for some purpose and his duty is that which is assigned to him by the Court. It is further contended by Mr. Krishnaswamy Aiyar that the Receiver has to respect the orders made before his appointment and relies upon *Bryant* v. *Bull* and *Bull* *Bryant* (8). Vice-Chancellor Bacon in delivering the judgment says:

"The appointment of a Receiver is a matter which does not concern mortgagees or prior incumbrancers, for a Receiver in the exercise of his authority will be obliged to respect former orders of the Court; and the prior incumbrancers will be at liberty to take such proceedings on behalf of their own interests as they may think fit, so that that circumstance occasions no kind of difficulty."

6. (1875) 1 Cal. 403.

7. (1895) 17 All. 106=22 I. A. 44 (P. C.).

8. (1878) 10 Ch. D. 155.

From this passage it cannot be inferred that a mortgagee can proceed with the execution of a decree in his favour without the leave of the Court appointing the Receiver. 1892 Pro. Div. 301 is quoted by Mr. Doraiswami Aiyar for the purpose of showing that the execution proceedings are a continuation of the suit and any party can be added at any stage of the proceedings. That case has no application to the present case as in that case assessment of damages was left over and until the assessment of damages was completed it could not be said that the suit had come to a termination. But in this case the mortgage suit of the Kumbakonam Court had come to a termination when the final decree was passed and there was nothing more to be done in the suit. But as I hold that the Receivers are not new parties to the suit, I think O. I, R. 10 does not stand in the way of their being made parties. Considering the fact that the very object of the appointment of the Receivers was to safeguard the interests of all the members of the family and to liquidate the debts in the best manner possible, it was the duty of the Subordinate Judge of Mayavaram to have made them parties to the execution proceedings, for the sale itself is liable to be defeated for want of necessary parties and in any case possession of the properties sold by Court could not be obtained without the leave of the High Court which appointed the Receivers. Considering the complications that might arise hereafter, I consider that the Subordinate Judge acted with material irregularity in refusing to make the Receivers parties to the execution proceedings. I therefore set aside the order of the Subordinate Judge and direct him to make the Receivers parties to the execution proceedings and proceed according to law, I allow the petition with costs. The 13th respondent will pay the costs of this petition.

1923 Madras. 147.

OLDFIELD AND VENKATASUBBA RAO, JJ.

T. Ramaswami Aiyar ... (1st Plaintiff) Appellant.

v.

T. Subramania Aiyar and others ... (Defendants 2, 3, 4, 7, 8 and 17) Respondents.

A. F. A. O. No. 40 of 1919, dated 20th April 1922 from the order of D. J. Madura in A. S. No. 24 of 1917, dated 3rd August 1917, 122 and 123 of 1914 and 266 of 1916 in O. S. No. 19 of 1895.

Civil P. C. (1908) *S.* 105 (1) *and O.* XX, *R.* 12—*C. P. C.* (1882) *Ss.* 211 *and* 396 —*Suit for partition—Order under old Code whether decree—Appeal.*

There was no such thing as a preliminary decree under the old C. P. C. in a suit for partition, and, of course, no such thing as a final decree. As a matter of practice, the order ascertaining the several parties interested in the property to be divided and their several rights therein used to be treated as itself a decree subject to appeal and as such an order contained the adjudication as to the rights and shares and persons interested, the description of that order as a decree may not be considered inapt. The so-called decree then is not a preliminary decree but an interlocutory order ascertaining the rights and shares with a view to pass the partition decree. O. XX, R. 12 does not apply to the case. 42 Mad., 296 Foll.

(P. 148, Col. 1; P. 149 Col. 2.)

Hindu Law—Partition—Profits—Interest—Trusts Act, S. 95.

As in a partition suit, the plaintiff is not entitled ordinarily to claim past profits, his claim for profits before date of suit must be disallowed. As regards subsequent profits, he is clearly entitled to have an account taken of the profits of the properties. A co-owner in possession of the co-ownership property, is a constructive trustee with reference to S. 94 of the Trusts Act and is subject to the same liabilities as a trustee with reference to S. 95. But it does not follow that he is liable for interest on the profits. 14 Cal. 493 at p. 509 Foll.

(P. 150, Col. 1.)

T. R. Venkatramasastri, S. Parthasarathi Aiyar, S. Venkatrama Aiyar and M. C. Vaidyanatha Aiyar—for the Appellant.

T. R. Ramachandra Aiyar, T. S. Narayana Aiyar, T.S. Anantharama Aiyar and T L. Venkatrama Aiyar—for the Respondents.

SADASIVA AIYAR, J :—The 1st plaintiff is the appellant before us in this second appeal which is called an Appeal Against Appellate Order.

This litigation has been going on for the last 26 years, the suit having been filed in 1895.

It was a suit for partition brought by the plaintiff against his father, brothers and other members of his family and alienees.

In 1899 when the old Civil Procedure Code was in force, the District Judge on

appeal made a decree as follows :—" It is ordered that the items Nos. 1, 2, 14 and 15 mentioned in the Sch. C and the moveables in Sch. D (except items 5, 10 and 37) of the plaint be divided into five shares and that the plaintiff be given a one fifth share of the same, etc."

As pointed out by Bhashyam Ayyangar, J. in *Mallikarjunadu* v. *Lingamurti* (1). " In the case of a suit for partition there is to be but one decree" (under the old Civil Procedure Code) " but before making that decree the Court may appoint a Commissioner to submit a scheme for effecting the partition under S. 396. There is in the section no reference made to a preliminary decree. All that the section enjoins is that the Court " after ascertaining the several parties interested in the property of which a partition is sought and their several rights therein, may issue a commission, etc." Thus, it was only after the Commissioner or commissioners sent the report or reports and after the actual division and allotment of shares to the parties (awarding sums if necessary for equalizing shares) and after hearing objections to the commissioner's report or reports and deciding on those objections (if any) that the Court could pass *the* decree (and the only decree) in the suit under the old Code. There was no such thing as a preliminary decree under the old Civil Procedure Code in a suit for partition, and, of course, no such thing as a final decree. As a matter of practice, the order, ascertaining the several parties interested in the property to be divided and their several rights therein, used to be treated as itself a decree subject to appeal and as such an order does contain the adjudication as to the rights and shares and persons interested, the description of that order as a decree may not be considered inapt. But, the description of that order as a preliminary decree and the description of the decree passed after the report of the Commissioners making the actual division as a final decree are not authorized by the old Civil Procedure Code.

The distinction between the old Civil Procedure Code (S. 396) and the new Procedure Code (O. XXVI Rr. 13 and 14, and O. XX, R. 18, which contemplate the passing of a *preliminary* decree in place of the order, ascertaining the parties and shares and contemplate a *final* decree after the Commissioner's report has not been kept in mind by the lower Courts during the progress of the present partition suit which as I said was governed by the old Civil Procedure Code for about 13 years after its institution and has been governed by the new Civil Procedure Code during the last 12 or 13 years.

The result has been that the order passed in 1899 under the old Code has been (by confusion and mistakes) called a preliminary decree in the proceedings after the new Code came into force and what is called a ' final ' decree has (after the report of the Commissioner appointed in this case in 1915) been passed in September 1916. Against this ' final ' decree of September 1916, an appeal was preferred to the District Court which dismissed the appeal and against that dismissal the present second appeal has been brought. I think for the reasons stated above that the decree passed by the Subordinate Judge in September 1916 is the only decree passed in this case and that the so called decree of 1899 is not a preliminary decree but an interlocutory order ascertaining the rights and shares with a view to pass the partition decree in the case after the lands are divided by (and other steps taken through) Commissioners, etc.

I now turn to the merits of the substantial questions in the suit. The plaintiff in his plaint prayed besides the division of the properties owned jointly, the award to him of the profits of his share of the lands for the three years preceding the date of the plaint and of subsequent profits, (till possession was given of his shares) from defendants 1 and 2. (The 1st defendant died after the suit). The order of 1899 was silent on the question of those profits. Here again, I have to point out that the Tamil word corresponding to ' profits ' seems to have been translated into the technical phrase ' mesne profits ' in the judgments and orders which we have to consider in the disposal of this case. " Mesne profits " according to the definition given in S. 211 of the old Civil Procedure Code and in S. 2, Cl. 12 of the new Code mean those profits which " the person in *wrongful* possession actually received, etc."

1. (1902) 25 Mad., 244 (277) (F.B.).

The observation of their Lordships of the Privy Council in *Prithi Pal* v. *Jowahir Singh* (2) may be quoted in this connection. "The District Judge thus proceeded erroneously in their Lordships' opinion to treat the claim for an account of the proceeds of the family estate as a claim for mesne profits, and quoted the provisions of the Code of Civil Procedure as to mesne profits. These provisions are intended for and are applicable to suits for land or other property in which the plaintiff has a specific interest, and not to a suit for partition where he has no specific interest until decree." As pointed out by their Lordships, a member of a Hindu family suing for partition and for the profits on his share is really suing for an account of the profits received by the manager or the persons in possession so that the proceeds so received by the latter which are also divisible property may be divided and his share therein also given to him. As stated by their Lordships at page 512, a sharer has a "clear right" to an account of the profits received by the person in possession of the whole, and to be awarded his share thereof, not as mesne profits received by a person in wrongful possession but as appurtenant to the plaintiff's right in his share of the lands.

The lower Courts have rejected the plaintiff's claim to his share of the profits received by the defendants from the divisible property for reasons which I shall set out in the words of the Subordinate Judge: "The objection of the first counter-petitioner" (the 2nd defendant) "that the petitioner is not entitled to ask for mesne profits seems to me well founded. In the suit, mesne profits have been prayed for but none appear to have been granted. The preliminary decree does not make any mention of mesne profits nor is any provision made therefor therein." This opinion of the Subordinate Court was pronounced not in what is called the "final judgment" of 13th September 1916 in pursuance of which the Subordinate Judge passed what he called the "final decree" but in an order passed in November 1915 by his predecessor on three interlocutory applications made for appointment of a Commissioner and for the taking of other necessary steps in the suit. The District Judge on appeal from the final (or only) decree refused to consider whether an account should be taken of the profits alleged to have been received by the 2nd defendant and the reason is thus shortly stated by him. "It has already been decided that the preliminary decree did not provide for mesne profits, and I cannot go into that in this appeal." The reason so given is rather obscure. It is contended that what the District Judge meant was that as the previous Subordinate Judge had decided in November 1915 that the preliminary decree did not provide for mesne profits and as that opinion of the Subordinate Judge (when deciding interlocutory applications) had become final by not having been appealed against, the plaintiff was not entitled to reopen that matter. If that is the meaning of the District Judge's observation, I think, it is erroneous in law. Neither the order appointing the Commissioner nor any opinion expressed therein can be the subject of an appeal and under S. 105, Cl. (1), Civil Procedure Code, a party has a right to appeal from a decree and any error in any order affecting the decision of the case passed in unappealable interlocutory proceedings before the decree may be set forth as a ground of objection in the Memorandum of Appeal. This, of course, means that that ground is open to him when appealing from the decree and should be considered and disposed of in deciding the appeal, if taken.

I might also refer to the judgment of Abdur Rahim and Oldfield, JJ., in A. S. No. 322 of 1919 explaining *Ghulusum Bibi* v. *Ahamadsa Rowther* (3) and to the decision in *Ramnath* v. *Goturam* (4) and the other decision referred to in the latter case in support of the following conclusions: (1) That O. XX, R. 12, Code of Civil Procedure, relating to technical "mesne profits" does not apply to the claim of a plaintiff suing for partition of lands and the profits which are accruing on the lands which ultimately might fall to his share under the decree: (2) That unless a preliminary decree for partition refused or should be deemed to have refused to grant profits, the Court is not precluded from granting profits in its final decree. In the present case, O. XX, R. 12, does

2. (1887) 14 Cal. 493 (509)=14 I. A. 37.

3. (1919) 42 Mad. 296.
4. (1920) 44 Bom. 179.

not apply; there was no such thing as a preliminary decree and there was no expression of opinion against the award of profits before the decree or order of 1899 was passed and no refusal in the decree or order of 1899 to award such profits. On the other hand, the division directed by the order 1899 impliedly recognized the right in the plaintiff to the award of profits accruing on the plaintiff's share. In all adjudications which are not intended to be final but only to be determinations of some of the questions involved in a suit, there is and ought always to be implied the reservation of leave to all parties to apply for further directions and adjudications necessary for the complete trial and complete disposal of the litigation.

If this view (which I hold to be the true legal view) be taken, the lower Courts were wrong in not going into and deciding on the clear right of the plaintiff to have an account taken of the profits of the properties in which he was awarded a share and in not giving him the appropriate relief in respect of such profits in the decree which was intended as the final stage in the disposal of the suit.

I now come to the above real question in dispute, namely, whether the plaintiff is entitled to have an account of the profits as claimed in the plaint. As in a partition suit, the plaintiff is not entitled ordinarily to claim past mesne profits, his claim for profits before date of suit must be disallowed. As regards subsequent profits, he is clearly entitled to have an account taken of the profits of the properties proved to have been in the 2nd defendant's possession, such profits being treated as appurtenances and accretions to the properties, the right to a share in which has been declared in the plaintiff's favour in the order of 1899. I would therefore call for findings on the following issues:—

(1) What are the properties which have been in the 2nd defendant's possession since the date of the suit up to the date when the plaintiff's share according to the decree was divided off and placed in his possession?

(2) What is the value of the net profits which have been so received by the 2nd defendant from the plaintiff's share of the lands?

Time for submission of findings will be three months from the date of the receipt of records by the District Court and ten days will be allowed for objections.

NAPIER, J.—I agree.

[In compliance with the order contained in the above judgment the District Judge of Madura submitted the following

FINDINGS.

* * *

1st Issue.—On the evidence I am satisfied that, as contended by 1st plaintiff, 2nd defendant has had S. No. 233 and items, 7, 14, 15 all along that is from 1905, except that the 1st plaintiff enjoyed his share of S. No. 233 in 1902 by way of rent and that he has had items 4 to 6 and S. No. 228 from the dates when he respectively redeemed them in 1908 and I find on this issue accordingly.

My finding on the second issue is that the former amount has been received by 2nd defendant from 1st plaintiff's share but that the latter amount has also to be added if 2nd defendant has recovered or does recover from 1st plaintiff anything under the Subordinate Judge's order of 25th November 1920.]

OLDFIELD, J.:—The first issue remanded relates to the properties in the possession of 2nd defendant. Some attempt has been made to argue that certain properties, to be referred to as the mortgaged items, have, since their delivery to plaintiff, to which reference will be made, been regained by 2nd defendant, wholly or in part. But that rests only on references to allegations to that effect in the Subordinate Judge's order on E. P. No. 154 of 1919 and E.A. No. 194 of 1920, on which no finding was reached, and is not supported by any evidence taken on the remand.

In fact there is no indication that this matter was ever submitted to the lower Court at the remand hearing or had been mentioned to the learned Judges, by whom the remand was ordered. Similarly as regards the suggestion that some properties were for a time in the possession of the father of plaintiff and 2nd defendant after the institution of the suit. No other objection to the finding on the first issue remanded has been made. We therefore accept it.

On the second issue remanded, relating to plaintiff's share of the net profits received by 2nd defendant and to be accounted for by him from plaintiff's share of the lands, or rather from the lands

assigned to the latter, we have been unable to ascertain and the learned Vakils concerned cannot say how the total found payable to plaintiff has been reached. We therefore can only with the assistance of the materials now available and accepted by the lower Court indicate the lines, on which the account must be taken. The 2nd defendant was in possession as manager of the family, until on the date of the plaint the joint family became divided and a tenancy-in-common replaced it, 2nd defendant continuing in possession as one of the co-tenants. It is therefore possible to say at once that he has from the date of plaint (22nd August, 1895) been accountable for plaintiff's share of the produce of all the lands with the exception for the present of Survey No. 228-B (representing items 1 and 2), 233 (item 3) and items 4 to 6, because the special considerations applicable to these require separate treatment.

The question is next whether plaintiff is entitled to interest on his share of the profits for each year from the time when 2nd defendant received it. As a co-owner in possession of the co-ownership property, he was, it may be conceded, a constructive trustee with reference to S. 94 of the Trusts Act and was subject to the same liabilities as a trustee with reference to S. 95. But it does not follow that he is liable for interest on the profits. For it has not been shown how a trustee can ordinarily be so liable in the absence of any breach of trust established against him in the special circumstances enumerated in S. 23. There is no imputation on 2nd defendant's realization of profits as fraudulent or inefficient; and, when the suit might at any moment during the long period of its suspension have been resumed and it might have been necessary for 2nd defendant to produce the funds in his hand, we are not prepared to hold that he was bound by S. 20 to invest them. Authority is, as my learned brother has shown, againt the duty of a trustee ordinarily to pay interest on profits. We accordingly cannot hold 2nd defendant liable for it, and, taking this view, we need not consider whether the learned Judges, in holding him liable for profits, not mesne profits, in the order of remand, intended, as has been argued before us, to deal with the matter.

Of the mortgaged properties Survey No. 233 (item 3) was subject to a simple mortgage and was, it has been found, throughout in 2nd defendant's possession; Survey No. 228 B and items 4 to 6 were under usufructuary mortgage and returned to his possession only on his redeeming in 1908. The fact that he advanced the monies by which Survey No. 233 was retained under O. XXI, R. 89 and by which the other items just enumerated were regained for the family, cannot affect his right to profits after the payments. For it is clear from the lower Court's statements I and II, that the receipt of profits for previous years had placed sufficient family funds in his hands for these purposes and that no expenditure of his own money, in virtue of which he can claim any special right over the profits, took place. He must therefore account for the profits of these lands also, of Survey No. 233 from the date of plaint and of the others from the date of his regaining possession on redeeming: but on these profits also no interest will be payable.

As regards the properties last mentioned as having been subjected to usufructuary mortgage, and it would appear, since the order to be next referred to is not explicit, also in respect of others, the matter is complicated by the fact that plaintiff and 7th defendant took delivery of their shares in execution of the first decree passed by the Subordinate Court without reimbursing 2nd defendant what he had spent on redemption. In appeal the District Judge held that they should have reimbursed him before doing so and on 20th February 1920 they deposited the amount and retained possession. Later however 2nd defendant in E. A. No. 194 of 1920, obtained from the Subordinate Court an order directing payment by them of profits for the properties for the period, during which their possession was eventually held to have been unjustifiable before his reimbursement. It is argued that this order became final and that 2nd defendant must be allowed to retain the amount paid under it without reference to his liability in the general account which is now being taken. This is not sustainable. It is clear that the Subordinate Court was dealing in its order only with the matter immediately before it, the 2nd

defendant's right to restitution of profits in connection with the lower appellate Court's alteration in its decree, not with any general or final account. In fact the right to such an account had been disallowed by the lower appellate Court in paragraph 3 of its judgment and this disallowance was the subject of the appeal to this Court. Second defendant must therefore refund to plaintiff and 7th defendant what they paid him by credit in the account to be taken.

The remaining question is whether 2nd defendant is entitled to interest on the amounts paid by him under O. XXI, R. 89 and for redemption. As the payment must be regarded as made from the family funds in his hands, the decision must be in the negative. His claim to interest at 9 per cent on Rs. 271-0-6 paid under O. XXI, R. 89, would in any case be excessive, since the debt was outstanding at 6 per cent only, having been merged in a decree.

The foregoing deals with the objections to the lower appellate Court's finding, so far as they have been pressed. In accordance with it plaintiff (and the same will apply to 7th defendant, when his claim is put forward) will be entitled to (1) his share of the profits as ascertained in statements i, ii and iii from date of plaint on all the items assigned to him, except Survey No. 228 B, and items 4, 5, 6 and on them from and including the crop season of October 1908 (2) credit for half the amount paid by him and 7th defendant under the order on E. A. No. 194 of 1920. There will be no interest on (1) for the reasons already given or on (2), because it represents profits, which plaintiff took prematurely and which would not have carried interest, if they had been realized by 2nd defendant. Similarly the amounts expended by 2nd defendant under O. XXI, R. 89 and on redemption carry no interest. They and their share of them repaid by plaintiff and 7th defendant can therefore be left out of the account, 2nd defendant retaining the amount of that repayment.

The appeal is adjourned for seven days in order that the practitioners concerned may consider the preparation of an account on these lines.

VENKATASUBBA RAO, J. :—I am of the same opinion, and I should like to state my reasons for holding that the 2nd defendant is not liable for interest.

On behalf of the plaintiff it is argued that the 2nd defendant stood in a fiduciary relation to him and would therefore be liable to pay interest upon the rents received from the lands.

In the first place, I am not satisfied that there is any fiduciary relation between the plaintiff and the 2nd defendant. After the interlocutory order of 1899 it is no doubt conceded that the parties became tenants-in-common with reference to the properties in question. But we have not been referred to any authorities in support of the proposition that the 2nd defendant stood in any fiduciary relation to the plaintiff. The decision in *Kennedy* v. *De Trafford* (5) is the other way. Action was brought against the mortgagees of some property to set aside a sale made by them under the power of sale contained in their mortgage-deed. The property mortgaged was held by two persons as tenants-in-common. They were co-owners, each possessing an undivided moiety. The mortgagees, gave notice that unless the parties paid off the mortgage the former would be prepared to sell the property at a price which would realize principal, interest and costs, and finally one of the mortgagors became the purchaser. The sale was impeached by the representative of the other mortgagor on the ground that it was made to a person who was incapable of buying the property because he was in a fiduciary relation. Lord Herschell observes :

"But then it is said the mere fact that Kennedy was co-owner with Dodson of this property creates such relationship between them that one co-owner could not take this property and hold it for himself, but that the other co-owner is entitled on equitable grounds to have it declared that the benefit of one half of that purchased should be his. My Lords, no authority has been cited in support of such a proposition."

In the Court of appeal Lindley, L. J. made the following observation in regard to this contention by the plaintiff, the co-tenant :—

"We are asked to say, and the point is an important one, that one of several tenants-in-common cannot get in for his own benefit an outstanding encumbrance or an outstanding estate or cannot be treated otherwise than as fiduciary owner standing in some fiduciary relation to his

5. (1897) H. L. A. C. 180.

co-tenant. As a general proposition that appears to me not to be the law of England."

Even assuming that there was a fiduciary relation, is the 2nd defendant liable for interest upon the rents of the land in his possession ? In *Blogg* v. *Johnson* (6), Lord Chelmsford, L.C., stated that generally interest cannot be recovered upon the arrears of income. Several cases are referred to in the judgment and the rule is said to be the established rule of the Court, which however, is only general and not inflexible.

In *Silkstone and Haigh Moor Coal Company* v. *Edey* (7), it was held that upon the setting aside of a sale by a trustee of a trust property to himself and the reconveyance of the property to the beneficiaries it is not the practice of the Court to charge the trustee with interest on the rents and profits received by him since the date of the sale.

Lewin states the law thus relating to the right of the beneficiary to have the property reconveyed to him :

"The *cestique trust*, if he chooses it, may, have the specific estate reconveyed to him by the trustee or where the trustee has sold it with notice by the party who purchased, the *cestique trust* on the one hand paying the price at which the trustee bought with interest at 4 per cent., and the trustee or purchaser on the other accounting for the profits of the estate but not with interest."

Stirling, J., in the case referred to above 1900 (1) Ch. 167 approves of the statement of the law in 'Lewin on Trusts.'

Macartney v. *Blackwood* (8), which is referred to in the judgment of Stirling, J., is also an authority for the proposition that when the sale is set aside, interest on the rents is not allowed.

In Halsbury's Laws of England, Vol. 28, at page 191 a statement of law is made to the same effect.

Interest was, no doubt, charged on arrears in some cases as *Melland* v. *Gray* (9) and *Gilroy* v. *Stephen* (10), but it seems to me that the cases fall, in the words of Lord Chelmsford, L. C., in *Blogg* v. *Johnson* (11), within the range of another principle of equity that where an executor or a trustee unnecessarily detains money in his hand which he ought either to have invested or to have paid over to the person entitled to it, he will have to pay interest on it. The Lord Chancellor observes :

"Where money is thus improperly retained it appears to me to be immaterial how the sum has arisen whether from a legacy or a distributive share or a residue or the arrears of income; in the latter case the claim for interest is not made on account of arrears, but for the improper keeping back of a sum of money, from whatever source derived which the executor or the trustee ought to have paid over."

As my learned brother has pointed out, it cannot be said in this case that the 2nd defendant was bound to invest the profits. The plaintiff had the conduct of the suit and it was quite open to him at any moment to ask for possession of the properties, for an account of the profits and for payment to him of the sum ascertained to be due. The delay is not attributable solely to the 2nd defendant, and the plaintiff has failed to show any grounds for making the 2nd defendant liable for interest.

1923 Madras. 153.

SPENCER AND DEVADOSS, JJ.

Oliyath Vazhayil Abuvakkar and others ... (Plaintiffs Nos. 1 to 28, 30 and 31) Appellants.

v.

Oliyath Kunhikuttiyali and others ... (Defendants Nos. 1, 2, 4 to 10, 12 to 34, 36 to 39 and 41 to 70) Respondents.

F. A. Nos. 182, 337 and 328 of 1920, dated 9th August 1922 from the Subordinate Judge, Tellicherry, O. S. Nos. 16 of 1917, 20 of 1919 and 29 of 1918 respectively.

(a) *Civil P. C., S.* 11—*Same parties—Decision in prior suit.*

Plaintiffs, members of a *Thavazhi*, sued for a declaration that the suit properties belonged to their *Thavazhi*, as *Puthravagasam* properties. It was found that, in a prior suit by the *Karnavan* of the *Tarwad* of which the *Thavazhi* in question was a branch, the plaint, though as originally framed was not against the *Thavazhi*, was subsequently amended by making the *Karnavan* of the *Tavazhi* a party defendant and he honestly defended the suit by contending that the suit properties were *Puthravagasam* properties. The contention was found against and the finding was confirmed on appeal to the

6. (1867) 2 Ch. App. 225.
7. (1900) 1 Ch. 167.
8. (1795) Ridge L. and S. 602.
9. 2 Collyer 295=63 E. R. 744.
10. (1882) 46 L. T. 761.
11. (1867) 2 Ch. App. 225.

High Court to which the members of the *Thavazhi* and its *Karnavan* were parties.
(P. 156, Col. 2.)

Held, that the decision in the prior suit against the *Thavazhi* operated as *res judicata*; and the members of the *Thavazhi* and its *Karnavan* having been parties to the appeal to the High Court against the decree in the prior suit, the decision of the High Court was *res judicata*.
(P. 156, Col. 2.)

(b) *Malabar Law—Succession—Acquisition of a member.*

According to the law of Malabar, all acquisitions of any member of a family undisposed of at his death form part of the family property and do not go to the nephews but fall to the management of the eldest surviving male. It is also well settled that acquisitions made with the help of the funds of the acquirer's own *Thavazhi* owning *Puthravagasam* properties become the property of the *Thavazhi* and the *Karnavan* of the whole *tarwad* cannot claim them in opposition to the *Thavazhi*. The mere fact that the mother or the father or the *Thavazhi* was possessed of some funds as a nucleus is not sufficient to make out that the acquisitions by the male members of the *Thavazhi* were impressed with the character of *Thavazhi* property. 2 M. H. C. R. 162 Foll.
(P. 157, Col. 1; P. 159, Col. 1.)

(c) *Practice—Law uniform for* 60 *years—Alteration.*

Where the law has been uniform for the last 60 years it will not be proper for Courts to alter it merely because it is opposed to the present consciousness of the people, when the legislation could have altered it. 32 Mad. 351 Considered.
(P. 159, Col. 2.)

(d) *Evidence Act, S.* 18—*Malabar Law—Admission by junior* Anandravan Karnavan.

A statement made by a person when he was a mere junior *Anandravan* cannot be used as an admission against the *Tarwad* of which he subsequently becomes the *karnavan*.
(P. 158, Col. 2.)

(e) *Malabar Law—Adverse possession—Eldest male member of* Thavazhi *as* Karnavan.

Where the eldest male member of a *Thavazhi* happens also to be the *karnavan* of the *Tarwad* of which the *Thavazhi* is a branch, there can be no adverse possession by the *Thavazhi* against the *Tarwad*.

K. P. M. Menon and K. V. Madhavan Nair—for the Appellants.

C. Madhavan Nair, K. Kuttikrishna Menon, B. Pocker, V. P. Karunakara Nambiar, M. C. Sridharan, T. S. Anantarama Aiyar and A. S. Venku Aiyar—for the Respondents.

DEVADOSS, J.:—This is an appeal by the plaintiffs against the decree of the Subordinate Judge of Tellicherry dismissing their suit for a declaration "that the plaint properties belong to their *thavazhi* and that the decrees of the Temporary Sub-Court of Tellicherry in O. S. No. 18 of 1914 and of the High Court of Judicature at Madras in Appeal No. 96 of 1916, preferred therefrom, are not binding on the *Vazhayil thavazhi*" and for incidental reliefs. The plaintiffs' case is that they and defendants Nos. 41 to 60 are members of a *thavazhi*, known as *Oliyath Vazhayil Thavazhi*, the 1st defendant is the *Karnavan* of the *Tarwad* of which the plaintiffs' *thavazhi* is a branch, the defendants 1 to 37 are members of the *tarwad*, the plaint properties are the *Puthravagasam* properties of the *Oliyath Vazhayil thavazhi*, the other members of the *tarwad* have no interest in the properties and that the 1st defendant as *Karnavan* of the *Tarwad* is not entitled to be in, or to claim, possession of them. The first defendant contends that the properties belong to the *Tarwad*, and they never were the *Puthravagasam* properties of the plaintiffs' *thavazhi*, that the suit is barred by reason of the decision in O. S. No. 18 of 1914, and that the plaintiffs are not entitled to any relief. The other defendants who are not members of the plaintiffs' *thavazhi* raise the same contentions as those of the 1st defendant.

Plaintiffs and defendants 41 to 60 are the descendants of one Nangomma. She had three sons and two daughters (1) Pokker, (2) Kunhammad, (3) Kunhayan, (4) Kunhacha and (5) Kunhama. 43rd defendant is the son of Kunhama. He is the *Karnavan* of the plaintiffs' *thavazhi*. Nangomma had an elder sister, Achotti, whose descendants are defendants 1 to 37. Defendants 38 to 40 are the descendants of Nangomma's maternal aunt Valia Aliumma. The 1st defendant who is the *Karnavan* of the *Tarwad* is the great grandson of Achotti. The Subordinate Judge dismissed the plaintiffs' suit holding that although the present suit was not barred by reason of the decision in O. S. No. 18 of 1914 yet the plaintiffs failed to make out that the properties were the *Puthravagasam* properties of their *thavazhi* and that though they were acquired by some of the descendants of Nangomma, yet they were not impressed with the character of *Thavazhi* properties, and that the plaintiffs were not entitled to any relief. The plaintiffs have preferred this appeal.

The first point for consideration is whether the present suit is barred by rea-

son of the decision in the said O. S. No. 18 of 1914, which was brought by the 1st defendant herein as *Karnavan* of the *tarwad*, for a declaration that a document executed by *Koyamutti*, the previous *Karnavan*, on 9th July 1909, in favour of the defendants 1 to 4 therein was not binding on the plaintiff or his *tarwad* and for surrender of the properties to him by defendants 1 to 4. The defendants 1 to 4 filed a written statement in which among other contentions they stated that they were members of a *thavazhi* and that the properties in their possession were the *Puthravagasam* properties of the *thavazhi* and that the *Karnavan* of their *thavazhi* should be made a party, that the properties having been given to them for maintenance by the *Karnavan* of their own *thavazhi* they were entitled to be in possession of them and that owing to their separation from the *tarwad* long ago there was no community of interest between the 1st defendant's *tarwad* and their *thavazhi*. The 43rd defendant herein was added as the 14th defendant to that suit in his capacity as *Karnavan* of the *Vazhayil thavazhi*. He filed a written statement and among other things he contended that the properties in dispute were *Puthravagasam* properties of the *Vazhayil thavazhi*, that Nangomma and her children had separated long ago from the *tarwad* and the properties having been acquired by the members of the *thavazhi* became *Puthravagasam* properties to which the *thavazhi* alone was exclusively entitled, that he as *Karnavan* was entitled to be in possession of them and also of the income, and that the plaintiffs had no sort of right to any of the properties of the *thavazhi*. The Temporary Subordinate Judge of Tellicherry held that the properties were not *Puthravagasam* properties of the *thavazhi* but belonged to the *tarwad* and that the defendants 1 to 4 should surrender possession to the plaintiffs. On appeal the late Chief Justice and Sheshagiri Aiyar, J., upheld the decision of the Subordinate Judge and dismissed the appeal of the defendants. It has been found by the Subordinate Judge who tried this suit that the conduct of that litigation was *bona fide*, and it is now conceded in appeal that it was so.

It is contended by Mr. Menon for the appellants that that decision in O.S. No. 18 of 1914 is not *res judicata* as between plaintiffs and 1st defendant in as much as the plaintiff in that suit did not admit the existence of the *thavazhi*. He further argues that though the matter now in dispute was directly and substantially in issue in the former suit, yet that suit was not between the same parties in as much as the 14th defendant therein was only brought on record on the objection of the defendants, and the suit as framed was not against the *thavazhi* as represented by its *Karnavan*. No doubt in that suit the plaintiff sued for possession of certain properties from persons who, according to his contention were not entitled to be in possession of them. But the defendants vehemently urged that the properties belonged exclusively to their *thavazhi* and that the 14th defendant was its *Karnavan* and therefore was the proper person to represent the *Thavazhi*. It was on the objection of the defendants 1 to 4 that the plaint was amended on 4th September 1914 and Olieth Pallikutti, the *Karnavan* of the *thavazhi* was added as the 14th defendant and he filed a written statement alleging among other things that the suit properties were *Puthravagasam* properties of his *Thavazhi* that there was no community of interest between his *thavazhi* and the *tarwad* of which the plaintiff was *Karnavan* and that the rights, if any, of the *tarwad* were barred by limitation and that the plaint properties had been given for maintenance to defendants 1 to 4 who were members of his *thavazhi* and that he was therefore entitled to the income of the properties. It is difficult to appreciate the contention that the *thavazhi* was not represented in that suit simply because the plaintiff ignored its existence when he filed his plaint though he joined issue with the defendants on the questions 'whether there was a *thavazhi* and whether the properties in dispute were the properties of the *thavazhi* or of the *tarwad*.' It was held in *Vasudevan* v. *Sankaran* (1) that :—

> "A decree in a suit in which the *Karnavan* of a *Nambudri illom* or a *Marumakkattayam tarwad* is, in his representative capacity, joined as a defendant and which he honestly defends, is binding on the other members of the family not actually made parties."

The leading judgment in that case is

1. (1897) 20 Mad. 129 (F. B.)

that of Mr. Justice Shephard who observes at page 141.

"Now it is conceded that, when a *Karnavan* sues on behalf of the family, he fully represents all its other members and an adjudication therein, if there is no fraud or collusion, is binding on the whole family. *Subramanyam* v. *Gopala*. (2) It is obvious that in such cases it is not possible to maintain any other view. For the entire executive authority being exclusively vested in the *karnavan*, it is not open to the party sued by him to raise any objection to the action on the ground of the non-joinder of the other members." *Byathamma* v. *Avulla* (3) * * "By parity of reasoning, then, it follows that a *karnavan* can be sued on behalf of the family. It is difficult to see how this conclusion can be avoided, unless the argument of the defendant based on the provisions of the Civil Procedure Code were correct."

It was contended in that suit that under S. 30 of the Code of Civil Procedure all the members of the family should have been made parties. Under the old S. 30 which was only an enabling section it was not obligatory on the plaintiff to make all the members of a *tarwad* parties to the suit. The learned Judge further observes :

"There are instances where even though the difficulty with reference to the application of the general rule has nothing to do with the fact that the persons interested are numerous, yet the law does allow, apart from statute, certain persons to prosecute or defend suits in their representative capacity, *e.g.*, Hindu widows with reference to reversioners; other persons having an estate analogous to that of a Hindu widow with reference to those entitled to take after such qualified owners and so on. In the case last mentioned the limited owners possess the representative capacity to sue or defend by virtue of their position. This, as already shown is eminently true in the case of a *Karnavan*. Consequently he does not require the aid of S. 30 to be a representative, but has the inherent right to act as such, provided, of course, there is in the particular case no conflict between his own interest and that of the family." * * * "Therefore unless there is shown in the words of Jessel, M. R., "fraud or collusion or anything of that sort or that the Court was cheated into believing that the case was fairly fought or fairly represented when in point of fact it was not," [*Commissioners of Sewers of the City of London* v. *Gellatly* (4)] a decision in a suit, defended by a *karnavan* in his representative capacity, must be held to be binding upon all those represented by him."

In *Gobind Chundar Koondoo* v. *Taruck Chunder Bose* (5), it was held by a Full Bench that :

"When once it is made clear that the self same right and title is substantially in issue in two suits, the precise form in which either suit was brought, or the fact that the plaintiff in the one case was the defendant in the other became immaterial."

In *Kelu Nambiar* v. *Chathu Nambiar* (6) it was held by a Bench of this Court, that if a matter be in issue under S. 11 of the Civil Procedure Code it is enough if the decision about it is necessary for the decree and it is not further necessary that there should be an express issue about it. In O. S. No. 18 of 1914 issue No. 4 "whether the plaint properties belong to the *Olieth tarwad* as alleged by plaintiff or to the *Olieth Vazhayil Thavazhi* as alleged by defendants 1 to 4 and 14 and whether there is such a *Puthravagasam Thavazhi* as alleged" was distinctly raised, and issue 7 "whether plaintiff is entitled to recover possession of the plaint properties" was also considered. It is difficult to see how it can be contended that in the previous suit the *thavazhi* was not properly represented and the question in issue in this suit was not distinctly raised. Mr. Menon's vehement contention that the suit which was brought was not against the *thavazhi* and therefore the decision in that suit could not operate as *res judicata* has no foundation when it is remembered that the defendants raised the question of the existence as the *thavazhi* and had the *karnavan* of the *thavazhi* brought on record as the 14th defendant, and he honestly defended that suit by contending that the plaint properties were *Puthravagasam* properties of his *thavazhi* and that he was its *karnavan* and therefore entitled to be put in possession of them, should the Court for any reason hold that the document under which defendants 1 to 4 held them, should be set aside. Whatever may have been the frame of the suit when it was filed, defendants 1 to 4 and the 14th defendant were arrayed as appellants and the plaintiffs and the other defendants as respondents in the High Court, and it is impossible to contend that the plaintiffs' *thavazhi* was not a party to the appeal in the face of the records of the appellate Court. I therefore hold that the plaintiffs' suit is barred by reason of the decision of the Temporary Sub-Court, Tellicherry, in

2. (1887) 10 Mad. 223.
3. (1892) 15 Mad. 19.
4. L. R., 3 Ch., D. 616.
5. (1877) 3 Cal. 145.
6. (1919) 25 M. L. T. 66=9 L. W. 84.

O. S. No. 18 of 1914. The argument founded on the frame of the plaint cannot be urged against the Memorandum of Appeal to the High Court. The decision of the High Court in A. S. No. 96 of 1916 on the points now in dispute is *res judicata* between plaintiffs and defendants.

The main contention on behalf of the appellants is that the suit properties are *Puthravagasam* properties of the plaintiffs' *thavazhi*, having been acquired by the sons of Nangomma with the help of funds furnished by their father Mayan Ali Nagha or by their mother Nangomma. It is further contended that even if the properties had been acquired by the sons of Nangomma without the help of the father's funds or the mother's funds yet as the properties had been treated as the properties of the *thavazhi* for a number of years they became the properties of the *thavazhi*:

"It is unquestionably the law of Malabar that all acquisitions of any member of a family undisposed of at his death form part of the family property and that they do not go to the nephews of the acquirer but fall, as all other property does, to the management of the eldest surviving male".

Kallati Kunju Menon v. *Palat Erracha Menon.* (7) It is also well settled that the acquisitions with the help of the funds of the acquirer's own *thavazhi* owning *Puthravagasam* properties, become the property of the *thavazhi* and the *karnavan* of the whole *tarwad* cannot claim them in opposition to the *thavazhi*. In order to succeed the plaintiffs have to make out:

(1) the existence of a *thavazhi*;

(2) (*a*) that the plaint properties were acquired with the help of *Puthravagasam* funds by the members of the *thavazhi*;

(*b*) or that though they were acquired without the help of *Puthravagasam* funds yet they were impressed with the character of *Puthravagasam* properties;

(*c*) or that the *thavazhi* acquired by prescription a title adverse to the *tarwad*.

The plaintiffs' case is that the plaint properties were acquired by the three brothers Pokker, Kunhamed, Konhayan, the sons of Nangomma by Mayan Ali Nagha who was said to be the captain of a sailing vessel and they must have acquired the properties with the help of the funds furnished by their father. A number of documents have been filed to support the plaintiffs' contention. But none of them proves that any funds of Mayan Ali Nagha were used by the brothers for acquiring the large fortune they left at their death. Ex. K3 is a Puramkadam deed of 1862 executed by Palikkandi Nelliyil Ahmed, to Olieth Pokker. In it there is a recital that the executant's Karnavan Palikkandi Kunhi Ahmad had demised the shop to Mayan Ali Nagha on kanom rights. This document is challenged to be a forgery. Doubts as to its genuineness were expressed in the judgment of Seshagiri Aiyar, J., in Appeal No. 96 of 1916 and nothing has since transpired to remove those doubts. Ex. K4 is a sale-deed, dated 8th April, 1866, executed by Palikkandi Nelliyil Ahmed and his younger brother to Olieth Kunhamed and in it there is a reference to the document in favour of Pokker. Granting that some property was acquired by Kunhamed in 1866 for Rs. 350 with the help of his father's funds, that fact alone will not help the plaintiffs unless they can show that the properties acquired at Cannanore were acquired with the help of the income or the corpus of the property conveyed under Ex. K4. There is no such evidence on record. It is next urged that the funds in the hands of the mother Nangomma were utilized for acquiring the properties and reliance is placed on Exs. B4, B3 and K1. Ex. B4, dated 14th October, 1830, is a sale-deed of *jenmam* right for Rs. 525 to Nangomma and Ex. B3, dated 31st May, 1856, is a sale-deed of another property to Nangomma for Rs.775, Ex.K1 is a sale-deed in favour of Nangomma, dated 4th January, 1862, for Rs. 5,000 said to be taken in discharge of a debt bond for the same amount in favour of Kunhayan. By Ex. K1 was conveyed the family house into which Nangomma and her children removed after the purchase. There is absolutely no evidence to show that any help was rendered to Pokker by Nangomma by supply of funds, whereas it is quite clear that Pokker began to acquire considerable properties so far back as 1849: *vide* Ex. K21. It may be that Pokker furnished funds for the purchase under Ex. K1. It is easy to suppose that Pokker who began to make a large fortune wanted to put

7. 2 M. H. C. R. 162, p. 163.

some property in the name of his mother. There is no evidence as to how Kunhayan came to lend such a large amount as Rs. 5,000 so far back as 1862. The properties conveyed under Ex. K1 may be considered as a gift to the mother by a dutiful son who was in affluent circumstances.

It is next urged that at least for the last thirty years, *i.e.*, since 1891 the members of the *thavazhi* have been asserting adverse title to the properties and therefore the *karnavan* and the other members of the *tarwad* are barred by limitation from claiming any interest in the properties. In 1891 Oliyath Achotti, a grand-daughter of Achotti, the elder sister of Nangomma, and the maternal aunt of the 1st defendant brought a suit for maintenance against Kunhamad *Karnavan* of the plaintiff's *thavazhi*. He as the eldest member of the whole *tarwad* happened to be at that time the *karnavan* of the *tarwad* as well. That Suit No. 475 of 1891 was evidently intended to test the rights of the members of the *tarwad* to share in the income of the properties in the hands of the members of the *thavazhi*. Ex. K7 is the written statement of Kunhamed. Therein he contended that the properties were the separate earnings of himself, of his elder brother Pokker and his younger brother Kunhayan who were dead at the time, having been acquired with the profits of the joint trade carried on by them at Cannanore with capital furnished by their father Mayan Ali Nagha, that the plaintiff and her *thavazhi* were not entitled to be maintained out of the income of those properties. He further saidthat he was at least entitled to 1/3rd of the properties and that the rest 2/3rd had lapsed to the family of his *thavazhi*. It is significant that he did not in that statement put forth the contention that they were *Puthravagasam* properties and that he was only entitled to be in possession of them as the *karnavan* of the *thavazhi*. He refused to act as guardian of the minor members of the *tarwad* not belonging to his *thavazhi* and on his objection the minor members were represented by the 3rd defendant under the orders of the lower Court. The issues in that suit were (1) " whether the parties are members of a joint *Marumakkattayam tarwad* having community of property? (2) Whether the defendants, *i.e.*, the members of the *thavazhi*, belong to a family or branch separated in interest from that of the remaining defendants "? There is evidence to show that the written statement, Ex. K7 was drafted by very well-known legal practitioners quite familiar with Malabar law and custom and it is not likely that if the properties were really *Puthravagasam* properties Kunhamad would not have mentioned that fact to the vakils nor is it likely that they would not have questioned him about them if any materials had been placed before them to lead them to suspect that they might be *Puthravagasam* properties. His contention that he was entitled to 1/3rd of the properties as having jointly acquired with his two brothers is opposed to the contention that they were *Puthravagasam* properties. In 1891 there seem to have been a number of cases and in all of them the same contentions were put forward but till the year 1910 there is no document in evidence to show that any claim was distinctly put forward that they were *Puthravagasam* properties. It is next urged that the 1st defendant has made admissions that the *tarwad* had no right to the properties and K19, and K47 are relied on. The 1st defendant did not become a *karnavan* till 1909 and any statement by him when he was only a junior *Anandravan* cannot be taken as an admission against the interests of the *tarwad*. He had no authority to represent the tarwad or to make admissions binding on the *tarwad*. It is alleged that he had a motive for making certain admissions as in Ex. K19. Whether such statements be true or false they cannot bind the *tarwad*.

It is next urged that the *tarwad* did not assert its title to the properties after 1891 when its title was denied by Kunhammad. It must be remembered that Kunhammad died in 1892 and Koyamutti, his nephew succeeded to the *karnavanship* of the *tarwad*. He happened to be not only the eldest male member of the *thavazhi* but also of the *tarwad*. Koyamutti died in 1909. After his death the 1st defendant who belongs to a different *thavazhi* from that of the plaintiffs, became *karnavan* and the moment he became *karnavan*, he began to contest the right of the 43rd defendant and others to withhold the properties from him. There can be no adverse possession against the *thavazhi* inasmuch as the members of Nangomma's

thavazhi were *karnavans* from 1871 to 1909. Mr. Menon relies on *Williams* v. *Pott* (8), to show that a person could acquire by adverse possession a lesser title than he is entitled to. His contention is that Kunhammad and Koyamutti, by asserting that the properties in their possession were *Puthravagasam* properties, though they were *Karnavans* at that time, acquired by such assertion an adverse title to the *tarwad*. No doubt in law it is quite possible for a person, entitled to a larger interest, by asserting a title less than the one he is entitled to for the statutory period to acquire such title. But there is no evidence to show that Kunhammad and Koyamutti ever asserted that the plaint properties were *Puthravagasam* properties belonging only to their *thavazhi*. Whenever occasion arose they asserted that it was the self-acquisition of Pokker and his brothers and not that they were *Puthravagasam* properties. If they were self-acquisitions, the law is that on their death the *tarwad* becomes entitled to them.

It is further urged that several properties were given for maintenance to various members of the plaintiffs' *thavazhi* and the claim of the *tarwad* is barred by limitation, it is unnecessary to consider this contention seriously when it is remembered that the plaintiffs' *thavazhi* furnished *karnavans* for the *tarwad* continuously from 1871 to 1909. Mr. Menon's contention is that he has only to show that the family had a nucleus of property in order to succeed in the suit. There is no authority for the position that the mere fact that the mother or the father or the *thavazhi* was possessed of some funds, is sufficient to make out that acquisitions by the male members of the *thavazhi* were impressed with character of *thavazhi* property. I therefore hold that the plaintiffs have failed to prove that the properties in dispute are *Puthravagasam* properties.

The next contention urged by Mr. Menon is that the Full Bench decision in *Govindan Nair* v. *Sankaran Nair* (9) is bad law and is opposed to the present consciousness of the people, and that we should reopen the question by referring this case for the opinion of a Full Bench. That decision was given in 1908, and for the last 14 years it has been held to be good law notwithstanding the doubt expressed as to its soundness by Judges quite familiar with the Malabar law and customs, namely, Sir Sankaran Nair, J., Miller, J, and Sundara Aiyar, J. The Madras High Court has held in *Krishnan* v. *Damodaran* (10), that the principle of the decision in *Govindan Nair* v. *Sankaran Nair* (9) did not apply to the self-acquisitions of a female member of a *tarwad* which descend to her *thavazhi*. It may be that the consciousness of the people is opposed to the principle laid down, namely that the undisposed of separate property of a male member of a Malabar *tarwad* becomes the property of the *tarwad*. It may be that the Malayalee Community which is one of the most progressive communities of Southern India, feels shackled by its peculiar laws and customs which are archaic and antiquated and quite unsuited to its present advancement and enlightenment. However much one may sympathize with the present feelings of the community, it is not the province of a Judge to alter the law however opposed it may be to the consciousness of the people. It is his duty to administer it as he finds it. I respectfully adopt the language of the learned Chief Justice in *Govindan Nair* v. *Sankaran Nair* (9):

> "I think this is a case in which we should act on the maxim *stare decisis*, and that if the law is to be altered it should be altered by the Legislature which can make due provision for the safeguarding of vested interest and existing titles."

The decision in *Govindan Nair* v. *Sankaran Nair* (9), followed a decision of Mr. Justice Holloway in *Kallati Kunju Menon* v. *Palat Erracha Menon* (2), and seeing that the law has been uniform for the last 60 years it would not be proper to alter it by a judicial decision, when it could be done by an Act of the Legislature.

In the result the appeal is dismissed with costs of respondents Nos. 1 to 4 and 6 to 34.

The connected appeals 337 and 338 follow the decision in the main appeal and are dismissed with costs of 1st and

8. (1871) 12 Eq. Cases 149.
9. (1909) 32 Mad. 351 (F. B.).
10. (1915) 38 Mad. 48 (F. B.).

3rd respondents in Appeal 337 and with costs of 1st respondent in Appeal 338.

SPENCER, J. :—I agree.

Appeals dismissed.

1923 Madras 160 (1).

KRISHNAN AND VENKATASUBBA RAO, JJ.

Gundapaneni Gopayya ... 1st Defendant—Appellant.

v.

Gundapaneni Kristnayya and others ... Respondents.

S.A. No. 61 of 1921, dated 28th August 1922 against the order of the Addl. Sub.-Judge of Ellore, in A. S. No. 128 of 1920.

(a) *Evidence Act, S.* 92 (2 *and* 6)—*Share list —Oral agreement to show it not to be final deed.*

A share list though unregistered is admissible in evidence to prove an oral agreement of which it is only a memorandum and not a formal deed of partition which was to follow.

(b) *Registration Act, S.* 17—*Final deed of partition.*

A memorandum of what was agreed, if the deed itself was intended by the parties to be the final partition-deed between them, will be clearly inadmissible in evidence for want of registration.

B. Jagannadha Das—for the Appellant.

N. Rama Rao—for the Respondents.

JUDGMENT :—Plaintiff has pleaded that it was orally agreed between the parties that the deed of 16th November, 1914, was not to be treated as the partition-deed between them but that a fresh formal deed was to be executed and registered for that purpose. This agreement can certainly be proved and it does not in any way affect the terms of partition between the parties which are noted in the deed. The deed calls itself a share list and not a partition-deed. If the oral agreement is proved, the written deed can only be treated as the minutes of agreement between the parties and not as a completed partition-deed and there is no difficulty then in admitting it in evidence, for want of registration, to prove the terms agreed to.

If on the other hand the plaintiff fails to prove the oral agreement set up by him and that the deed was only a memorandum of what was agreed and the defendants show that the deed itself was intended by the parties to be the final partition-deed between them, it will be clearly inadmissible in evidence for want of registration. It could not then be treated merely as embodying an agreement between the parties and further plaintiff will not be entitled to ask for a fresh deed as his remedy would only have been to get that deed registered, which it is now too late to do. See *Venkatasami* v. *Kristayya* (1).

As the Munsif disposed of the case without taking any evidence, the order of remand to him was right and he will now dispose of it according to law in the light of the above observations.

Costs will abide and follow the results.

Order confirmed.

1. (1893) 16 M. 341.

1923 Madras. 160 (2).

AYLING AND VENKATASUBBA RAO, JJ.

Tanjore Palace Estate by its Receiver Sundaram Iyer ... Appellant—Defendant.

v.

Thiyagaraja Pillai ... Respondent—Plaintiff.

F. A. Nos. 82 and 83 of 1921, dated 5th January 1922 against the decree of Addl. Sub.-Judge, Tanjore, in A. S. Nos. 95 and 96 of 1920.

(a) *Adverse possession—Mortgagor and mortgagee.*

Adverse possession against the mortgagor would not operate to the prejudice of the mortgagee. The mortgage being simple, a trespasser's adverse possession which commences after the date of the hypothecation is not a bar to the mortgagee's right to recover the land. 48 Cal. 425 Foll.

(b) *Civil Procedure Code, S.* 47—*Mortgage suit—Auction-purchaser.*

The interest of a purchaser at a sale held in execution of a mortgage-decree is certainly more than merely the interest of the judgment-debtor.

(c) *Limitation Act, Art.* 137—*Scope.*

Art. 137 does not apply to purchasers at sale held in execution of mortgage-decrees.

K. V. Krishnaswami Aiyar—for the Appellant.

T. R. Venkatarama Sastri and K. S. Sankara Aiyar—for the Respondent.

JUDGMENT :—This is an appeal against the judgment of the Acting Subordinate Judge of Tanjore who reversed the decision of the District Munsif of Tiruvadi on the question of limitation and remanded the suit for disposal on the other issues raised in the case.

The main facts necessary for determining the issue of limitation may be briefly stated. The *Kudivaram* rights in the properties to which this suit relates belonged to one Samarao and were sold for arrears of rent due by him to the Palace Estate and were purchased by one Maria Pillai on 1—3—1895 to whom the Palace Estate granted a Patta. Maria Pillai, on 1—1—1897, hypothecated the properties to one Nethar Bibi who filed O. S. No. 400 of 1902 and obtained a decree. She assigned the decree to one Thyagaraja Pillai and he in execution of the decree, purchased the properties, on 5—9—1906 and obtained symbolical possession of them on 27—8—1907. Thyagaraja Pillai is the plaintiff in the present suit which was filed on 4—9—1918.

The Palace Estate, the defendant, has set up the plea that the suit is barred by limitation. One Kalki Ramachandra Rao obtained symbolical possession of the properties in execution of the decree in O. S. No. 15 of 1894 of the Tanjore Sub-Court and the Palace Estate purchased the properties in 1905 for arrears of rent payable to it by the said Ramachandra Rao.

The Subordinate Judge says in his judgment. "It is not stated or proved by the defendant that somebody else was in possession on the date of the mortgage or that Maria Pillai had no title to mortgage on that date". Maria Pillai was therefore not only the owner of the properties on the date of the mortgage but no one other than himself was in possession of the properties on that date. The Subordinate Judge also finds that the title of the Palace Estate arose only on 22—5—1905 and it is to be presumed that the Palace Estate did not claim to have been in possession of the properties previous to 22—5—1905. The defendant was thus in adverse possession of the estate from 22—5—1905 to 4—9—1918 the date of the suit. The question to be determined is whether the possession of the Palace Estate for over 12 years before the suit which admittedly is adverse to the mortgagor, is also adverse to the mortgagee or Thyagaraja Pillai who got the assignment of the decree from the mortgagee and became the purchaser of the properties. The Subordinate Judge relying on *Vyapuri* v. *Sonamma Bai Ammani* (1) held that any adverse possession against the mortgagor would not operate to the prejudice of the mortgagee and that the rights of the plaintiff (purchaser) would not be affected. We are of opinion that the Subordinate Judge's decision is correct. 39 Mad. 811 (F. B.) is an authority for the proposition that, the mortgage being simple, a trespasser's adverse possession which commences after the date of the hypothecation, is not a bar to the mortgagee's right to recover the land. After a review of several cases bearing upon the subject the learned Judges came to the conclusion that the trespasser's possession which is adverse to the mortgagor cannot affect the rights of the simple mortgagee and that it would be unreasonable to hold that the mortgagee's rights are extinguished by the extinction of the mortgagor's title by 12 years' adverse possession before the mortgagee is in a position to protect his rights. The reason for holding that the simple mortgagee is not affected, is that he is not entitled to the possession of the property. That this is the principle underlying the decision appears from each one of the judgments delivered in the case. In view of the fact that the matter is concluded by the authority of the Full Bench ruling above referred to, we think it unnecessary to discuss the other cases that have been cited before us. It is sufficient to say that this question was considered by the Calcutta High Court in *Priya Sakhi Debi* v. *Manbodh Bibi* (2) where Sanderson, C. J. and Mookerjee, J., adopt the view enunciated in I. L. R. 39 Mad. 811. They had to deal with the question whether adverse possession against the mortgagor would affect the mortgagee. At page 433 Sanderson, C. J., says : " In my judgment ' adverse possession' implies that the person against whom adverse possession is exercised, is a person who is entitled to demand possession at the moment adverse possession begins.

1. (1916) 39 Mad. 811 (F.B.).
2. (1917) 44 Cal. 425.

The mortgage in this case being a simple mortgage, the mortgagee was not entitled to demand possession of the property at the time the defendant No. 3 went into possession in 1892 and indeed the plaintiff has never yet become so entitled. Consequently, in my judgment, Art. 144, even if applicable, will not avail the defendant No. 3 to dispute the plaintiff's claim."

Mr. K. V. Krishnaswami Aiyar on behalf of the appellant contended before us that the adverse possession of the trespasser would not affect the mortgagee only so long as he was a mere mortgagee but that he would be affected the moment he obtained a decree for sale. We are unable to follow this argument because the protection afforded to the mortgagee was owing to the fact that he was not entitled to the possession of the property and the mortgagee's position in this respect is not improved by his obtaining a decree for sale. The learned vakil referred us to various cases for the purpose of establishing that, when a mortgagee obtains a decree, his rights under the decree would supersede his rights under the mortgage. We do not think that these cases have any bearing upon the question at issue and following 39 Mad. 811 (F. B.) we hold that the rights of the plaintiff (purchaser) were not barred by the adverse possession of the Palace Estate which commenced subsequent to the mortgage in favour of Nethar Bibi. In this view the claim of the plaintiff has not become barred under Art. 144 of the Limitation Act.

It has next been argued by the learned vakil for the appellant that the article applicable to a suit of this nature is Art. 137 of the Limitation Act. He contends that this being a suit by a purchaser at a sale in execution of a decree, the purchaser is bound to come to Court within 12 years from the date when the judgment-debtor is first entitled to possession; and that Art. 137 in terms applies, and therefore recourse should not be had to Art. 144. What is the result of holding that Art. 137 applies? Although as has been pointed out above, the rights of the mortgagee are not extinguished by any adverse possession against his mortgagor, time against the purchaser under Art. 137 is to be computed from the date the judgment-debtor is first entitled to possession; that is, a purchaser will be precisely under the same disability as the mortgagor. The right conceded to the mortgagee turns out to be illusory and the trespasser who could not set up his adverse possession against the mortgagee becomes enabled to set it up against the purchaser at the execution sale. We may take two illustrations to elucidate this point. Let us suppose that a mortgage is executed in 1880 and the suit upon the mortgage is brought in 1890 which is in time under Art. 132. We shall assume that the suit is finally decided in 1903. The property is brought to sale and purchased in 1904. In the meantime, a trespasser takes possession of the property in 1891 and completes 12 years' adverse possession by 1903. The purchaser sues in 1904. If we accept the contention of the learned vakil for the appellant the mortgagor being first entitled to possession in 1891, the purchaser's suit filed in 1904 is liable to be dismissed under Art. 137. In the case above stated if the mortgagee himself becomes the purchaser, the purchase confers on him no rights whatsoever, whereas it is conceded that as mortgagee he had the right to proceed against the property.

The second illustration is this:—The mortgage is in 1880. The adverse possession of the trespasser commences in 1881. The mortgagee files a suit upon the mortgage in 1892 and his suit is in time under Art. 132. He obtains a decree in 1894, himself purchases the property and files a suit immediately for possession against the trespasser. If the view pressed upon us regarding the effect to be given to Art. 137 is correct, the suit would be barred as the same was filed more than 12 years since the judgment-debtor was first entitled to possession, that is 1881.

It will be noticed that Art. 136 refers to a suit by a purchaser at a private sale and the time is to be reckoned from the date when the vendor is first entitled to possession. The sale under Art. 136 is a sale of the interest possessed by the vendor. Similarly under Art. 137, the sale contemplated must be taken to be the sale of the interest possessed by the judgment-debtor referred to in that article. Does the purchaser at a sale held in execution of a mortgage-decree obtain

merely the interest of the judgment-debtor? The answer is obviously "no". The interest that the purchaser acquires is certainly more than merely the interest of the judgment-debtor though it is not necessary for us to define the exact nature of the interest acquired by him. We would therefore hold that Art. 137 does not apply to purchasers at sales held in execution of mortgage-decrees. We consider that this is the only reasonable construction of Art. 137.

We may once again advert to 39 Mad. 811 (F. B.) The facts of that case, as appear from the report are these: one Solomon Thenkondan hypothecated certain lands to one Jatho Rao Sahib on 28th August 1878. The defendant's adverse possession began in 1890. In 1900 the suit was brought on the hypothecation bond by the mortgagee, and a decree for sale was obtained by him on 27th November 1900. In execution of the said decree the hypothecated lands were sold to the decree-holder's widow, the plaintiff purchased the lands on 31st October 1906 and obtained the sale certificate on 1st December 1906. She instituted the suit in the year 1910. It will be seen that adverse possession commenced subsequent to the date of the mortgage, the 28th August 1878. The suit was instituted about 20 years after adverse possession began. If, therefore, Art. 137 was applied, the plaintiff's suit should have been dismissed. As a matter of fact, it was held by the Full Bench that the possession of the trespasser was not adverse to the mortgagee and the result was that the suit was held to be in time. It is noticeable that it was not argued on behalf of the defendant in that case that Art. 137 applied, although if as a matter of fact, the said Article was applied, the result of the case would have been different. We are not prepared to say that it was due to a mere oversight that reference was not made to Art. 137; it was not referred to because it was thought clearly inapplicable.

It is necessary to deal with another contention of the appellant. He says that the plaintiff put forward a specific case of having obtained possession in 1907 and having been dispossessed in 1908, and that the plaintiff's suit should fail because he was unable to make out the case set up by him. The appellant's Vakil argues that Art. 142 is the Article applicable. Assuming for a moment that the plaintiff came with a specific case of dispossession under Art. 142 and that his allegation in that behalf was disbelieved by the Court, does it follow that the plaintiff's suit should be dismissed on that ground? *Ex hypothesi* his right to sue accrued only on the 5th September 1906. If he instituted the suit within 12 years from that date we see no ground for dismissing his suit on the score that he alleged having obtained possession on a subsequent date and was dispossessed by the defendant. The plaintiff is entitled to say that the allegation relating to his possession and dispossession may be treated as superfluous and that he may be allowed to rest his case upon the footing that his suit is within 12 years of the accrual of his right. The occasion for the application of Art. 142 does not arise when, upon the facts proved or admitted, dispossession cannot possibly have accrued beyond 12 years of the institution of the suit. The plaintiff could have obtained possession, if at all, only after his purchase on the 5th September 1906, which falls within 12 years from the date of his suit. In our opinion therefore Art. 142 is inapplicable.

For these reasons, we agree with the Subordinate Judge that the suit is not barred by limitation, and would dismiss the appeal with costs.

Appeal No. 83 of 1921 is also dismissed with costs.

Appeal dismissed.

1923 Madras. 163.

SPENCER AND DEVADOSS, JJ.

Jakkamreddi Seshadri Reddi and others ... (Defendants) Appellants.

v.

Sir S. Subrahmania Aiyar, K.C.I.E. and others ... (Plaintiffs) Respondents.

Appeal No. 166 of 1921, dated 16th August 1922 against the decree of the Sub.-Judge, of Nellore, in O. S. No. 61 of 1917.

(a) *Inams — Inam grant — Resumption— Court's Power.*

The discretion of exercising its power to resume the grant lies with the Government and a Court cannot on the assumption that the object of the grant has failed, make any direction, that the inam should revert to the temple and that the trustee should manage it and treat it as property belonging to the temple.

(P. 165, Col. 1.)

(b) *Evidence Act, S. 90—Copy of a document, 30 years old.*

Where documents are filed, as being copies of documents more than thirty years old which came from proper custody, the presumption, arising under S. 90, as to their genuineness might be made by the Court. 2 M. L. W. 509 Foll.

(P. 165, Col. 2.)

(c) *Inam—Subsistence from produce surplus.*

Where the grant was one of an inam to be held by an individual and his heirs burdened with the trust of doing certain services for the temple.

Held, in such cases any surplus income left after the performance of the services accrues to the benefit of the donee. It is not necessary in such cases that the inam holder should account for his disposal of the surplus produce of the land.

(P. 166, Col. 2.)

(d) *Civil P. C., S. 92—Removal of trustee—Account.*

Where the trustees who were illiterate did not maintain proper accounts and there was uncertainty as to their legal position under the deed of grant, *held*: there was no reason for removing them unless it was proved that they had misappropriated temple income. 16 M. L. W. 247 Dist.; 1918 M. W. N. 786 Foll.

(P. 167, Col. 1.)

C. Madhavan Nair and D. A. Krishna Variar—for the Appellants.

T. V. Ramanatha Aiyar—for the Respondents.

SPENCER, J.:—This suit was instituted under S. 92, Civil Procedure Code, by the President of the Dharmarakshana Sabha of Madras which is an institution for the protection of religious institutions and by another person, who is the 2nd plaintiff, for the removal of the defendants from the office of trustees of the temple of Sri Chenna Kesawaraswami in the village of Voddu in the Nellore District and for appointing new trustees and for drawing up a scheme for the efficient management of the temple. The plaint alleged 18 different breaches of trust against the defendants, but the controversy between the parties turned chiefly upon the ownership of certain items of immoveable property, items 1 to 8. At the time of trial it was conceded that items 1, 8 and 3 to 5 were temple properties to which the defendants had no claim. In respect of items 6, 7 and 2, the question at issue was whether these items were the absolute property of the temple being endowments granted by the Government in the name of the god or whether they were service Inams in the name of the manager of the temple burdened with the trust of getting certain religious duties performed. I will proceed to deal with these items in the order in which they are taken in the lower Court's judgment.

Item 6. Thali Maniem Inam. Exs. C and C1, which are proceedings of the Inam Deputy Collector and an Inam title-deed respectively of the years 1860 and 1861 show that this inam was given to an individual named Papiah for making ornaments for the deity, that when Papiah died, the inam came into possession of his wife Lakshmakka, who got a title-deed confirming the inam to her and her successors free of tax, that afterwards it was alienated to a Brahmin named K. Subbarayudu by name and that the Deputy Collector recommended that the alienee might continue to enjoy the inam so long as the service was sufficiently performed. In 1912 a title-deed was issued for this inam in favour of the 1st defendant Ex. VIII and the 1st defendant made two statements in 1912 marked Exs. Q and Q1, declaring that he was rendering the service required by making jewels for the Devastanam and that the heirs of the former inamdar were not then traceable. In his evidence at the time of trial the 1st defendant deposed that the service attached to this inam consisted of getting jewels made by the goldsmith and paying his wages, the jewels being for the adornment of the god but the cost of materials for the jewels was being met out of the temple income. The Subordinate Judge was of opinion, for some reason which he did not explain, that a trustee cannot hold a service Inam land. This was not the opinion of the Government who granted the title-deed in the 1st defendant's favour. The learned Judge observes:

"I must say that this land reverted to the temple and that it should be held as temple property subject to the management of trustees especially when Government have not chosen to take any steps for resuming this land. This is my finding on this point."

The power of resumption of inams, however, clearly lies in the hands of the Government. The Government has not

yet resumed that land but it will no doubt do so, if it finds at any time that the object of the grant has failed; while the discretion of exercising its power to resume the grant lies with the Government, the Court cannot make any direction, as the Subordinate Judge has done, that the Inam should revert to the temple and that the trustee should manage it and treat it as property belonging to the temple.

Item No. 7.—It appears from the Inam Deputy Collector's proceedings, Ex. E, that a tope of Iluppa trees once stood on this item and that the temple had the right to enjoy the oil derived from those trees. The Inam Deputy Collector recommended that the inam should be confirmed in the name of Pedda Reddi, the father of defendants, and Subba Reddi on condition of paying one-fourth of the full assessment as a personal inam. The 1st defendant stated that the land had been converted into wet and that there were no Iluppa trees now standing and the Judge has directed that one acre of this land in the possession of the 2nd defence witness should be treated as the property of the temple as that witness admitted that he was enjoying that extent for doing the service of sweeping and making wicks for the lamps of the temple and other deities. There is no basis for a finding that any portion of the land in this item belonged to the temple, for the temple was only entitled to the usufruct of the Iluppa trees which no longer exist. The only order that can be made is that the holder of the land should continue to enjoy it subject to the trust of supplying the temple with oil according to *mamool*.

Item No. 2. This is the most important item as it covers a wide extent of land. The first defendant has made a statement as to the loss of the original title-deeds which he alleges were stolen by the 2nd plaintiff when he was employed under him as a clerk and there is no particular reason for disbelieving that statement which stands uncontradicted by any evidence on the plaintiffs' side. Exs. XXXI and XXXI(*a*) purport to be true copies of the original grants signed by the defendants' grandfather, Jakkam Reddi Subba Reddi. These documents were filed in the lower Court on the 13th December, 1918. There is no record of any objection having been taken before the documents were filed as being copies of documents more than thirty years old which came from proper custody, namely the Collector's office; the presumption arising under S. 90 of the Indian Evidence Act as to their genuineness might have been made by the Court. See *Nanu Nair* v. *Ashta Moorthi Nambudripad* (1). The Subordinate Judge, who wrote the judgment in this case, remarks that these documents were introduced subject to objection if any; but, unfortunately, he was not the judge who heard the evidence and there is nothing in the B Diary to show that the documents were admitted subject to objections. It is argued that these documents are not properly speaking secondary evidence, but I find they bear the signature of the defendants' father under the words "A true copy of the original" which is some guarantee that they were compared with the original and found to be correct. The appearance also of these documents is in their favour. Ex. XXXI purports to be a grant of 20 gorrus of forest land to Jakkam Reddi Krishna Reddi who was the great grand-father of the defendants for the purpose of enjoying the land and causing the *Neivedya* and *Deeparathanam* services to be rendered to Sri Chenna Keswaraswami. Ex. XXXI(*a*) purports to be a grant of 212 3/16 gorrus of forest land in favour of Jakkam Reddi Krishna Reddi and subject to the same conditions as to services to be rendered to the temple. The land covered by Ex. XXXI(*a*) at that time was probably of very little value, but, owing to increase in the value of cultivable land and the discovery of mica mines in this locality it has now become very valuable. Exs. XXXI(*b*) XXXI(*c*) and XXXI(*d*), which are documents of delivery relating to this inam, confirm the conclusions arising from Ex. XXXI and XXXI(*a*) and make their genuineness more probable. Ex. XII, the report made by the Karnams of the village in 1824, states that that is a *kandriga* or service inam enjoyed by Jakkam Reddi Krishna Reddi for the purpose of making *Neivedya* and *Deeparathnam* offerings and that he was getting such services done to the Swami. The Subordinate Judge refers to Ex. 1 which is a kaifiat made by the karnam in the village before

1. (1915) 29 M. L. J. 772=2 L. W. 509.

the Collector of the Nellore District in 1851. He says that the question put by the Collector pre-supposes that the inam was intended to be the property of the suit temple and that the answer given by the karnam shows that the defendants' family were simply managing this item as Dharmakartas; but it does not appear that the defendants were parties to this enquiry and the opinion of the Collector, whether expressed or implied, is not evidence against their title. Ex. III is another statement made by some karnam on some date and occasion not known. This document and Ex. VII are not of much value so far as they conflict with the evidence of the deeds of grant. Ex. VII, being a statement made by the uncle of the 1st defendant during the latter's minority is not binding on him as an admission. Exs. B and B2 are statements made by the village officials and residents of Vadur. The circumstances under which these statements were made do not appear and being statements of persons not called as witnesses they are not evidence against the defendants. Ex. V the Inam Register is an important document and in Col. 13 therein the name of the original grantees is Sri Chennakeswaraswamivaru; in Col. 16, the present owner is stated to be Jakkam Reddi Pedda Reddi and Co., managers of the temple and in Col. 10 the inam is said to be hereditary so long as the service is performed. The title-deed for this land, which is described therein as a *davadayam* or pagoda Kundriga inam, Ex. VI was granted to "the manager for the time being of the pagoda of Sri Chennakeswaraswamivaru," and the conditions are stated to be that a quit-rent of Rs. 57-12-0 should be paid and that the inam should be confirmed to the said manager and his successors so long as the conditions of the grant are duly fulfilled. The inam statements Ex. XXX(*a*) records that this land was granted by Mr. Travers to Jakkam Reddi Krishna Reddi who felled the trees, cultivated the land and was performing the *Neivedya* and *Deeparathana* services in the suit temple. In Ex. K. which is a list of cultivation of a portion of this inam, it is described as Devudu Kandrigai. This is a document signed by the 1st defendant and if the expression of Devadayam Kandrigai could be treated as an admission that the inam was an absolute endowment to the temple, this might be utilized as an admission of his own want of title but Devudu Kandrigai conveys no more than Devadayam Inam. Exs. XXXI and XXXI(*a*) suggest that this inam was granted to Krishna Reddi for his enjoyment of the produce subject only to the duties to be performed on behalf of the temple. In Ex. XXXI(*a*) it is recited that the reason for the further grant of 212 gorrus was that the grantee was *unable to maintain himself* with the lesser extent of 20 gorrus. The document states that the grantee should pay every year the instalments of the kists to Government and *enjoy the produce*, and that things should be carried on in this manner as long as it might be deemed proper by the Government. The words in italics indicated that it was intended that Krishna Reddi should derive his subsistence from the produce. Therefore the grant appears to have been one of an inam to be held by an individual and his heirs burdened with the trust of doing certain services for the temple. In such cases any surplus income left after the performance of these services accrues to the benefit of the donee. See *Srinivasacharyulu* v. *Pratyanga Rao* (2) and *Mahammad Hussain Saheb* v. *Abdul Rahim Beg Sahib.* (3) It is not necessary in such cases that the inam-holder should account for his disposal of the surplus produce of the land. The other exhibits in the case are of minor importance. Exs. S. L. R. M. U. A. and A1. If there was any admission in paragraph 17 of Ex. A1 by the defendants' Vakil it is not proved to have been authorized by them.

We must reverse the findings of the Subordinate Judge on Issue III and hold that items 2, 6 and 7 are not recoverable from the defendants as being the exclusive property of the temple.

Under the IVth issue it is not shown that the defendants commited any breach of trust in respect of this land as the grant does not provide for the utilization of the surplus produce. From Ex. K and the plaintiff's own statement it appears that a portion of the lease amount was utilized to pay off a promissory note for the personal debt, but the defendants have

2. (1922) 30 M. L. T. 101.
3. (1922) Mad. 8; 15 L. W. 241.

not been asked to explain why they took the rent to pay a private debt and there is no substantial charge against them under this head. The Subordinate Judge found the charges B, H, P and Q of misconduct not proved. Charge 1 relates to the change of Archakas. It is unimportant and it is not shown that the defendants deliberately changed any of the old practices of the temple. The other charges relate to the claim for lands with which I have already dealt with. The defendants appear to have felt some doubt as to their rights in respect of these inams and this uncertainty can hardly be stated to have been unjustifiable having regard to the difficulty felt both by this Court and the lower Court in determining what exactly was the nature of the original grant. In his memorandum filed on 14th November 1917, the 1st defendant stated that items 2 to 6 were service Inams and that item 7 was an Inam belonging to defendants' family. In the argument it was admitted that items 1, 8, 3, 4 and 5 belonged to the suit temple. In a statement made in 1016, Ex. II, the 1st defendant admitted that items 3, 4 and 5 belonged to the temple, that there was no other land belonging to the god and that he was its Dharmakartha and that item 2 was an Inam for festival purposes. In Ex. JJ. the defendants' father first said that he was authorized to use the income of the Devastanam lands for the expenses of the temple only and then expressed his ignorance whether he could use any of the income for his own benefit as the patta was in English. The defendants are not persons of much education and they seem to have been in some genuine uncertainty as to what their duties and rights were. Their uncertainty as to their legal position under the deeds of grant and other documents is not a reason for punishing them to the extent of removing them from office. The trust is not likely to be better administered by being placed in the hands of persons unconnected with the family of the founder. The defendants are interested in seeing that worship is maintained in this temple which their ancestor founded. It is not proved that they misappropriated any of the temple income. In fact the Subordinate Judge finds in paragraph 30 of his judgment that the income derived from the temple properties must have been wholly spent for temple purposes. The credit of Rs. 32 to the temple in the accounts as income of the *manyam* appears to have been calculated upon some calculation of averages and does not indicate any intention of fraud. The 1st defendant's account-keeping was not his strong point. The defendants may not hitherto have realized their duty of strictly accounting for every pie of the temple income. This is not a case resembling that of *Srinivasa Chariar* v. *Evalappa Mudaliar* (4) where a trustee was found to have asserted private ownership in himself to trust properties, to have strenuously resisted their recovery and to have supported this unfounded assertion by deliberate concoction of accounts. The features of this case are more like those of the case reported in *Subbaroya Chetti* v. *Subramaniya Iyer* (5) where we held that there was no reason to disturb the defendants who had been in possession of the office of Dharmakartas for many years and belonged to the original family of trustees and we declined to remove them at the instance of strangers unconnected with the family, unless we found clear evidence of misconduct and unless it appeared to be to the clear benefit of the trust that the Dharmakarta should be removed.

In this state of things we dissent from the lower Court's finding on issue VII that the defendants should be removed from their office. This litigation will serve as a lesson to them to keep proper accounts of the temple income and to guard against any mixing of the temple property with their own property; subject to the regular performance of the duties imposed in the deeds of grant they may continue to enjoy the properties subject to the trust so long as they are managers or Dharmakarthas of the suit temple.

The appeal is allowed and the suit dismissed. The respondents will bear their own costs both here and in the lower Court. The appellants may recover their costs from the income of the lands.

DEVADOSS, J.—I agree.

Appeal allowed.

4. (1922) P. C. 325=45 Mad. 565.
5. (1918) M. W. N., 786.

1923 Madras. 168.

SPENCER AND DEVADOSS, JJ.

Joga Yerrayya and others ... Appellants —Defendants.

v.

Nakina Salleyya Patrudu and others ...Respondents —Plaintiffs.

A. No. 214 of 1921, dated 23rd August 1922 against the decree of the Sub-Judge of Vizagapatam in O. S. No. 50 of 1918.

(a) *Hindu Law—Alienation by Daughter—Legal necessity, want of—Grandsons as Reversioners—Settlement by mother.*

Where the daughters, who took properties under a deed of settlement made by their widowed mother, alienated the properties without legal necessity the grandsons as reversioners were held not bound by the alienation.

(P. 168, Col. 2.)

(b) *Mesne profits—Claim for, in plaint—No specific issue.*

When plaintiffs claimed mesne profits which were not specifically denied in the written statement, the absence of specific issue on the point did not disentitle plaintiff to mesne profits.

(P. 169, Col. 1.)

(c) *Limitation Act, Art.* 141—*Scope.*

Where an alienation was made by two daughters who took the properties under a deed of settlement by their mother, *held*, limitation against grandsons who were reversioners ran from the death of the last female owner. 13 M. L. W. 436 Dist.

(P. 168, Col. 2 ; P. 169, Col. 1.)

B. Jagannadha Doss—for the Appellants.

Y. Suryanarayana—for the Respondents.

JUDGMENT :—This is a suit brought by reversioners to set aside alienations made by their mother and aunt. The Subordinate Judge decreed the plaintiffs' suit, and those alienees who have not compromised the suit now appeal against his decision. There is also a memorandum of objections by the plaintiffs on the question of mesne profits.

The last male-holder of this estate was Padmanabha Patrudu, the grandfather of the plaintiffs who died in 1874. He left a widow Iddayyamma and two daughters Narasamma and Erakamma. The alienations in dispute were made by the two daughters, and the basis of their power of disposal is Ex. 1, a deed of settlement executed during Iddayamma's lifetime in favour of her two daughters Narasamma and Erakamma and her foster-daughter, Papayamma. The learned Subordinate Judge has found that this settlement is not binding on the plaintiffs.

In appeal it is argued that this was a *bona fide* family arrangement and that it ought to be supported, so far as the members of the family are concerned. In support of this contention three decisions have been cited. *Musammat Hardei* v. *Bhagwan Singh* (1) *Mussammat Hirat Bibi* v. *Musammat Sohan Bibi* (2) and *Upendra Nath* v. *Bindeshri* (3). In *Mussammat Hardei* v. *Bhagwan Singh* (1) the Privy Council held that the plaintiff who was a party to the arrangement was bound by her own agreement, and that she could not impeach the sale made on the faith of that arrangement. But their Lordships expressed no opinion as to whether this arrangement was binding on the grandsons. They observed that that question should not be determined in that suit in which they had no present interest. *Mussammat Hiran Bibi* v. *Musammat Sohan Bibi* (2) and *Upendranath* v. *Bindeshri* (3) are cases of a compromise of a *bona fide* disputed claim, as is evident from the words of Lord Moulton which are quoted by the learned Judges of the Calcutta High Court. In the present case it is not suggested that in 1889 any dispute existed which Ex. 1 was intended to settle and the cases cited are therefore not in point. The Subordinate Judge was certainly right in finding that Ex. 1 was not binding on the plaintiffs. Ex. 1 evidently does not embody any family arrangement because during the lifetime of the widow, Iddayyamma, the two daughters who would have been the nearest reversioners if she had died at that time had no authority to deal with the estate.

[In their Lordships' opinion none of the alienations were such as would be binding on the reversioners.]

It is lastly suggested that the plaintiffs' suit is barred by limitation as the plaintiffs' aunt died in 1905 more than 12 years before suit. As the daughters of Idayyamma acquired no rights under Ex. 1 the plaintiffs' cause of action under Art. 141 did not arise until the death of plaintiffs' mother, who was the last limited

1. (1915) 20 C. W. N. 105.
2. (1913) 18 C. W. N. 929=27 M. L. J. 149.
3. (1915) 22 C. L. J. 452.

owner and died in 1915, within 12 years of the suit. Therefore the suit is within time. It is clear from *Chengappa* v. *Buradagunta* (4), that the succession of male reversioners to an estate is not accelerated by relinquishment of a Hindu widow in favour of a co-widow. Time begins to run from the death of the last female owner in cases where there are more than one who has a widow's estate. The appeal fails on all points and is dismissed with costs.

Memorandum of Objections.

In the plaint the plaintiffs claim mesne profits at the rate of Rs. 290 for three years. In the written statement the plaintiffs' claim was not traversed on this point, but the defendants put the plaintiffs to proof of all the allegations in the plaint which they do not admit. The question of mesne profits was not decided in the lower Court on the ground that there was no issue on this point. This was not a sufficient reason for the omission, as an issue should have been framed at the trial. The lower Court will now pass a final decree providing for mesne profits from the date of Narasamma's death until possession is given of the items in dispute. The lower Court will take such evidence as is produced and as it finds necessary as to the income of the lands now awarded to the plaintiffs. The memorandum of objections on this point is allowed with costs. In other respects it is dismissed.

Decree modified.

4. (1920) 43 Mad. 855.

1923 Madras. 169.

DEVADOSS, J.

M. Deivanayagam Pillai ... Petitioner.

v.

P. T. S. Diwan Mohideen Rowther and others ... Respondents.

Civl. Revn. Petn. No. 340 of 1921, dated 5th May 1922, from the Sub-Judge of Tinnevelly in O. P. No. 3 of 1921, dated 2nd April 1921.

Civil P. C., S. 115—Govt. of India Act, S. 107—Order on petition as to election—District Judge and Sub-Judge whether Court—Madras District Municipalities Act.

The High Court has no jurisdiction to interfere with orders passed by Sub-Judge or District Judge on petitions presented under the rules for the decision of disputes as to the validity of an election held under Madras District Municipalities Act, as they are not Courts as defined by C. P. C., 21 Bom. 279 Foll.

(P. 170, Col. 2.)

E. Duraiswamy Aiyar—for the Petitioner.

A. Swaminatha Aiyar—for the Respondents.

JUDGMENT :—This is an application to revise the order of the Subordinate Judge of Tinnevelly refusing to try an election petition presented under the District Municipalities Act, V of 1920. The petitioner and respondents 1 and 2 were candidates at an election held on 15th March. 1921, to fill up two vacancies in the Tinnevelly Municipality. The petitioner is an unsuccessful candidate. The respondents 1 and 2 were declared duly elected. Under R. 1 for the decision of disputes as to the validity of an election held under the Madras District Municipalities Act, the petitioner applied within 7 days to the Subordinate Judge of Tinnevelly for a declaration that the elections of respondents 1 and 2 were invalid on various grounds. The Subordinate Judge who at first granted an *interim* injunction ultimately refused to try the case on the ground that he had no jurisdiction to try the election petition. I must at the outset say that it is very difficult to follow the reasoning of the learned Subordinate Judge. R. 1 makes it quite clear that the petition should be presented to the District or Subordinate Judge 'having jurisdiction'. The words 'having jurisdiction' mean having territorial jurisdiction over Municipalities to fill up vacancies in which the election is held and the petitioner was perfectly justified in going to the Court of the lowest jurisdiction for obtaining relief under the rules framed by the Government. But the question is whether I should revise the order which appears on the face of it to be illegal. Under the Madras District Municipalities Act, the officers who can try an election petition are the District and Subordinate Judges. The question is, when they entertain or refuse to entertain an election petition, whether they act as Courts as defined by the Civil Procedure Code or as mere officers who are invested with jurisdiction to try a particular class of cases, namely, election petitions.

Mr. Swaminatha Aiyar raised a preliminary objection that the High Court had no jurisdiction to revise an order passed by the District and Subordinate Judge under the rules framed under the Madras District Municipalities Act. The case which is almost on all fours with the present is *Balaji* v. *Merwanji*. (1) In that case a Bench of the Bombay High Court held that :—

"The District Judge acting under S. 23 of the Bombay District Municipal Act, Amendment Act, (II of 1884) is not a Court within the meaning of the word in S. 622 of the Civil Procedure Code (Act XIV of 1882), and the High Court has no jurisdiction to revise his order refusing to set aside an election :"

and that it could not interfere with an order as to costs made by him. S. 23 reads thus :—

"If the validity of any election of a Municipal Commissioner is brought in question by any person qualified either to be elected or to vote at the election to which such question refers, such person may at any time within ten days after the date of the declaration of the result of the election, apply to the District Judge of the District within which the election has been or should have been held. The District Judge may, after such enquiry as he deems necessary, pass an order for confirming or amending the declared result of the election, or for setting the election aside."

The learned Judges observe at page 281 :

"The District Judge in the present case is neither of these, and the order can have no application to him. He is merely a *persona designata*, and if he has jurisdiction at all to award costs, there is nothing to prevent him from awarding them on the scale he has adopted."

Though the Madras District Municipalities Act uses the word 'Court' in Ss. 47 and 60, it has carefully avoided the use of the word 'Court' in other sections and the rules framed under the Act which have the same force as the sections enacted by the Legislature use only the words 'District and Subordinate Judge.' It cannot be contended with any show of reason that by the use of the words 'District Judge and Subordinate Judge' the Legislature intended that District Court and Sub-Court should have jurisdiction. If that were so the Legislature could have made it quite clear and the rules framed under the Act would have put it beyond question. I may also refer to *Vijiaraghavalu Pillai* v. *Theagaraya Chetti*, (2) where it was held that the High Court had no jurisdiction to revise an order passed by a Presidency Magistrate in an enquiry held by virtue of the rules framed by Government under the Madras City Municipal Act whereby a Magistrate may decide as to the competency or otherwise of a candidate for a Municipal election. The learned Judges held :

"That the Magistrate is not a Court subject to the appellate jurisdiction of the High Court within the meaning of that word in S. 15 of the Charter Act and that he was in the position of a referee between the President of the Municipal Corporation and the candidate."

There is also a case in the same volume *Vasudeva Aiyar* v. *The Negapatam Devasthanam Committee* (3) and the learned Chief Justice refers to *Balaji* v. *Merwanji* (1) in these terms :

"There the question arose with reference to a section of the Bombay District Municipal Act, Amendment Act of 1884. That enactment contains a section (S. 23) providing that, where the validity of any election of a Municipal Commissioner is brought in question, the District Judge, after such enquiry as he deems necessary, may make an order confirming the election or setting it aside. The Chief Justice and Parsons, J., were of opinion that: "A District Judge acting under S. 23 of the Bombay District Municipal Act, Amendment Act, 1884, is not a Court within the meaning of the word in S. 622 of the old Civil Procedure Code. They suggest that he was a *persona designata* apparently for a specific purpose. That seems to be so."

In the state of the authorities it is impossible to contend that the Madras Legislature intended to treat, the officers who are to try an election case as Courts either within the meaning of S. 115, Civil Procedure Code or S. 107 of the Governmentof India Act. Though I hold that the Subordinate Judge's order is utterly illegal, as he had jurisdiction to try the case, I am constrained to dismiss the petition with costs, as the High Court has no jurisdiction to interfere with orders passed on petitions presented under the rules for the decision of disputes as to the validity of an election.

Petition dismissed.

1. (1897) 21 Bom. 279.
2. (1915) 38 Mad. 581.
3. (1915) 38 Mad. 594.

1923 Madras. 171.

OLDFIELD AND KRISHNAN, JJ.

Narantakath Avullah ... Complainant—Petitioner.

v.

Parakkal Mammu and others ... Accused—Respondents.

Cri. Revn. Case No. 366 of 1921, and Cri. Revn. Petn. No. 291 of 1921, dated 13th August 1922 from the Sessions Judge, North Malabar Dn., C. No. 12 of 1920.

Penal Code, Ss. 79 and 494—Cri. P. C., S. 439—Bigamy—Re-marriage by Mahomedan wife after husband's conversion to Ahamadiyan faith——Ahamadiyans not apostates from Islam.

The Ahamadiyans, followers of Ahamad who lived in the Punjab 15 years ago, are merely a sect among Mahomedans and a person's acceptance of Ahamadiyan tenets does not render him an apostate from Islam so as to annul a marriage contracted by that person previous to his acceptance of Ahamadiyan principles. The 5th respondent had been married to the petitioner who subsequently joined the Ahamadiyan faith. Thereafter the 5th respondent without obtaining any divorce married the 3rd respondent on the opinion of certain Muslim theologians, that the petitioner's acceptance of Ahamadiyan doctrines amounted to apostacy. The lower Court accepted the view that the adoption of Ahamadiyan faith constituted apostacy from Islam and acquitted the accused.

Held : in revision the decision of the lower Courts must be upset. Though there was no question of the application of *mens rea* or of S. 79, Penal Code in the case of an offence under S. 494, I. P. C., and though the acquittal was unsustainable, a retrial was not necessary under the circumstance of the case. Principles of Ahamadiyan faith discussed.

Zafrulla Khan, M. C. Parthasarathi Aiyangar and P. V. Venugopala Aiyar—fot the Petitioner.

The Public Prosecutor—for the Crown.

C. Madhavan Nair—for the Accused.

OLDFIELD, J. :—We are asked to revise the order of aquittal of the 5th respondent on a charge of bigamy, punishable under S. 494, Indian Penal Code, and of the other respondents on subsidiary charges. The petitioner is the complainant who prosecuted the 5th respondent's husband and the Public Prosecutor who has had notice, has under instructions taken no part in the proceedings. We should not ordinarily proceed at the instance of a private party in revision of an acquittal ; and we do so here, only because we are satisfied that a question of public importance relating to the personal status of a substantial part of the Moslem community is raised.

That question is whether petitioner's adherence to Ahamadiyan tenets made him a *murtad* or apostate from Mahomedanism. If it did, it had, it is not disputed, the effect of dissolving his admitted marriage with 5th respondent ; and such dissolution prior to her re-marriage with 3rd respondent is her first and principal defence to the charge. The reply attempted is that Ahamadiyans are merely a sect of Mahomedans, their divergencies from ordinary Mahomedanism not involving abandonment of that creed or making them schismatics. Some objection has been taken to our entering on this controversy in revision, by petitioner on the ground that it is purely one of fact since only his religious views and their orthodoxy are in question, and by respondent on the ground that it relates only to degrees of orthodoxy, which the Court has no business to estimate. But, although I feel the difficulty involved in an attempt to deal with matters, with which I am necessarily unfamiliar, and although I appreciate the improbability that our decision can commend itself to those with whom personal associations and devotional sentiment must weigh more than the materials, on which we have to proceed, the issue cannot be avoided. For it is one of mixed law and fact, inasmuch as it relates substantially and ultimately to the personal status, which petitioner's religious view determines; and to say that only degrees of orthodoxy are in dispute is to beg the question whether the Ahamadiyans' deviation from Islam is such as entails abandonment of any essential thereof.

The lower Court has attempted very little by way of direct ascertainment whether that deviation does so, its conclusion appearing really to rest on the finding that the Ahamadiyans are regarded as apostates by orthodox Mahomedans and the principle that :

> " What the doctrine and faith preached in the Koran are is to be decided, not according to the interpretation put on it by individual persons, but according to the interpretation generally accepted and adopted by Musalmans as a whole. "

And this test, *securus judicat orbis* may in appropriate circumstances have its

value. But to apply it fairly, we must make sure that the judgment relied on is really general and has been reached by the community as a whole and that it has been reached after due deliberation and the passing of sufficient time for the disappearance of the prejudice which new beliefs must always incur. Ahamad, whom the Ahamadiyans follow, died, we are told, in Punjab in 1908 : and in the 15 years, which have passed, it is difficult to suppose that Islam or even Islam in India can have come to any mature conclusion on his teachings. In fact it has not been shown that it has done so. For, of 4, 6, 7, D. Ws., whose evidence alone is relied on, the 1st is the son of the Government Kazi of Madras, was formerly an assistant Kazi and Arabic professor in a private Madrassa, in this city, and describes himself as now chief priest in a District in the Nizam's Dominions, whilst the other two are a Kazi and a Musaliar or religious leader in Malabar. The evidence of the 2nd attracts suspicion as to the extent of his acquaintance with Ahamad's writings and the 3rd said that there was " no one in the Mahomedan world, whose opinion on religious matters was binding on the conscience of Musalmans." These persons are not shown and do not appear to have more than a local influence aud reputation; and there is nothing before us except their assertions in some instances of doubtful value. In the question propounded to P. W's., father in the fatwa Ex. I " Religious decrees of learned men of Arabia and India ", declaring Ahamad and his followers apostates, are referred to ; but none is specified either in the question or answer and none was produced at the trial. In these circumstances it has not been established that the Muslim community either generally or in India has reached any decision which we can regard as conclusive.

This failing, discussion has turned on the character of the divergences between the teaching of Ahamad and the orthodox creed. The former are enumerated, it is not disputed, correctly by the lower Court. But as regards the latter the parties are at variance, petitioner contending that the formula " There is one God and Mahomad is His Prophet" is exhaustive, and respondents that we must take account of other doctrines sanctioned by the Koran or other authorities. Petitioner in support of his contention relies on the judgment of Mahmood, J., in *Queen-Empress* v. *Ramzan* (1), those of Edge, C. J., and Mahmood, J., in *Ata-ullah* v. *Azim-ullah* (2) and on *Maula Baksh* v. *Amiruddin* (3) as showing that monotheism and belief in Mahomad as God's Prophet are the only essentials. But it is clear that the question in those cases was only between one sect and another or the general body of Mahomedans as to the right to worship in a Mosque or the validity of a *Wakf*, not as it is here, between orthodox and alleged schism, to decide between them something more is evidently required than the base formula referred to above. For the latter portion of it cannot be taken as requiring a belief only in the history or legend of Mahomad without reference to acceptance of his message and ascertainment of its terms and of the legitimacy of the constructions placed on them later, of which in fact in the case of the Ahamadiyans respondents complain. The materials for a conclusion, which the parties have provided, are the evidence of the witnesses already mentioned, the fatwa Ex. 1 ; a book M. O. 1 ; " The claim and teachings of Ahamad " and a pamphlet M. O. V. " What distinguishes Ahamadees from Non-Ahamadees." No reliance was placed before us on the works exhibited as M. Os. II, III, and IV.

It is first to be observed that the Ahamadiyans, statedly at least emphasize their adherence to the Islamic formula. In M. O. V. Ahamad's principles are stated in his own words beginning.—

" We are Muslims by the grace of God : Mustafa, the Holy Prophet of Arabia, is our leader and guide. The wine of our spiritual knowledge is from the cup of the Book of God which is called Koran : Every Prophethood has found its culmination in that Messenger of God, whose name is Mohammad. The revelation and inspiration that we receive have not been granted us independently, but it is through him that we have received this gift ;"

and the pamphlet goes on, like the manifestoes of other religious developments, to state the distinctive features of Ahamad's teaching as a return to the early fervour of the recipients of the original revelation, an abandonment of worldly affairs and political greatness for

1. (1885) 7 All. 461.
2. (1890) 12 All. 494 (F. B.).
3. (1920) 1 Lah. 317.

the earlier more spiritual methods of propogating the faith and an eradication of the errors, into which Moslems from time to time have fallen. And similarly in M. O. 1 the first chapter maintains Monotheism and the supremacy of the Koran and there are (p. 106) extracts from the latter under headings :

" The Almighty God declares that Islam is the perfect and chosen religion.

" The Almighty God commands every soul to follow no other religion than Islam, " and Mahomad is the Prophet of God for all the nations of the world."

The form moreover to be signed on initiation (p. 104) runs :

" I bear witness that there is no God but Allah. He is one, having no partner, and Mahommad is the Servant and Messenger of God."

All this would seem to involve a plenary acceptance of Mahomadanism ; and in fact the respondents' objection is to the Ahamadiyan additions to it and their alleged inconsistency with it. But we have, in my opinion, been shown no distinct authority as to which doctrines of Islam are regarded as fundamental or the extent to which additions to them, deviations from them or inconsistencies with them are permitted. 7th defence witness no doubt said generally that any Mussalman who took away from, added to or tampered with the Koran, was a *murtad* and 4th defence witness that among sects the differences were not in matters of faith, but in ritual ; and there is also the judgment of Mahmood. J., in *Queen Empress* v. *Ramzan* (1) in this sense. But 4th defence witness also explained his description of some sects as *murtads* on the ground that their deviations from the teaching of the Koran were on fundamental points, refusing, however, 'to regard the Shiah's disbelief in the first three Caliphs as a deviation from the faith at all. That private judgment and analogical deduction are, in appropriate circumstances and to a greater or less extent, legitimate methods of ascertaining the law is recognized in the text books : (Amir Ali on Mahomedan Law 11 and 14 : Abdur Rahim on Mahomedan Jurisprudence 25) ; and we have not been shown how they are not also legitimate in theology, so long as fundamental principles are maintained and the question is only of the development to which every creed must be subject, so long as it retains life and growth and adapts itself to altered conditions. This in fact is enough to justify the Ahamadiyans in their fifth and sixth alleged deviations from orthodoxy as enumerated by the lower Court. For their abandonment of the sword for peaceful argument as the method of propogation of Islam has been inevitable since the cessation of militant conditions and the permeation by Mahomedans of countries, to whose law they owe allegiance ; and their refusal to acknowledge the spiritual supremacy of the Sultan of Turkey cannot, if only for chronological reasons, be fundamental.

The remaining four points of divergence, referred to by the lower Court are set out in its judgment, the evidence and Ex. 1, unfortunately in very general language, which was not made more specific before us. But they amount, as I understand them, to assertions that Mahommad and other earlier recognized prophets, for instance Jesus Christ, have not been the sole channels of communication between God and man ; that others, for instance Buddha, Rama and Krishna have been bearers of Divine message ; and that the last of such messengers was Ahamad himself, who is to be identified with the Prophet " who will come after me and whose name will be Ahamad " referred to in the Koranic verse quoted in Ex. 1, and there is also imputed to the Ahamadiyans a novel doctrine that " Jesus Christ is still dead and buried and not in heaven." As regards this doctrine it is sufficient that it is presented in Ex. 5, (p. 49), the only source of information available, as founded on the interpretation of the Koran and tradition and that it has not been shown how rejection of any dogma, which is fundamental or affects the position and supremacy of Mahommad or has been defined by any final or general authority, is involved. As regards the remaining points it is obvious and the references in the latter part of 4th defence witness's evidence indicates, that much depends on the sense, in which the expressions used by Ahamad are understood and the significance of his teaching as a whole. If, for instance, he did (and we have not been referred to any particular passage) speak of Krishna and Rama as heavenly messengers or Avatars, the corrective is given in the far less definite claim at p. 160 in Ex. 5. " I do

not say it to please anybody, but God has revealed to me that Krishna and Rama were also righteous servants of God and had true connection with Him;" and, if he did identify himself with the Promised Messiah, he explained at p. 143 that "the perfect follower of God's revelation cannot be called an independent prophet, for this is a disrespect towards the prophethood of Mahommad," and in the note on p. 144 that "no prophet, who is also a law-giver, can appear after the Holy prophet, even from among his followers. For this door is completely closed." That Ahamad identified himself with the Ahamad, whose advent is foretold in the verse above referred to, can involve no unorthodoxy, much less rejection of any fundamental tenet, unless, what we have not been shown, all speculation as to the fulfilment of Koranic prophecy is forbidden; and the quotation in Ex. 1 from the Alamgari Fatwa must be inconclusive in the absence of information as to its context or the method, by which its author would have reconciled it with the Koranic text. Reference has been made to the extent, to which Ahamad statedly accepted and proceeded from the fundamental tenets of Islam. It was then for respondents to show that his additions to and divergences from them involved their abandonment; and it is not possible on the materials before us to hold that they do so. It is satisfactory that a similar conclusion was reached in *Hakim Kalib* v. *Malik.* (4) It follows that petitioner is not a *murtad* and his marriage with 5th respondent is subsisting.

This conclusion makes it necessary to consider the further defence, accepted in the alternative by the lower Court that the respondents are entitled to acquittal because they acted without *mens rea* and in the honest belief that the marriage was dissolved. This is unsustainable. For there is not really any question here of the doctrine of *mens rea* or of the application of S. 79, Indian Penal Code, since the respondents acted under a mistake of law or under a mistake of mixed law and fact. *R.* v. *Tolson,* (5) being distinguishable on that ground, I am with all respect unable to follow the authority relied on by the lower Court, the judgment of Holmwood, J., in *Abdul Ghani* v. *Azizul Huq* (6) and must hold that, whatever weight the good faith of respondents might deserve, if the proper sentences to impose were in question, it is irrelevant to their liability to conviction.

The case, however, is before us in revision and with reference to the last clause of S. 439, Criminal Procedure Code the only course open to us is to order a re-trial. Mr. Zafrullah Khan for petitioner does not ask us to take this course, since he desires only to obtain an authoritative settlement of the questions argued. Further proceedings are in my opinion unnecessary, since respondents acted in a mistaken, but honest, belief as to the law and only nominal sentences would be the result. In these circumstances and for this reason, the petition is dismissed.

KRISHNAN, J.:—This is a criminal revision petition filed by the complainant against the order of acquittal, by the learned Sessions Judge of North Malabar, of the accused in Sessions Case No. 12 of 1922, of whom the 5th accused a Moplah woman was charged with bigamy under S. 494, Indian Penal Code, and the rest with abetment thereof. The Sessions Judge found that the 5th accused was lawfully married to the complainant but that he subsequently joined the new sect of Ahamadiyans, and that, thereupon after obtaining the opinions of certain Mahomedan theologians that his act amounted to apostacy and severed the marriage tie, she married a second time the 3rd accused in the case. She had also pleaded that the complainant had actually divorced her but that plea was found against by the Judge and had not been renewed before us. On these findings the question to be decided was whether her second marriage amounted to bigamy, and that depended on the further question whether the act of an orthodox Mahomedan in joining the Ahamadiyan sect amounted to apostacy under Mahomedan law or not; for it is conceded on both sides that one of the recognized consequences of apostacy by a Mahomedan is to sever his marriage tie with his wife. All the authorities are agreed on that point. The learned Sessions Judge has upheld the contention of the accused that her husband did become an apostate by joining the Aha-

4. (1917) 2 Pat. L. J. 108.
5. (1889) 23 Q. B. D. 168.
6. (1912) 39 Cal. 409.

madiyans. He has also held that even if that view was wrong, the woman acted with due care and caution and *bona fide* believed that her first marriage had come to an end in law and that she was free to marry again and therefore she was not guilty as there was an absence of *mens rea* or guilty intention. He thus acquitted all the accused on those two grounds and we have to consider in revision the correctness of his views on the two points.

Before doing so it is necessary to mention that a preliminary objection was taken by the learned Counsel for the accused to our hearing the petition on the ground that no revision lies against an order of acquittal. It cannot however be said that the High Court has no power to interfere in revision with an order of acquittal, for there is no such restriction in the sections of the Criminal Procedure Code which deal with our powers in revision, Ss. 435 and 439. On the other hand Cl. (4) of S. 439 contemplates orders of acquittal being revised, for it lays down a restriction on what the High Court can do on such a revision. It enacts that the Court cannot convert a finding of acquittal into one of conviction. This Court, however, as a matter of sound and recognized practice, has always refused to revise orders of acquittal at the instance of private parties except in very exceptional cases. This, however, is, in my opinion, one of those exceptional cases as it raises two important questions of law, one of them of great interest to the new and growing class of Ahamadiyans and to the Mahomedans in general and the decision of the case turns entirely upon the decision of those two points of law and not on any appreciation of evidence. In these circumstances we have decided to overrule the objection.

Turning now to the question of apostasy raised, it is undoubtedly a question of Mahomedan theolgy to say what deviation from the recognized doctrines of Mahomedanism wouldamount to apostasy; but as civil rights and legal status of parties are based on its decision, we must decide it ourselves. The accused has called 3 witnesses of the orthodox party who assert themselves to be men learned in Mahomedan theology and who say that the adoption by a Mahomedan of the tenets of Gulam Ahmed Mirza the founder of the sect of Ahamadiyans amounts to apostasy under that law; but we cannot accept their opinion as settling the question as argued for the accused, particularly as they are interested as orthodox Mahomedans in denouncing the members of the new sect as unbelievers and as they have not given satisfactory reasons for their opinions. As pointed out by Sir Abdur Rahim in his Muhammadan Jurisprudence, page 250, some people are too prone to charge others with unbelief and treat them as heretics, but the correct law is that when heretical doctrines are opposed to clear and indisputable texts they would amount to unbelief and not otherwise. Consensus of opinion as a source of law or the doctrine of Ijma is not universally recognized among Mahomedans; but even if we take consensus of opinion as a proper source of law there has not been, as pointed out by my learned brother, such a lapse of time since the founding of the new sect of Ahamadiyans as to have developed any such general consensus of opinion regarding the status of its members, we must therefore consider the doctrines of Ahamadiyans and see whether their adoption by Mahomedans would amount to heresy and make them apostates or *murtads* and put them outside the pale of Mahomedanism. It may be observed that in doing this we must take the doctrines as propounded by Ahamed himself and accepted by his followers and not the distorted version of them as given by their opponents. It is accepted by the complainant that the Ahamediyan doctrines are correctly stated in a small pamphlet by Mr. Sher Ali, B.A., and published by Sadar Anjuman Ahamadiyya of Qadian, Punjab, entitled "what distinguishes Ahmadees from Non-Ahamadees" filed as an Exhibit in this case M. O. 5. The creed of Ahamed is set out in it on pp. 2 and 3. It begins by saying:

> "We are Muslims by the Grace of God, Mustapha (the Holy Prophet of Arabia) is our leader and guide.....The wine of our spiritual knowledge is from the cup of the book of God which is called the Quran."

A perusal of what is stated in the pamphlet shows clearly that the Ahamadiyans subscribe to the *Kalma* that there is no God but one God and Mahomed is His Prophet and unreservedly accept

the prophethood of Mahomed and the supreme authority of the Quran. In fact it would seem that they differ from the orthodox Mahomedans only in some six points which are set out in the pamphlet and also by the learned Judge in his judgment.

They are briefly stated as follows :—

1. While both parties believe that God had been speaking to his Prophets in the past the Non-Ahmadees hold that Mahomed was the last prophet with whom God spoke and since then he has not spoken to and will not speak to anyone till the end of time. The Ahmadees on the other hand believe that God continues to hold communion with his holy servants now as in the past.

2. While both sides accept that Mahomed was Khatamum—Nabiyyin (the seal of the Prophets) they differ as to its interpretation. Ahmadees say that it means that no new prophet can arise except as a follower of Mahomed and bearing his seal and not that no new prophet can arise at all as the Non-Ahmadees hold.

3. Ahmadees admit into the list of prophets before Muhamed world teachers such as Zoroaster, Buddha, Krishna and Ramachandra and this they say is according to the Koran but Non-Ahmadees refuse to acknowledge them as prophets. Of course the Ahmadees hold that Ahmed was himself a prophet of God but unlike the earlier prophets he got his prophethood through Mahomed who was made a prophet-maker by God.

4. Ahmadees believe that Jesus Christ was actually crucified but he did not die on the cross. He came out alive and went to Kashmir and died and is buried there. Whereas the Non-Ahmadees hold that Jesus was bodily carried to heaven by God before crucifixion. The Ahmadees think that the prophecy of the second advent of Jesus is to be fulfilled not by Jesus coming back in person but by his spirit entering another man and they believe this has been fulfilled by the advent of Ahmed himself.

5. While the Non-Ahmadees believe that the promised Madhi will carry on a holy war or jihad and spread Islam by the sword, Ahmadees repudiate this doctrine and hold the promised Madhi and the Messiah are the same and that he will spread Islam by arguments and heavenly signs and not by violence. They accept Ahmed as that Messiah.

6. Ahmadees deny the claim of the Sultan of Turkey to the Caliphate and hold that every Muslim is bound to remain loyal to the Government under which he lives and which protects him.

These are said to be the main differences. I agree with my learned brother in thinking that these differences are not sufficient to justify us in holding that that the Ahmadees are not Mahomedans but apostates. As already stated, they accept the Kalma, the prophethood of Mahomed and the authority of the Koran. These undoubtedly are the essential conditions for a person to be a Mahomedan, and they are complied with by the Ahmadees. That would seem to make them Moslems governed by the Mahomedan Law. Mr. Ameer Ali says in his book on Mahomedan Law, 4th Edition, Vol. II, page 36 that :

"Any person who professes the religion of Islam, in other words, accepts the unity of God and the prophetic character of Mahomed is a Moslem subject and is subject to the Mussalman Law. So long as the individual pronounces the Kalma of Tauhid, the creed of Islam, it is not necessary for him or her to observe any of the rights and ceremonies or to believe in particular doctrines which imply Iman or belief."

and again on page 112 :—

"Every person who acknowledges the Divine Unity and the messengership of the Arabian prophet is regarded as within the pale of Islam ; nothing more is required."

To the same effect, is the opinion of Sir Abdur Rahim in his Mahomedan Jurisprudence, page 249 where he says the Islamic faith consists in acknowledging the authority of one God the Law-giver and the truth of Mahomed's mission as His prophet. Similar expressions of opinion are found in the judgment of Mahmood, J., in *Queen-Empress* v. *Ramzan* ; (1) in *Atta-ullah* v. *Azim-ullah* (2) which was a case relating to the sect of Wahabis ; though the decisions in those cases referred to worship in a Mosque they are of value to show how eminent Mahomedan lawyers have looked upon the question as to who are Mahomedans. Besides those cases the learned counsel for the petitioner has brought to our notice one recent decision in which the very question raised before us as to the status of Ahmadees seems to have been raised, *viz.*, the case of *Hakim Khallil Ahmed* v. *Malik Istafi.* (4) It was expressly ruled there that the sect known as Ahamadees are Mahomedans notwithstanding their pronounced dissent on several important matters of doctrine from the orthodox Mahomedan faith. In view of these authorities which I accept, it follows that a Mahomedan does not become an apostate by merely accepting the doctrines of Ahamadees. The Ahamadiyans are in my view only a reformed sect of Mahomedans.

If we examine the 6 points of difference set out above between the Ahamadees and the Non-Ahamadees none of them

seem to refer to any essential principles of Mahomedanism or to conflict with the Quran. The point that has been most pressed before us is that Ahmad having set himself up as a prophet has by that very act become an apostate and his followers as followers of an apostate are also apostates. No authority has been cited for this contention. We cannot act on what D. W. 4 says in his answer Ex. 1 as stated in the Fatwa Alamgiri. The original passage has not been shown to us nor has it been shown that it applies to a case like the present where the prophethood of Mahomed is unreservedly accepted.

For the above reasons I have come to the conclusion that the complainant never became an apostate and that his marriage with the 5th accused was subsisting at the time of her second marriage. We have now to consider whether the plea of good faith and absence of *mens rea* is established in the case and is a proper defence to the charge. It is said that the accused acted in good faith because she obtained the opinion of D. W. 4 and others that she was entitled to re-marry and her learned Counsel has relied on *R.* v. *Tolso* (5) and on S. 79 of the Indian Penal Code. Now in this matter, I think, we must be guided more by the wording of the section of the Code than by the English Law. S. 79 only excuses a person who by reason of a mistake of fact and not by reason of a mistake of law in good faith believes himself to be justified by law in doing the act in question. So far as I can see there is no question of fact on which the 5th accused made any mistake. It was purely one of law whether the fact of her husband becoming an Ahamadee made him an apostate in law and severed her marriage tie. Her acting on the opinion of others is thus no answer to the charge against her, though as observed by my learned brother it may be considered in mitigation of sentence. The English case cited is distinguishable on the ground that there the mistake was one of fact. The opinion of Holmwood, J., in *Abdul Ghani* v. *Azizul Haq* (6) relied on by the Sessions Judge cannot with all respect be accepted as an authority, as the learned Judge has not discussed the question or referred to any authority and has not noticed the difference between the effect of a mistake of law and of a mistake of fact. Sherfuddin, J., who sat with him put the case on the ground that the marriage which was broken by the husband becoming a Christian could not be held to be subsisting during the period of *iddut* when the second marriage was contracted and therefore no charge for bigamy would lie. On the other hand it has been held in Bombay in *Reg* v. *Sambu Raghu* (7) and again in *Emperor* v. *Bai Ganga* (8) that believing in good faith that the accused was justified in remarrying is not a defence to a charge of bigamy but can be considered only in mitigation of sentence. This same view has been taken in Punjab (*see* 1 Lahore, p. 440). I hold therefore that the second ground of defence of the accused also fails. In the result the acquittal must be set aside but in the circumstances of this case I agree that it is not necessary to order a re-trial.

reversed.

7. (1876) 1 Bom. 347 (352).
8. (1916) 19 Bom. L. R. 56 (60).

1923 Madras. 177.

KRISHNAN, J.

Kowtha Suryanarayana Garu ... Petitioner.

v.

Yarudala Venkayya and others ... Respondents Defendants.—

Civl. Revn. Petn. Nos. 434, 435 and 436 of 1921, dated 12th September 1922, against the order of the Addl. Deputy Collector of Bezwada in S. Nos. 306, 367 and 368 of 1920, dated 18th January 1921.

(a) *Civil P. C., O. IX, R. 9,—Dismissal for default—Refusal to restore on merits.*

Where a suit was dismissed for default and the Court refused to restore it on the ground that it would fail on merits, without going into the reason for plaintiff's absence, *held*, the order was revisable under S. 115.

(P. 178, Col. 2.)

(b) *T. P. Act, Ss. 6 and 8—Transfer of rent.*

A case of transfer of rents due prior to transfer with immoveable property does not fall under S. 8 and S. 6, Cl. (e) is not a bar to the maintainability of the suits.

(P. 179, Col. 1.)

V. Ramadas—for the Petitioner.

P. Chendhiah—for the Respondents.

JUDGMENT:—These are three petitions to revise the order of the Additional Deputy Collector, Bezwada, refusing to restore three suits which had been brought

before him for arrears of rent alleged to be due from the defendants to the plaintiff. *Ex parte* decrees had been passed in these suits originally, but they were set aside at the instance of the defendants and the suits were posted again for hearing. On the date of that hearing the plaintiff's vakil and the plaintiff were absent and so was the agent of the plaintiff and the suits were dismissed for default. Applications were made to restore the suits on the grounds that the default by non-appearance was accidental and not due to any wilful negligence on the part of the plaintiff. The Additional Deputy Collector, after having given notice to the other side and having heard the vakils of both parties, dismissed the applications without considering whether any proper ground had been made out or not for the absence of the plaintiff at the adjourned hearing, because he was of opinion that the suits, in any event should fail as they were suits for recovery of rent due on the lands prior to their purchase by the plaintiff from the previous owners. He considered that the case would fall under S. 8 of the Transfer of Property Act. But it is stated before me in this Court that besides the lands the right to arrears of rent was also transferred by the sale-deeds to the plaintiff and that would certainly give a right to maintain the suits. In the case cited by the Additional Deputy Collector, *Muthu Hengsu* v. *Netravathi* (1) there was no question about an actual transfer of the right to recover rent. That was a case where apparently a claim was made to past mesne profits. That case was considered by one of the Judges who took part in it, Seshagiri Aiyar, J., when sitting with Sadasiva Aiyar, J., in *Venkatarama Aiyar* v. *Ramasami Aiyar* (2) wherein he makes a statement that, if his decision was to be understood as laying down that, even in cases of actual transfer of mesne profits as subsidiary to the enjoyment of the property, the right could not be enforced, he was not prepared to stand by it. Here we have not got a case of mesne profits at all but a case of transfer of rents with immoveable property; S. 8 does not apply to such a case at all; nor is S. 6, Cl. (e) a bar to the maintainability of these suits. The Additional Deputy Collector has gone wrong on this point of law and therefore, his decision is not supportable.

I am of opinion that these petitions fall under S. 115 of the Code of Civil Procedure, because the Additional Deputy Collector has not disposed of the matter as he ought to have done on the question whether there was a proper excuse for the absence of the plaintiff. These petitions, therefore, must be remanded to the Additional Deputy Collector to be taken on his file once again and to be disposed of according to law. Costs in this Court in C. R. P. No. 434 will abide and follow the result. There will be no costs in the other two revision petitions in this Court.

Case remanded.

1. (1920) 12 L. W. 44
2. (1921) 44 Mad. 539.

1923 Madras. 178.

OLDFIELD AND RAMESAM, JJ.

The Public Prosecutor ... Appellant.

v.

Virammal and others ... Accused (Nos. 1, 3 and 4).

Cri. A. No. 785 of 1921, dated 22nd August 1922 from the A. S. J., Tanjore, in S. C. No. 27 of 1921.

Evidence Act, S. 45—Thumb impression—Conclusions.

If the finger-prints are clear enough to sustain an argument, there is no reason why an argument by way of deduction should not be as sure foundation for a conclusion and it may be a better one than any based on direct evidence. There is nothing in the so-called science of finger-print or the qualifications of an expert in it, which need deter a Court from applying its own eyes and its own mind to the evidence and verifying the results submitted to it by the witness. 32 Cal. 759. Ref.

J. C. Adam, the Public Prosecutor—for the Crown.

B. Satyanarayana—for the Respondents.

OLDFIELD, J.:—In this case we are asked to revise the order of acquittal of the 1st accused of an offence punishable under S. 82 (c) of the Indian Registration Act, false personation and admission in an assumed character of the execution of a document, and the 3rd and 4th accused of abetment thereof. It is unnecessary to go further into the facts than to say that the learned Public Prosecutor has based his argument before us exclusively on certain finger-prints. A number of finger-prints were taken at the various stages of the proceedings before and dur-

ing the trial. We are now asked to set aside the acquittal solely with reference to Ex. B and Ex. N.

We could in fact deal with the case very shortly, if the lower Court had not taken up an attitude and entered on general considerations, which we think are unsound and which it is necessary to correct. The attitude of the lower Court was in effect a refusal to exercise its own judgment on the finger-prints at all under an attempt to discredit the evidence of the 3rd Prosecution Witness the finger-print expert, on general grounds. That attitude and refusal may have been due to its reluctance to enter into what is generally described as the 'science' of finger-prints or to come to close quarters with the evidence of a person described as 'an expert.' But in fact there is nothing in the so-called science of finger-prints or the qualifications of an expert in it, which need have deterred the lower Court from applying its own magnifying glass or its own eyes and its own mind to the evidence and verifying the results submitted to it by the witness. For the argument in finger-print cases rests on a simple deduction from a number of observations of the similarities and differences between the finger-prints in question, the probabilities approaching more or less closely to certainty as those similarities or differences are many or few. It is of course a different question to be answered according to the circumstances of the particular face and the clearness of the finger-prints available whether such similarities or differences are established; and to that we shall apply ourselves in the sequel.

The lower Court has first justified its attitude by reference to *Emperor* v. *Abdul Hamid* (1). But the judgments in that case show that the learned judges there entered on an inspection of the finger-prints before them and were unable to base any argument on them, only because they were too indistinct to support the expert's conclusion. There is then the observation of Henderson, J., to the effect that a conviction based on finger-prints alone would be unsafe; and similarly that of the learned Judge in *Bazari Hajam* v. *King-Emperor* (2). With all respect we cannot take that view. For if the finger-prints are clear enough to sustain an argument, there is no reason why an argument by way of deduction should not be as sure foundation for a conclusion and it may be a better one than any based on direct evidence. The portion first referred to in *Emperor* v. *Abdul Hamid*, (1) was relied on by Seshagiri Aiyar, J., in *In re Singri Bhima* (3). But I am unable with all deference to follow the learned Judge's mathematical demonstration based on a quotation apparently from Sir E. R. Henry's work on finger-prints, page 61 and think that he must have been misreported.

Turning now to the evidence in the present case and to the finger-prints, Exs. H and B, with which alone the learned Public Prosecutor asks us to deal, we have examined them to the best of our ability and are unable to reach any affirmative conclusion with reference to them. There is no doubt a general similarity between the two finger-prints. But Ex. N is so blurred that no verification by counting the lines in it for comparison with the number in the same position in Ex. B is possible. This may be due to the fact that the 1st accused had injured her thumb, voluntarily or not, before Ex. N was taken. However this may be, in the absence of anything, on which an argument strong enough to exclude reasonable doubt can be based, we cannot interfere with the lower Court's conclusion. The appeal is dismissed.

RAMESAM, J.:—I agree and wish to add a few words with reference to the quotation in Seshagiri Aiyar, J's., judgment in *In re Singri Bhima*. (3) What Sir Edward Henry states at page 50 of his book is, that the chance of finding one particular distinguishing mark is one in four. It follows from this that the chances of finding the combination of distinguishing marks is one in 4^6 or 4096. I think this is what the learned judge intended to state and what appears as 46 is a mistake for 4^6. When the learned judge states that "two out of four persons will have one distinguishing mark in common" what was meant was—corresponding to *a person* having a certain distinguishing mark, we are likely to find *another* in a group of four chosen at random having

1. (1905) 32 Cal. 759.
2. (1922) Pat. 78=1 Pat. 242 (244).
3. (1915) 27 I. C. 900.

the mark in common with him. Similar remarks apply to the later statements of the learned judge, When he says "there will be two persons from out of 46 men who will have all the six marks in common" what was meant was—If we have a person with six marks, we are likely to find another who has all the six marks, in common with him, out of a group 46 persons chosen at random. A similar correction should be applied to the statement "out of 4096 persons, two persons would possess the marks spoken to by the expert." In each case, however, the learned Judge adds to the person compared, the one person that may, as a matter of probability, be found in a group and makes it two. This is not strictly accurate.

Appeal dismissed.

1923 Madras. 180 (1).

SPENCER AND VENKATASUBBA RAO, JJ.

Perincheri Tamasikkum Panchikkal Parappan Kidavu. (Defendants 5 and 6) Appellants.

v.

Karuppala Thottala Poyil Edathil alias *Kalangadi Edathil Unnichennan and others* ... (Plaintiffs and Defendants 1 to 4, 7, 8 and 10 to 14) Respondents.

A. A. O. No. 4 of 1922, dated 28th September 1922 from the order of Sub. J., South Malabar, Calicut, in A. S. No. 178 of 1920, dated 25th October 1921.

Civil P. C., O. I, R. 10—*Plaintiff, substitution—Continuation of suit*—Bona fide *mistake.*

A suit might be continued by new plaintiff even where the original plaintiff had no right to sue, provided that the defect in institution was due to a *bona fide* mistake.

K. P. M. Menon—for the Appellants.

C. V. Ananthakrishna Aiyar—for the Respondents.

JUDGMENT :—Mr. Menon contends that the 13th defendant should not have been ordered by the Subordinate Judge to be allowed to carry on the suit as a plaintiff, on the ground that the suit as originally instituted was incompetent.

This question is really concluded by *Krishna Boi* v. *The Collector and Government Agent, Tanjore* (1), which decided that under S. 27 of Act XIV of 1882 (which corresponds to O. I, R. 10 (1) of Act V of 1908) a suit might be continued even where the original plaintiff had no right to sue, provided that the defect in institution was due to a *bona fide* mistake. See also *Ambalavana Pandara Sannadhigal* v. *The Advocate-General, Madras* (2).

Subbaiyar v. *Kristnaaiyar* (3), was based on S. 73 of Act VIII of 1859 which contained no provision corresponding to R. 10 (1) of O. I.

If different Courts take different views on a point of law on which the plaintiff's right of action depends, that in itself is evidence that the plaintiff made a *bona fide* mistake in commencing the action in his own name. Vide *Hughes* v. *Pump House Hotel Company No.* 2. (4).

The Subordinate Judge was therefore right in directing the amendment of the plaint so as to allow 13th defendant to come in as a co-plaintiff, and the appeal against order is dismissed.

As regards costs the plaintiffs and the 13th defendant in this Court are entitled to and will get their costs of the appeals both in this Court and in the Subordinate Judge's Court. The order that results in costs in the District Munsif's Court being costs in the suit is not inequitable seeing that the appellants withstood the respondent's application even in the First Court, and it will stand; but for the costs of the amendment of the plaint the plaintiffs will pay Rs. 25 to the defendants 5 and 6 and it will be so provided in the final decree irrespective of the result of the suit.

Appeal dismissed.

1. (1907) 30 Mad. 419.
2. (1920) 43 Mad. 707.
3. (1876) 1 Mad. 383.
4. (1902) 2 K. B. 485.

1923 Madras. 180 (2).

RAMESAM, J.

Virappa Chettiar ... Petitioner.

v.

Kathayee Ammal and another ... Respondents.

Cri. Revn. N. C. No. 40 of 1922, dated 5th May 1922 from the Sub-Divisional 1st Class Mag., Mannargudi, dated 16th August 1921.

Criminal P. C., S. 145—Scope.

It is the duty of the Magistrate to complete the inquiry and to pass final orders under S. 145, Cr. P. C. where proceedings have been started under it and a preliminary order passed.

R. Rajagopala Aiyangar—for the Petitioner.

V. C. Seshachariar—for the Respondents.

ORDER:—There is no finding by the Magistrate that any party was in possession before the locking of the building by the counter-petitioners. Nor could he give such a finding, as there were no materials which could properly be the basis of such a finding as no enquiry was made. It is the duty of the Magistrate to complete the enquiry under S. 145 of the Criminal Procedure Code in the proceedings started under it and a preliminary order passed (see *Velayudu Kone* v. *Narayana Kone* (1), and the cases cited therein). If the petitioner was not ready with his evidence, and showed no good cause for an adjournment, the Magistrate ought, at least, to have taken the evidence of the counter-petitioners. The order of the Magistrate is vacated and the case will be sent back to be disposed of according to law. It will be open to the petitioner, also to file a written statement and to adduce evidence at the new enquiry and the Magistrate will be bound to record and consider it.

Case sent back.

1. (1915) 2 L. W. 1208.

1923 Madras. 181.

WALLACE, J.

Kovaganti alias *Nallagonda Appiah and another* ... Petitioners (Accused Nos. 1 & 2)

v.

Crown ...

Cr. Revn. C. No. 52 of 1922, dated 10th October 1922 from the Judgment of S. J., Kistna Dn., Masulipatam Cr. A. No. 77 of 1921.

Criminal P C., Ss. 234 and 239—Penal Code, S.241—Joint trial—Passing counterfeit coins on different occasions to different persons on the same day.

Where two persons were jointly charged with and convicted under S. 241 of the I. P. C., of passing counterfeit coins on three different occasions on the same day to three different persons.

Held, the trial was not illegal within the meaning of S. 234 or S. 239. (39 Cal. 292 Diss.; 25 M. L. T. 379 Foll.).

T. S. Raghunatha Rao—for the Petitioners.

The Public Prosecutor—for the Crown.

ORDER:—The two petitioners in this petition are jointly charged with and convicted of under S. 241 of the Indian Penal Code, of passing counterfeit coins on three different occasions on the same day to three different persons. The first and main point urged in their favour is that the joint trial contravenes S. 234 of the Criminal Procedure Code.

2. It is quite clear that the offences are of the same kind, and that either petitioner might have been tried by force of S. 234 with all three offences at the same trial. I can see no reason for restricting the scope of S. 234 to offences committed against the same person, for which position petitioner argues. The essence of the offence in S. 241, Indian Penal Code is the delivery of counterfeit coin to *any person* and three deliveries of counterfeit coin to three different persons are clearly offences of the same kind within the meaning of that term as set out in S. 234 of the Criminal Procedure Code.

3. The next point taken is that even if either petitioner could have been legally tried in one trial for all the three deliveries, the joint trial of both petitioners for all the three deliveries is contrary to S. 234. I can see no force in that contention either. S. 239 lays down that when more persons than one are accused of the same offence, they may be tried together, and that "the provisions contained in the former part of this chapter shall apply to all such charges," that is, in a trial of two accused persons jointly under S. 239, S. 234 may be also applied. The use of the singular number "person" in S. 234 is thus clearly not intended to rule out the plural number. The Calcutta High Court no doubt in its ruling quoted in *Budhai Sheik* v. *Emperor* (1) gives support to petitioners' view, but in the ruling reported in *Kumaramuthu Pillai* v. *Emperor* (2), Sadasiva Aiyar, J., of this Court held that "person" in S. 234 is not restricted to a single individual

1. (1906) 33 Cal. 292.
2. (1919) 25 M.L.T. 379 (387.).

and the same view is taken by the Patna High Court in *Kailash Prasad Varma* v. *King-Emperor* (3) and the Allahabad High Court in *Emperor* v. *Bechan Pande* (4). This view commends itself to me for the reasons already stated. I hold therefore that there was nothing illegal in the charge framed by the trying Court.

4. I am asked to reduce the sentence, but obviously the petitioners were systematically passing counterfeit coins and detection of such offence is difficult. I am not prepared to interfere and dismiss this petition.

Petition dismissed.

3. (1918) 3 Pat. L. J. 124.
4. (1916) 38 All. 457.

1923 Madras. 182.

KRISHNAN AND VENKATASUBBA RAO, JJ.

Ponduri Adeyya and others ... Defendants 1 to 3—Appellants.

v.

Jaladi Burreyya and others ... Plaintiffs—Respondents.

A. A. O. No. 84 of 1922, dated 15th September 1922 from the order of the Dt. Judge, Guntur, in A. S. No. 181 of 1921.

Evidence Act, S. 108—*Scope—Hindu Law—*12 *years' rule—Applicability.*

Where the plaintiffs claimed as nearest reversioners, as their father who was entitled to succeed had not been heard of for more than 10 years.

Held, the rule of Hindu Law that at least 12 years should elapse before a man unheard of should be treated as dead, was inapplicable, but the 7 years' rule under S. 108 of the Evidence Act applied. The rule of Hindu Law is only a rule of evidence and is not applicable after the passing of the Evidence Act. 2 Beng. L. R. 134 Dist. ; 1 All. 53 Foll.

V. Ramdoss—for the Appellants.

B. Somayya—for the Respondents.

JUDGMENT :—This is an appeal against an order of remand passed by the District Judge of Guntur in a suit brought by the plaintiffs to recover the properties of one Tirupathayya deceased as the persons entitled to them as his heirs or nearest reversioners. The plaintiffs' case is that their father Kotayya and the deceased Tirupathayya's father, Virayya were divided brothers, that Virayya died long ago, that Tirupathayya died nine months before suit and that their father Kotayya had not been heard of for nearly ten years before the date of suit. They therefore claimed that it should be presumed that Kotayya was dead and that they were thus the nearest reversioners to Tirupathayya.

Defendants denied the allegation that Kotayya was not heard of for some years, and on that an issue was framed, "whether plaintiff's father Kotayya was not heard of for ten years as alleged in the plaint." The District Munsif tried this issue and held that, even if Kotayya had not been heard of for ten years, there was no presumption as to the exact date of his death and that, as plaintiffs were claiming as the heirs of Tirupathayya, they were bound to show that Kotayya died before Tirupathayya, and in that view of the issue, he dismissed the suit.

The District Judge has now held in appeal on the question of fact that Kotayya was not heard of for over ten years and that plaintiffs are therefore the nearest reversioners to the deceased Tirupathayya and has remanded the case for disposal on the remaining issues raised. It is difficult to see exactly what importance there is in the fact that Kotayya died before Tirupathayya. It makes no difference in the rights of the plaintiffs in this case. So far as appears from the allegations in the plaint and in the written statement, whether Kotayya should be taken as dead before or after, plaintiffs will be the persons entitled to succeed. It is not alleged anywhere that there are other heirs who would come in any event. If we apply the presumption that arises under S 107 of the Evidence Act that no doubt does not enable us to say exactly when Kotayya should be taken to have died. See *Veeramma* v. *Chenna Reddy*, (1) *Muhammad Sharif* v. *Bunde Ali*, (2) and *Narke* v. *Lal Sahu* (3). But it certainly enables us to say that before the date of the suit he must be treated as dead. That being so, plaintiffs would come in as heirs of Tirupathayya or of their own father and be entitled to sue.

One argument requires to be noticed in this connection. It was urged that the rule under S. 107 of the Evidence Act

1. (1912) 37 Mad. 440.
2. (1911) 34 All. 36.
3. (1909) 37 Cal. 108.

does not apply to this case as it is a case regarding inheritance of properties of a deceased Hindu and therefore the rule of the Hindu Law governing the question as to what length of time should elapse before a man unheard of should be treated as dead is to be applied; that rule is that at least twelve years should elapse. Some authorities have been cited to us by Mr. Ramadas in support of his contention that we should apply the 12 years' rule and not the 7 years' rule under S. 107 of the Evdience Act. *Janmojay Muzumdar* v. *Keshab Lal Ghose*, (4) *Guru Das Nag* v. *Motilal Nag* (5). These cases, it will be noticed, were before the Evidence Act I of 1872 was passed as is pointed out in the case brought to our notice on the opposite side. *Dharup Nath* v. *Gobind Saran* (6). They cannot therefore be taken as of any authority after the passing of the Evidence Act. The case of *Parmeshar Rai* v. *Besheshar Singh*, (7) was also cited to us; but there the decision was not that the 12 years' rule should be applied but the 7 years' rule in the particular circumstances of the case. The observation by the learned Judges, especially of Spankie, J., was in favour of the contention that the seven years' rule applies. We are dealing here not with any question of inheritance or succession under the Hindu Law but only with a question of a rule of evidence and the Hindu Law will not apply. That view has been accepted and expressly followed by Sir Charles Sargent, C.J., and Nanabhai Haridas, J., in *Dhondo Bhikaji* v. *Ganesh Bhikaji*, (8) Again in *Mazhar Ali* v. *Budh Singh*, (9) the question had to be considered with reference to Muhammadan Law, and it was held by that Court that the rule of Muhammadan jurisprudence of allowing ninety years to pass before a person who is absent is to be taken as dead was only a rule of evidence and was no longer applicable after the passing of the Evidence Act.

In these circumstances we hold that the twelve years, rule cannot now be applied at all but we should apply the rule under the Evidence Act, and accepting the District Judge's finding that, Kotayya was not heard of for the last ten years, he must be presumed to have died on the date of suit. Plaintiffs therefore are entitled to maintain the suit and the order of the District Judge is correct.

We dismiss this appeal against order, and direct the appellants to pay the costs of the respondents.

4. 2 B. L. R. 184.
5. 6 B. L. R. App. p. 16.
6. (1886) 8 All. 614.
7. (1875) 1 All. 53.
8. (1887) 11 Bom. 483.
9. (1885) 7 All. 297.

1923 Madras. 183.

OLDFIELD AND DEVADOSS, JJ.

R. Nagasami Iyer ... Petitioner.

Cr. Revn. Case No. 92 of 1922, Cr. Revn. Petn. No. 86 of 1922, dated 23rd October 1922 from the Dt. Magt. Ramnad, D. Dis. 8110 (c) 1-21 dated 11th August 1921.

Legal Practitioner—Private pleader—Right to appear in Magistrates' Courts—General prospective orders by District Magistrate—Revision.

A District Magistrate has no authority to direct other Magistrates subordinate to him by the issue of general prospective orders as to the general exercise of their judicial discretion of allowing a person to practice as a private pleader in their Courts, and any person aggrieved by the refusal of any Magistrate to allow him to appear as a private pleader in any particular case should move the High Court in revision.

P. R. Ganapathi Aiyar and K. S. Ramabhadra Aiyar—for the Petitioner.

The Public Prosecutor—for the Crown.

ORDER:—We are asked to revise the orders of the District Magistrate of Ramnad on two petitions, the first asking him to grant permission to the petitioner to practise as a private Vakil in all the Magistrates' Courts in the District, the second asking him to grant permission to the petitioner to practise as a private Vakil in the specified Sub-Magistrate's Court, that at Arupukottai. The District Magistrate dismissed both these petitions.

An attempt has been made to argue that the District Magistrate was wrong in dismissing the petitions with reference to the High Court's Circular, Disposal No. 1453 dated 18th October, 1899, and the further explanatory circular Dis. No. 1797, dated 22nd October, 1918. We do not feel called upon to decide what bearing, if any, those circulars have on the petitioner's case, because it is a sufficient ground for our refusal to interfere in revision with the District Magistrate's orders that he has no power to pass any such orders as those prayed for. What

the petitioner asked the District Magistrate to do was to issue general orders that he, the petitioner, was entitled to practise either in all the Courts in the district or in a specified Court as a private pleader in the future in all cases. The District Magistrate has no authority to direct other Magistrates, though Subordinate to him, by the issue of gegeral prospective orders as to the general exercise of their judicial discretion.

In these circumstances, the petitioner was asking the District Magistrate to do what that officer had no power to do. If the petitioner thinks he is aggrieved by the refusal of any Magistrate to allow him to appear in a particular case, he is at liberty to move us in revision. At present, no such case is before us. The petitions are dismissed.

Petitions dismissed.

1923 Madras. 184.

OLDFIELD AND DEVADOSS, JJ.

Kandasami Mudali and another ... Petitioners. (Counter-Petitioners).

v.

Guruswami Pillai ... (Petitioner) Respondent.

Cri. Revn. Cases Nos. 97 and 98 of 1922 and Cri. Revn. Petn. Nos. 90 and 91 of 1922, dated 28th September 1922, from the Dist. Magt., Chittoor, in Cri. Revn. Petn. No. 17 of 1921.

(a) *Workman's Breach of Contract Act* (1859) *S.* 1—*Amendment Act of* 1920, *S.* 5—*Joint Contract.*

When the employer relied on a contract made with two artificers, jointly, *held*, there is nothing in S. 1 to exclude joint contracts. Joint contracts, which are not expressly excluded by the wording of S. 1 may be contemplated in it, for S. 5 of the Amending Act, XII of 1920, provides that the "contract" in the Original Act shall extend to all contracts within the meaning of the Contract Act. What the Court has to do in dealing with cases under the Act is to see whether as a matter of evidence and as a matter of fact, the artificer or any of the artificers before it, has received an advance of money. 2 Bom. L. R. 545 dist.

(b) *Evidence Act, S.* 92—*Workman's Breach of Contract Act, S.* 1.

There is no reason in S. 92 of the Act why the fact whether in case of a joint contract both or either of the workmen have actually, or constructively received all or part of the advance, should not be proved, since the fact that one of two joint contracting parties actually receives the consideration does not necessarily involve that he does not receive it as regards part or whole as the agent of the other and a finding to that effect will not necessarily involve any variation of the terms of the contract.

C. S. Venkatachariar—for the Petitioners.

J. C. Adam (the Public Prosecutor)—for the Crown.

N. Chandrasekara Aiyar—for the Respondents.

ORDER:—These cases come before us on applications for revision of the order of the District Magistrate of Chittoor directing further enquiry into a complaint under the Workman's Breach of Contract Act, XIII of 1859, as amended by Act XII of 1920. The whole proceedings having been brought before us in order that their propriety may be considered, it will serve no useful purpose to consider whether the District Magistrate had the power to make such an order in proceedings under the Act.

We therefore turn at once to the merits of the question raised. That question is whether the contract, on which the respondent, the employer, relies being a contract made with the two petitioners, the artificers, jointly can be the subject of proceedings under the Act at all. The Sub-Magistrate, who orginally dealt with the case, held with reference to *Bhau Abaji* v. *Rama* (1), that the Act deals only with cases of advances to individuals and not with cases of advances to more persons than one jointly. We think that this statement of the purview of the Act is too wide and cannot be sound if regard is had to the wording employed. S. 1 of the Act, XIII of 1859 provides, to quote the material portion, that:

"When any artificer shall have received from any employer or from any person acting on behalf of such employer an advance of money, if such artificer shall wilfully and without lawful or reasonable excuse neglect or refuse to perform such work according to the terms of his contract."

certain specified consequence shall follow. There is nothing explicit in this section to exclude joint contracts. No doubt the singular is used. But the first question is whether there is before the Court any artificer who has received an advance.

It is quite possible that even where a joint contract is in question proof may be

1. (1900) 2 Bom. L. R. 545.

forthcoming that of the contracting persons both or either have actually or constructively received all or part of the advance for which it provides. We cannot see any reason in S. 92 of the Evidence Act why this should not be proved, since the fact that one of two joint contracting parties actually receives the consideration, does not necessarily involve that he does not receive it as regards part or whole as the agent of the other, and a finding to that effect will not necessarily involve any variation of the terms of the contract. That joint contracts, which are not expressly excluded by the wording of S. 1 may be contemplated in it, results further from S. 5 of the Amending Act XII of 1920, which provides that the word "contract" in the Original Act shall extend to all contracts within the meaning of the Indian Contract Act. It seems to us that what the lower Court has to do in dealing with cases under the Act is to see whether, as a matter of evidence and as a matter of fact, the artificer or any of the artificers before it has received an advance of money.

The question so far is one of fact, with which the Sub-Magistrate in his order has not dealt, because he adopted (no doubt quite properly) the general rule sanctioned by the authority of *Bhau Abaji* v. *Rama* (1). Turning to that decision, we observe first that it was given before the amendment of the Act by Act XII of 1920. The material portion of the judgment is short and the main ground of decision is contained in the sentence :

> "It cannot be said that any one of the joint recipients of the money has received an advance of money."

With all deference, it is impossible to be certain whether that can be said or not, until evidence on the point has been taken and the materials for a decision whether any one of the joint contractors did receive an advance in the particular case are available. It is said then :

> "It would be impossible for the Court, under Sec. 2, if the complainant exercised the option of requiring re-payment, to order the defendant to re-pay the money advanced to him, for it is impossible to say how much each received."

That again will be a matter of evidence. We are with all respect unable to follow this authority.

It has then been urged that the intention of the Legislature cannot have been to render a joint contractor liable to imprisonment, when, as often may be the case, it is by the default of his joint contractor that the work is not done. Such cases are, however, sufficiently provided for by the requirement of proof of wilful default and by the provision introduced in S. 2 (1), Act XII of 1920, for the exercise of the allowance in Magistrate's discretion as to the nature of the penalty to be imposed.

Taking this view, we decline to interfere with the District Magistrate's order, our reasons for so declining being to put them shortly, that the general principle enunciated by the Sub-Magistrate as the ground of his decision is not sustainable and that each case must be dealt with on a consideration, of the evidence available in it and of the applicability of the actual wording of the Act to the case or cases of the individuals before the Court.

Petition dismissed.

1923 Madras. 185.

WALLACE, J.

Derwish Hussain ... Petitioner.

Criminal Revn. C. No. 114 and Cr. R. P. No. 105 of 1922, dated 3—11—1922 from the order of Hony. Presidency Magistrate, Royapettah, Madras, dated 31st January 1922 in Cr. C. No. 16472 of 1921.

(a) *Criminal P.C., S. 344—Witness not called.*

Where accused did not ask for fresh process after the witness failed to attend though served, adjournment was held to have been rightly refused.

(P. 186, Col. 1.)

(b) *Criminal P.C., Ss. 263, 370 and 441—Absence of reasons may vitiate judgment.*

It is one thing to hold that, in a case where all the record before the original trying Court is also available before the High Court in revision, no substantial failure of justice has occurred by the omission of the trying Court to record reasons. It is a very different case when the conviction was passed without reasons therefor on evidence of which no record is taken and which therefore is not available to the High Court. In such a case the omission to record reasons is a grave irregularity which in most cases would be sufficient ground for interference. In the case of convictions by Presidency Magistrates there is the saving S. 441 and when the record submitted under that section discloses sufficient grounds for the decision, it may be taken into consideration.

(P. 186, Col. 2.)

M. A. T. Coelho—for the Petitioner.

The Crown Prosecutor—for the Crown.

ORDER :—Two points are taken by petitioner (1) that he was refused opportunity to have his defence evidence produced (2) that the Bench Court has recorded no reasons for his conviction.

2. As to point (1) after a good deal of searching of records rendered necessary by the inaccurate reports of the Hony. Presidency Magistrates' Court, it was verified that the petitioner had paid batta for a subpœna for the production on 20th December 1921 of two Police diaries from D-2 and D-3 Stations, and that subpœnas were issued accordingly. Service was effected too late and neither diary was produced on 20th December 1921. The case was taken up on several dates after that on 3rd January 1922, 10th January 1922 and 24th January 1922, but on none of these dates did petitioner ask for any further subpœnas or warrants for the production of these diaries nor was any taken out. On the date of final hearing 31st January 1922, the Bench Court refused further adjournment on the ground that defence witnesses though served were absent. In the circumstances I consider the refusal was fully justified.

3. As to point (2) it is the case that the Bench Court has recorded no reasons whatever for convicting petitioner and the question is whether this omission to obey the terms of S. 263 (*h*), Crl. Procedure Code is an irregularity which wholly vitiates the trial, or, if not, whether petitioner has been gravely prejudiced by the omission. This is not a case which S. 370 (*i*) will remedy since a substantive sentence of imprisonment has been passed and therefore under S. 370 (*i*) as equally under S. 263 (*h*), the Hony. Presidency Magistrate should have recorded reasons. The Crown Prosecutor argues that the defect is cured by S. 441 which permits a Presidency Magistrate to submit with the record when called for under S. 435, a statement setting forth the grounds of his decision. But as a matter of law, it is clear that S. 441 does not abrogate the terms of S. 263 or S. 370. I take it that it merely allows the Presidency Magistrate to supplement the reasons which have been already stated under Ss. 263 and 370.

4. Under S. 537 however, this Court will not upset a conviction on the ground of irregularity in the judgment unless a failure of justice has resulted. My attention has been called by petitioner to certain rulings, *e.g.*, *Queen-Empress* v. *Shidgauda* (1) and *In the matter of the petition of Panjab Singh* (2) passed under S. 263 (*h*) or its equivalent S. 227 (*h*) in the former Code, wherein these Courts held that the omission to record reasons was in itself a sufficient ground for interference in revision. Neither of these cases was a case of judgment by a Presidency Magistrate. As a general rule I consider the principle of these rulings, *viz.*, that the Magistrate must state reasons so that the High Court may judge whether there were sufficient materials before him to support the conviction, perfectly sound. Rulings quoted on the opposite side such as *King-Emperor* v. *Alagirisami Pathan* (3), *Tilak Chandra Sarkar* v. *Baisa Gomoff* (4) deal with other sections of the Code such as S. 202 or S. 367 and neither deals with a case of a Presidency Magistrate or of a summary trial. It is one thing to hold that, in a case where all the record before the original trying Court is also available before the High Court in revision, no substantial failure of justice has occurred by the omission of the trying Court to record reasons. It is a very different case when the conviction was passed without reasons therefor on evidence of which no record is taken and which therefore is not available to the High Court. In such a case I agree with the rulings already quoted that the omission to record reasons is a grave irregularity which in most cases would be sufficient ground for interference.

5. But in the case of convictions by Presidency Magistrates there is the saving S. 441 and when the record submitted under that section discloses sufficient grounds for the decision, it may be taken into consideration. The reports submitted in this case by the Bench on 25th February 1922 and 17th October 1922 show that the Magistrate had a clear recollection of the case and the evidence recorded therein and had good grounds

1. (1894) 18 Bom. 97.
2. (1881) 6 Cal. 579.
3. (1902) 25 Mad. 546.
4. (1896) 23 Cal. 502.

for their decision. Considering these, as under S. 441 they may be considered, as setting forth the reasons for the conviction of petitioner, I am of opinion that no substantial failure of justice has occurred in his case.

6. I am asked to interfere with the sentence. It is a stiff sentence, but I am not prepared to interfere with the discretion of the Hony. Presidency Magistrate in this case. I dismiss the petition.

7. I would impress on the Bench the necessity of obeying Ss. 263 and 370, Criminal Procedure Code in future.

1923 Madras. 187 (1).

KRISHNAN, J.

A. S. Ramaswami Mudaliar and another ... (Accused) Appellants.

v.

Crown ... Opposite Party.

Cr. A. No. 147 of 1922, dated 1st September 1922 from the order of Chief Presidency Magistrate, Egmore, Madras, C. No. 126 of 1922.

Penal Code, S. 294 (*a*) (1)—*Scope.*

The conditions for the application of 1st clause of the section are complied with, when it is shown that the accused did keep an office where they carried on the necesary preliminary work for running a lottery and received the lottery moneys and which they held out to the public as the place where the lottery would finally be drawn.

T. S. Anantharaman—for the Appellants.

The Public Prosecutor—for the Crown.

JUDGMENT :—The only contention in this case is that the accused are not guilty under the 1st clause of S. 294 (*a*), Indian Penal Code but only under the 2nd clause, as it is said there was no actual drawing of the lottery. The 1st clause of the section speaks of keeping an office for the "purpose of drawing any lottery." I think the conditions for the application of that part of the section are complied with, when it is shown that the accused did keep an office where they carried on the necessary preliminary work for running a lottery and received the lottery moneys, and which they held out to the public as the place where the lottery would finally be drawn. Ex. U shows that they did have such an office and they kept it for the purpose of carrying on all the business connected with the lottery and for drawing the lottery when the time arrived for it. I think the Magistrate was right in the view he took.

Sentences are not heavy considering the loss caused to the public by the action of the accused, even if they themselves did not benefit much by it.

The appeal is dismissed.

Appeal dismissed.

1923 Madras. 187 (2).

OLDFIELD AND RAMESAM, JJ.

Aydrooss and another ... (Petitioners) Appellants.

v.

Emperor ... Opposite Party.

Cr. A. No. 191 of 1922, dated 24th July 1922 from the order of Special Judge, Malabar, Calicut, in Case No. 5 of 1922.

(*a*) *Penal Code, S.* 149—*Offence, meaning of—Railways Act, S* 126.

The definition of "offence" in S. 149 does not include offences under special Acts.

(P. 188, Col. 1).

(*b*) *Penal Code S.* 34—*Scope.*

To justify the application of S. 34 evidence of some distinct act by the accused, which can be regarded as part of the criminal act in question, must be required.

(P. 188, Col. 1).

P. Govinda Menon—for the Appellants.

J. C. Adam (Public Prosecutor)—for the Crown.

JUDGMENT :—We see no reason for interference with the lower Court's findings of fact. The evidence against the 2nd and 8th accused, appellants before us was no doubt given against the former only by 1st and 3rd prosecution witnesses and against the latter only by 1st, 3rd and 4th prosecution witnesses. We do not think that any sufficient reason of the nature of enmity or the like has been made out for rejecting this evidence. There was some delay in the giving of information to the authorities but that is an almost invariable feature of these cases and was probably inevitable in view of the state of the country. The defence evidence did not assist the accused.

Accepting the findings of fact there is no reason for interference with the conviction of an offence punishable under S. 143, I.P.C. The objection to the conviction under S. 126, Indian Railways Act, is that there is no evidence in the case of either of these accused of

having himself done or taken any immediate part in any act specified by the section. It is not possible to apply S. 149, I. P. C. because the definition of "offence" in S. 149 does not for the present purpose include offences under special Acts. The learned Public Prosecutor has suggested the application of S. 34, I. P. C., but the evidence does not in our opinion justify the conclusion that the criminal act in question, the removal of rails, sleepers, etc., was done by several persons, including these accused. The part these accused played is in fact unspecified, and we think that in order to justify the application of the section evidence of some distinct act by the accused, which can be regarded as part of the criminal act in question, must be required.

Taking this view, we allow the appeal to the extent that we set aside the conviction of an offence punishable under S. 126 of the Indian Railways Act and the sentence of seven years' rigorous imprisonment. The accused must therefore be released, when they have served their sentence of six months' rigorous imprisonment for the offence punishable under S. 143, I. P. C., and any sentence in default of payment of the fines which may be necessary.

Partly allowed.

1923 Madras. 188 (1).

WALLACE, J.

S. P. Nataraja Pillai ... Petitioner (Accused).

v.

Crown ...Opposite Party.

Cr. Revn. Case No. 216 of 1922 and Cr. Revn. Petn. No. 190 of 1922, dated 28th September 1922, from the order of the 2nd Presy. Magt., Madras, in C. C. No. 913 of 1922, dated 27th February 1922.

Penal Code, S. 21 (8) S. P. C. A. Agent 'Public servant.'

An agent of the S. P. C. A., who has been appointed, in respect of offences under S. 53 of the Madras Act III of 1888, a member of the Madras City Police Force is a 'public servant' within the definition contained in S. 21 (8) of the I. P. C.

V. Rajagopalachariar—for the Petitioner.

K. P. M. Menon—for the Crown.

ORDER :—Petitioner, an agent of the S. P. C. A. has been appointed in respect of offences under S. 53, Madras Act III of 1888, a member of the Madras City Police Force constituted under that Act. By virtue of that appointment he is empowered to arrest offenders under that section.

2. It appears to me clear that he is, so far as his inclusion in the Madras City Police Force operates, an officer of Government whose duty is to bring offenders to justice. He is therefore a public servant within the definition of S. 21 (8) of the Indian Penal Code.

3. The case reported in *Upendra Kumar Ghose* v. *The King-Emperor* (1) is in favour of this view.

4. This petition fails and is dismissed.

Petition dismissed.

1. (1906) 3 C. L. J. 476.

1923 Madras. 188 (2).

VENKATASUBBA RAO, J.

R. Varadachariar ... Respondent—Petitioner.

v.

C. R. Kalyanasundaram Aiyar ... Petitioner—Respondent.

Cr. Revn. Petn. No. 238 of 1922, dated 8th September 1922, from the D. J., Coimbatore, in O. S. No. 26 of 1922.

Legal Practitioners' Act, S. 36—Jurisdiction—Duty of the Court—Tout—Petitioner for taking proceedings—Revision.

A petition was filed in the District Court to have a person included in the list of touts. It referred to S. 36 but it did not give sufficient particulars as to why his name should be included. The person whose name was sought to be included applied to the District Judge to have the petition taken off the file on the ground that it disclosed no cause of action and that even if all the allegations made against him were true, he would not be a tout. The District Judge held that the allegations were sufficient and proceeded with the examination of witnesses who were cross-examined by the alleged tout at great length after his application to reserve the cross-examination was refused, and ultimately the alleged tout filed a petition in the High Court to quash the whole proceedings : *Held* : The High Court had powers to interfere in revision with orders made under S. 36, but no grounds had been made out for quashing proceedings in the particular case. Under S. 36 of the Legal Practitioners' Act, it is not necessary that there should be a petition at all, it does not contemplate the case of a party making definite allegations against an alleged tout. There is a

sufficient compliance with the section if the alleged tout is called upon to show cause why his name should not be included in the list, provided an opportunity was given to him to rebut the evidence tendered and otherwise to place his case before the Court. S. 36 of the Legal Practitioners' Act creates a special jurisdiction, but does not define the details of the mode in which that jurisdiction is to be exercised. The course to be adopted should be such as would do substantial justice to the parties brought before the Court. An enquiry under S. 36 cannot be conducted in the manner prescribed in Cr. P. C. regarding enquiries altogether of a different nature.

(P. 189, Col. 2; P. 190, Col. 1; P. 191, Col. 1).

C. P. Ramaswami Aiyar (The Advocate-General) and K. Bashyam Aiyangar—for the Petitioner.

T. R. Ramachandra Aiyar and T. M. Krishnaswamy Aiyar—for the Respondent.

JUDGMENT:—I have heard very full arguments and I proceed to deliver judgment at once.

This revision petition arises out of and is connected with an application made to the District Court of Coimbatore by the respondent, a High Court Vakil to take action under S. 36 of the Legal Practitioners Act XVIII of 1879, against the petitioner who was alleged to be a tout.

The petitioner complained that the petition filed by the respondent was defective, that it did not contain necessary particulars and that, even if all the allegations made in it against him were true, he would not be a 'tout' as the word is defined in the Act, and he applied to the District Court that the petition might be rejected on the ground that the allegations in the petition could not constitute the basis of an enquiry. The District Munsif dismissed the application and it has been argued before me that the District Judge had no jurisdiction to proceed with the enquiry and that he at any rate acted with material irregularity in refusing to order particulars. I have been asked to quash the proceedings.

The learned Advocate-General on behalf of the petitioner argued very forcibly that it was apparent from the petition filed by the respondent that the latter had very indefinite conceptions regarding a tout, that, while making irrelevant imputations, he did not even suggest that the petitioner was guilty of any acts which would be improper under the Act, that the respondent's object appeared to be to make allegations with a view to create prejudice and that he carefully avoided giving any particulars or making any definite and clear charges. With this criticism of the petition, I entirely agree. It was argued on the analogy of O. VII, R. 11, Code of Civil Procedure, that the petition should have been rejected. This argument would no doubt be sound if the proceedings were between two parties as in the case of a civil suit. Under S. 36 of the Legal Practitioners' Act, 1879, it is not necessary that there should be a petition at all. It does not contemplate the case of a private party making definite allegations against an alleged tout. I must therefore regard the petition filed in this case as a superfluity. The District Judge is authorzied to frame and publish lists of persons proved to his satisfaction habitually to act as touts. No procedure is laid down and the section merely provides that no person shall be included in any such list until he has had an opportunity of showing cause against such inclusion. It is important to bear in mind that evidence on which the District Judge may act under the section may be "evidence of general repute." It seems to me that the Court acting under S. 36 would sufficiently comply with its provisions if it called upon the alleged tout to show cause why his name should not be included in the list, provided an opportunity was given to him to rebut the evidence tendered and otherwise to place his case before the Court. Although the petition filed by the respondent was defective, it referred to S. 36 of the Act and contained a prayer that the petitioner should be declared a tout. The petitioner had notice of the nature of the proceedings instituted against him and he clearly knew that he was asked to defend himself in respect of action taken under S. 36. Moreover the words:—

"Evidence of general repute" in section indicate that it is not necessary to prove specific acts on part of an alleged tout. I am therefore unable to accept the argument that O. VII, R. 11, Code of Civil Procedure, is applicable."

The next argument of the Advocate-General was that the procedure laid down in Ss. 107 to 112 of the Code of Criminal Procedure, 1898, should be followed in an enquiry of this kind. I cannot accept this contention. In Ss. 107

108, 109 and 110 occur the words, "the Magistrate may, *in the manner hereinafter provided*, require such person to show cause;" S. 112 provides the manner; it enacts:

"When a Magistrate acting under S. 107, S. 108, S. 109, or S. 110 deems it necessary to require any person to show cause under such section, he shall make an order in writing setting forth the substance of the information received....."

and S. 115 requires that every summons or warrant shall be accompanied by a copy of the order made under S. 112.

It will thus be seen that in respect of the proceedings under sections of the Code of Criminal Procedure, the law has made the observance of certain rules imperative and it seems unreasonable to hold in the absence of similar provisions in the Legal Practitioners' Act, that an enquiry under S. 36 of that Act should be conducted in the manner prescribed in the Code of Criminal Procedure regarding enquiries altogether of a different nature.

It was next argued that the District Judge should have followed the procedure laid down in regard to charges of unprofessional conduct against legal practitioners. This argument again seems to me untenable. S. 14 of the Legal Practitioners' Act, 1879, deals with such charges. It prescribes a very definite procedure. It says:

"If any such pleader is charged, the presiding officer shall send him a copy of the charge."

It further provides that such copy shall be served upon the pleader at least 15 days before the date of hearing. The contrast between S. 14 and S. 36 is very marked and I cannot import into the latter words which find a place only in the former.

What then is the duty of the Courts in regard to enquiries under S. 36? I think the answer is contained in the following passage in the judgment of Mukerjee and Carnduff, JJ., in *Hari Charan Sircar* v. *District Judge of Dacca* (1):

"The position, therefore, reduces itself to this. S. 36 of the Legal Practitioners' Act creates a special jurisdiction, but does not define the details of the mode in which that jurisdiction is to be exercised. What course is that to pursue? The obvious answer is, that the course to be adopted should be such as would do substantial justice to the parties brought before the Court."

1. (1910) 11 C. L. J., 518.

I accept with great respect the principle enunciated in this passage.

I shall examine with reference to the facts of this case, in the words quoted above, whether the course adopted, is such as will do substantial justice to the petitioner. It is no doubt true, that several applications made by the petitioner were rejected by the District Judge. His application, that the cross-examination of the respondent's witnesses might be reserved, was refused. Further it was represented to the District Judge that, if the respondent was examined first, the petitioner would be able to know what the definite charges against him were and therefore the Court should take the evidence of the respondent before other witnesses were examined in the case. Even this application was dismissed. In the circumstances it would have been more satisfactory if the District Judge had complied with at least one of the requests of the petitioner. This was not done. The opposition of the respondent was clearly not *bona fide*. This is proved by the sequel. The respondent examined several practitioners in support of his case that the petitioner was a tout. Those witnesses spoke generally to the fact that the petitioner was interesting himself in litigation which was not his own that he was generally seen in Court helping parties, giving instructions to vakils and so forth. These facts, if true, were as much within the respondent's knowledge as within the knowledge of any pleader examined. Still he closed his case without himself giving evidence, although it was at his instance that the proceedings were initiated. But these are not matters which must weigh with me in dealing with this application.

The question is:—"Has any case been made out for my interference?" On the 4th March, the District Judge made the order to which reference has been made stating that the details given in the petition were sufficient and that the enquiry should proceed. On the same date two witnesses for the respondent were examined. On the 7th three more; on the 9th and 16th five further witnesses were examined. The petitioner cross-examined the witnesses at considerable length. He had ample opportunity to ascertain what the charges against him were. The witnesses were not examined at a stretch

from day to day and after the respondent closed his case on the 16th of March, the petitioner commenced to examine his own witnesses from the 27th March and the Civil Revision Petition was filed in this Court on the 28th March. From these facts, it is clear that the Petitioner could have no legitimate complaint in regard to the course adopted.

I have closely examined the evidence and I shall say nothing about it which is likely to prejudice either party but I cannot accept the argument of the learned Advocate-General that there is no evidence to sustain a charge. It will be for the District Judge to act or refuse to act upon the evidence but I cannot say that there is no material on which he can proceed.

On behalf of the petitioner several cases were referred to as authorities for the proposition that the High Court can interfere in revision with orders made under S. 36 of the Legal Practitioners' Act. I agree that the High Court has undoubted power to interfere. When the lower Courts acting on no legal evidence whatsoever declared a person to be a tout, the High Court in the exercise of its revisional powers will set aside the order. See *Sundar Upadhya* v. *The President of the Mukhtears' Association, Chapra* (2), In re *Siddeshwar Boral* (3), In re *Somayajulu Ramamurthi* (4), In re *Jounalagedda Sambayya*, (5) and *Keramat Ali* v. *Emperor* (6). But these cases have no bearing upon the question under consideration.

Several other cases were cited by the learned Advocate-General. Of these In re *A. G. Ganapathy Sastry*, (7) In the matter of *John Thompson of Moulmein*, (8) *Suryanarayana Aiyar* v. *Sitharama Sastri*, (9) deal with charges made against Legal Practitioners and *Ranga Reddi* v. *King-Emperor* (10) and *Konda Reddi* v. *King-Emperor*, (11) relate to proceedings under Ss. 107 to 112 of the Code of Criminal Procedure. For reasons already given by me these authorities are of little assistance.

I am therefore not prepared to hold that the District Judge either usurped jurisdiction which he did not possess or acted with material irregularity. I would therefore refuse to quash the proceedings, but I would observe that if the petitioner, should desire to cross-examine further any of the witnesses that have already been cross-examined, the District Judge should give him the necessary facility. I may add that Mr. T. R. Ramachandra Aiyar has on behalf of the respondent expressed his willingness to produce any witnesses required for further cross-examination.

I dismiss the Civil Revision Petition and I do not propose in the circumstances to make any order as to costs.

Petition dismissed.

2. (1910) 15 C. W. N. 1000.
3. (1899) 4 C. W. N. 36.
4. (1912) M. W. N. 959.
5. (1915) 28 I. C. 918.
6. (1921) 62 I. C. 829.
7. (1909) 6 M. L. T. 253.
8. 14 W. R. 257.
9. (1896) 6 M. L. J. 142.
10. (1920) 43 Mad. 450.
11. (1918) 41 Mad. 246.

1923 Madras. 191.

KRISHNAN, J.

Ramaswami Chetty ... (Complainant) Petitioner.

v.

Muthuvelu Mudali and others ... (Accused.) Respondents.

Cr. Revn. C. No. 263 of 1922, and Cr. Revn. Petn. No. 234 of 1922, dated 1st September 1922, from the judgment of B. Magts., Cuddalore, in S.T.No. 1027 of 1921.

Madras Town Nuisances Act (1889) *S.* 3 (12)—*Trial by Bench Magistrates.*

An offence under S. 3 (12) of the Act III of 1889 falls within Cl. 2, R. 1 of the rules for the guidance of Bench Magistrates and the Magistrates have jurisdiction to dispose of the case. (13 Mad. 142 Foll.)

(P. 192, Col. 1.)

T. R. Srinivasa Aiyangar—for the Petitioner.

M. Patanjali Sastri—for the Respondents.

The Public Prosecutor—for the Crown.

ORDER :—This is a revision petition by the complainant against the acquittal of the accused by the Bench Magistrates of South Arcot. The ground taken is that the Bench had no jurisdiction to try an offence under S. 3, Cl. 12 of Act III of 1889. Curiously enough the objection is taken by the complainant himself who invoked the jurisdiction of the Bench.

This does not however prevent him from doing so in revision for a Court cannot get jurisdiction, if it had not any in law, merely because complainant invoked its jurisdiction.

On the question of jurisdiction it is argued that the Bench had jurisdiction only to try offences under Ss. 5, 6 and 7 named in R. 1, Cl. 5 (*e*) of the rules framed by the Government for the guidance of Bench Magistrates under S. 16 of the Code of Criminal Procedure. The answer to this argument is that S. 3 is not mentioned in Cl. 5 (*c*) because it falls under the earlier clause, Cl. (2) as an offence against the conservancy clause of the Police Act punishable only with fine or with imprisonment for a term not exceeding one month. Though S. 3 is in the Town Nuisances Act, S. 11 of that Act directs that the section is to be read with and forms part of Act XXIV of 1859, the Police Act. It was ruled in *Queen-Empress* v. *Oolaganadan* (1) that all the clauses in S. 48 of the Police Act fell within the term "Conservancy clause." S. 3 (12) of the Towns Nuisances Act is practically the same as Cl. 6 and part of Cl. 7 of S. 48 of the Police Act. That case is therefore an authority for holding that an offence under S. 3 (12) of the Act III of 1889 falls within Cl. 2, R. 1 of the rules for the guidance of Bench Magistrates and the Magistrates had jurisdiction to dispose of the present case.

The petition fails and is dismissed.

Petition dismissed.

1. (1890) 13 Mad. 142.

1923 Madras. 192.

KRISHNAN AND VENKATASUBBA RAO, JJ.

C. K. Ramaswami Goundan ... (Petitioner) 1st Respondent.

v.

Muthu Velappa Goundan and others ... (1st and 2nd Petitioners, and 2nd Respondent) Respondents.

Civl. Revn. Petn. Nos. 341 and 342 of 1922 and C. Mis. Petn. Nos. 1869 and 1870 of 1922, dated 18th September 1922, against the order of the Dist. Judge's Court, Coimbatore, in O. P. Nos. 47 and 51 of 1922, dated 10th April 1922.

(a) *Madras Local Boards Act* (1920) *Ss.* 55 (2) (1) *and* 57, *Rr.* 10 *and* 12—*District Judge whether Court—Finality of order, C. P. C., S.* 115—*Government of India Act, S.* 107.

Where by erroneous construction of R. 10 of the Transitory rules taken with S. 55, Cl. 2 (v), the District Judge assumed jurisdiction to declare the membership of *G.* as void and as a necessary consequence, his presidentship also and he then went on to declare that *V* was duly elected, without giving any one an opportunity to show that his election was vitiated by the commission of election offences as alleged in the written statement of *G.*

Held: that that amounts to acting with material irregularity or illegality in the exercise of his jurisdiction. To assume jurisdiction, to do a certain act by taking an erroneous view of law when there is really no jurisdiction, raises a case for interference under S. 115, C. P. C. Both in the case of S. 57 and in that of the election rules, jurisdiction is given to the District Judge as the District Court and is really a supplemental jurisdiction conferred on an existing tribunal and as the District Court is subordinate to the High Court and subject to its appellate jurisdiction, it is open to High Court to revise its orders both under S. 115, C. P. C. and under S. 107 of the Government of India Act. The provision in R. 12, Cl. (3), that orders under Sub.-Rr. 1 and 2 shall be final is not a bar to the exercise of revisional powers. Full effect can be given to the provision by holding that it prevents interference with the order by way of appeal or by suit. When revisional powers are intended to be taken away, it has always been held that it must be done by express words to that effect. Finality can be attached only to orders passed with jurisdiction as those without jurisdiction are really nullities. It seems clear from the rules that the District Judge and the Subordinate Judge are given jurisdiction under them not as mere *persona designata* but as the presiding officers of their respective Courts and they act as Courts in their inquiry into such petitions. (11 Mad. 26; 40 Bom. 509 at 512; 39 Mad. 195, Foll.).

(b) *Madras Local Boards Act* (1920) *Ss.* 55 (2) (v), *Rr.* 10 (1), (2), (3) *and* 12 (2) (*Transitory rules*)—*Construction—Taluk Board—Nomination—Election of President—Validity.*

The term of office of all members of the Taluk Board as members shall under R. 10 expire on the date fixed by the notification made under the Act by the Local Government, but for the purpose of carrying on the executive functions of the Taluk Board, the President of the old Taluk Board continues in office as President until a President for the newly-constituted Taluk Board is elected. The notification under the new Act fixed 1st March 1922 as the date for the dissolution of the old Taluk Board and the President of the District Board under the powers vested in him appointed one *G*, the President of the old Taluk Board, to be a member of the Taluk Board to take effect from the 1st March 1922. The members of the newly-constituted Board elected on 15th March 1922, *G* as the President. On a petition to declare the election of *G*, as President

invalid on the ground that *G* was not qualified to be a member of the newly-constituted Taluk Board as his nomination to the same was ineffective under S. 55 (2), as he continued in office as President of the old Taluk Board till 15th March 1922, and as his term of office as member of the Taluk Board had not therefore expired on the 1st March 1922.

***Held*, that *G* ceased to be a member of the Taluk Board on the first March 1922, though he continued to exercise the duties of a President until the election of the new President and that the nomination of *G* as member of the new Taluk Board was valid ; and that the election of *G* as President was not vitiated on that ground.** (P. 194, Col. 1.)

S. Srinivasa Aiyangar, S. Muthiah Mudaliar, M. Krishna Bharati and K. Ramaswami Gounder—for the Petitioner.

T. R. Ramachandra Aiyar, A. Krishnaswami Aiyar, K. Periaswami Gounder and T. M. Krishnaswami Aiyar—for the Respondents.

KRISHNAN, J. :—These petitions arise in connection with the election of the President of the Taluk Board of Gopichetty Palayam under the new Madras Local Boards Act XIV of 1920. Petitioner before us, Mr. Ramaswami Gounder and one of the respondents Mr. Venkatesa Iyer were the rival candidates for the place. In the election on the 15th of March last, the date fixed for it, Mr. Gounder was declared duly elected. Thereupon an application O. P. No. 51 of 1922 was made to the District Judge of Coimbatore under S. 57 of the Act to have it declared that Mr Gounder was disqualified as a member under S. 55, Cl. (2) (v) and therefore unfit to be a President under S. 15, Cl. (1). On this petition the District Judge gave a declaration that Mr. Gounder was disqualified for appointment as a member. It may be mentioned that the date fixed for the new Taluk Board to come into existence in the notification under R. 9 of the Transitory Rules was the 1st March ; the elections and nominations were over by the 21st of February on which date the President of the District Board, Coimbatore, had nominated Mr. Gounder as a member of the new Board to take effect from the 1st of March. It is this nomination that the District Judge has held to be bad. Civ. Revn. Petn. No. 342 of 1922 and Civ. Mis. Pent. No. 1870 of 1922 are against the order in O. P. No. 51.

About the same time, two other members of the new Board filed O. P. No. 47 of 1922 making a number of allegations of corruption, fraud and other election offences against Mr. Gounder and prayed for an enquiry and asked that his election as President might be declared void and a re-election ordered. This petition was filed under the rules framed by the Government of Madras under S. 199 of the Act for the trial of election petitions and published in the *Fort St. George Gazette*, No. 650 dated 14th June 1921. The District Judge heard this petition and O. P. No. 51 together and without holding an enquiry on evidence held that, on his finding in O. P. No. 51 that Mr. Gounder was "ineligible to be a member of the re-constituted Taluk Board, his election to the Presidentship of that body became illegal" and made a declaration to that effect purporting to act under R. 11 (*c*) of the rules. He then proceeded to declare Mr. Iyer to have been duly elected as president without any opportunity being given to Mr. Gounder or to any others to attack his election on grounds of corruption, etc., which had been alleged by Mr. Gounder in his written statement. Civ. Revn. Petn. No. 341 of 1922 and Civ. Mis. Petn. No. 1869 of 1922 are filed against these orders.

There can be no doubt that the orders of the District Judge are wrong. The argument is put thus by him. Under R. 10 of the Transitory Rules Mr. Gounder continued as President till the new President was elected and took charge ; that must be after the 15th of March the date of election. Mr. Gounder must therefore be taken to have continued as a member of the Board as no one can be a President without being a member and that as S. 55, Cl. 2 (v) says :

> "A person who is already a member of the Local Board whose term of office will not expire before his fresh election or appointment can take effect is disqualified for election or appointment."

Mr. Gounder's nomination or appointment as member to take effect on the 1st of March was therefore illegal. The District Judge says, he ceased to be a member and his election as President was bad. Under what rule and when he ceased to be a member the Judge does not say. If the nomination is bad because Mr. Gounder was already a member he must be taken to have continued as member under his original right unless under

some rule or other his membership ceased. Loss of Presidentship does not carry with it loss of membership. No rule has been pointed out to us as having that effect, unless R. 10, Cl. (2) of the Transitory Rules is applied in which case his membership ceased on the 1st of March and his nomination was not obnoxious to S. 55, Cl. (2) (v).

The fact is the District Judge has misconstrued R. 10 altogether. Cl. (1) of it merely continues the Presidentship of the old President and not his membership, Cl. (2) deals with the office of member and makes it expire with the date fixed in the notification under R. 9. That clause applies in my opinion to the membership of all members including that of the President. No doubt the words "office of other members" are used in Cl. (2) but that, I think, is to distinguish the office of the President from the office of the members.

It is said that this view contravenes the rule that the President should be a member of the Board. As a matter of fact in this case Mr. Gounder was nominated a member as soon as his old membership ceased and there was no gap. But even if R. 10 contravenes the rule above stated, R. 10 must prevail under S. 238 of the Act.

The District Judge's view leads to the extraordinary result that no one who was a President of the old Board at the time of its reconstitution could stand as a candidate for the 1st Presidentship of the new Board; a result which I cannot accept that the Legislature intended without very clear language showing it.

If, as I hold, the District Judge was wrong in thinking that Mr. Gounder's nomination was bad, the whole basis of his judgment fails and his orders are all wrong. But it is argued for the respondents that we have no power to interfere with them in revision or by way of *writ of certiorari*, because it is said that the District Judge in disposing of these petitions was acting asa *persona designata* and not as a Court and was not subordinate to the High Court nor subject to its appellate jurisdiction as required by S. 115, Civil Procedure Code, and S 107 of the Government of India Act, to enable us to interfere. It was further contended that as orders under S. 57 and under R. 12 of the election rules are both declared to be final we cannot interfere and also that even if S. 115 or S. 107 applied to such proceedings as these, we should not interfere in the present case because there is no question of jurisdiction or material irregularity of procedure to justify our interference. It is also argued that a *writ of certiorari* will not lie both because the inquiry is not a judicial one and because there is no question of want of jurisdiction arising here. The petitioner argues to the contrary.

I shall consider these arguments first with reference to O. P. No. 47 of 1922 which was filed under the election rules. It seems clear from the rules that the District Judge and the Subordinate Judge are given jurisdiction under them not as mere *persona designata* but as the presiding officers of their respective Courts and they act as Courts in their enquiry into such petitions. R. 4, Cl. (3) expressly says that in certain cases the Judge may direct any *Court* subordinate to him to hold the enquiry. A District Judge or Subordinate Judge has no Court subordinate to him when acting as a *persona designata* but only when acting as the District Court or the Subordinate Court. This point seems to be strongly in favour of petitioner's contention. But this is not the only indication to show that the Judge acts as a Court in disposing of election petitions, for R. 6 makes the procedure for trial of suits under the Civil Procedure Code applicable to enquiries under election petitions as nearly as may be. Evidence is taken on oath and provision is made for hearing counsel. The Judge has finally to come to his decision between the parties judicially and not arbitrarily. All these to my mind support the view that the Judge acts as a Court.

The use of the term "Judge" instead of the term "Court" in the rules is, I think, not sufficient to imply that he acts as *persona designata* any more than the use of the word "Court" would necessarily imply the contrary; *see* the observations in *Minakshi* v. *Subramanya* (1) and *Municipality of Belgaum* v. *Rudrappa* (2). The words "enquiring authority" used in

1. (1888) 14 I. A. 160=11 Mad. 26.
2. (1916) 40 Bom. 509 at p. 512.

the rules to which also our attention was drawn by the respondents' Vakil are only used as a compendious way of referring to the District Judge or the Subordinate Judge who conducts the enquiry and no inference can be drawn from their use. I think the objection to our interference against the orders in O. P. No. 47 of 1922 on the ground of the Judge not acting as a Court fails.

The next question is whether the provision in R. 12, Cl. (3), that orders under Sub-Rr. 1 and 2 shall be final, is not a bar to the exercise of revisional powers. Full effect can be given to the provision by holding that it prevents interference with the order by way of appeal or by suit. When revisional powers are intended to be taken away, it has always been held that it must be done by express words to that effect. Finality can be attached only to orders passed with jurisdiction as those without jurisdiction are really nullities. The meaning of the word "final" has been considered in *Matangini Debi* v. *Girish Chunder Chongdar* (3) and the cases therein cited and also in *Valli Ammal* v. *The Corporation of Madras* (4) held not to exclude the High Court's powers of revision. Following these cases I hold that R. 12 (3) is not a "bar" to the exercise of our revisional powers.

The next question is whether we should decline to interfere on the ground that no question of jurisdiction arises. Before dealing with this point I shall consider the arguments with reference to O. P. No. 51 of 1922, as the order in it is made the basis of the orders in O. P. No. 47 by the District Judge.

The first contention in O. P. No. 51 also, is that the District Judge acted only as a *persona designata* and not as a Court under S. 57 of the Act. The question is more difficult to decide under the section than under the rules as the indications are not so clear. But on the whole I have come to the conclusion that there is no certain indication that the District Judge is to be treated merely as a *persona designata* under the section. He is the presiding Officer of an existing tribunal and jurisdiction is given to him in words which refer to the territorial jurisdiction conferred upon his Court. I have already held that the use of the word "Judge" instead of the word "Court" is inconclusive. Cl. 2 gives him the right to make such enquiries as he thinks fit but says nothing of the procedure to be adopted for them. I take it that, when he does make an enquiry, he will adopt the same procedure as for any other judicial enquiry in his Court, for otherwise he could not, merely as a *persona designata*, examine witnesses on oath. The principle stated in *National Telephone Company, Ltd.* v. *Postmaster-General* (5) that, when jurisdiction is given to a Court without defining the procedure to be followed, it will attract the ordinary procedure of that tribunal, will have to be applied. The enquiry may often be of a complicated kind as he has to determine under Ss. 55 and 56 questions such as whether a person is insane or interested in a contract with the Local Board or has ceased to reside within jurisdiction and so forth. Such an enquiry cannot be held satisfactorily without taking evidence on oath: But to do so the Judge must be acting as a Court and not as a mere nominated individual. It is true he can dispense with any enquiry if he deems fit; but that is inconclusive in deciding whether he acts as a Court or as a *persona designata*, for in either case he may be given that power though no enquiry may be necessary in some instances. He has further to give a decision between the parties as to whether the person concerned is disqualified from being a member under S. 55 or S. 56 of the Act or not. I take it he has to give his decision not arbitrarily but judicially, particularly as it is declared to be final in the section. These circumstances show to my mind that the District Judge is acting as a Court and not as a mere *persona designata* under S. 57 of the Act as well.

I shall now consider the authorities cited by the learned Vakil for the respondent in support of his contention. The first case he quoted is *Balaji Sakharam* v. *Merwanji Nowroji* (6). That was a case under the Bombay District Municipalities Act II of 1884. No doubt the learned Judges held that the District Judge in acting under S. 23 of the Act was not a Court and no revision lay against his

3. (1903) 30 Cal. 619.
4. (1915) 38 Mad. 41.
5. (1913) A. C. 546.
6. (1897) 21 Bom. 279.

order. There is, however, no discussion in the judgment, the learned Judges following a previous judgment of the same Court reported on page 87 of P. J. No. 1894. Turning to that case we find no discussion there either, the learned judges again following two of their previous unreported decisions in applications Nos. 127 of 1892 and 236 of 1889 which are not available for reference. The reasoning of the learned Judges for their conclusion is thus not known. But accepting their decision, it is clearly distinguishable from the present case, for there is a clear distinction between the language of S. 23 of the Act they were dealing with and that of S. 57 of the Local Boards Act though there is undoubtedly some similarity as well. The Bombay Act provides that for purposes of the enquiry the District Judge may exercise any of the powers of a Civil Court. This may well have been held to indicate that the District Judge when making the enquiry was not a Civil Court himself. Each case has to be judged on its own language and I am unable to treat the Bombay case which deals with a different Act as an authority for the present case.

The next case referred to is *Vijayaraghavalu Pillai* v. *Theagaroya Chetti* (7). This case arose under the rules framed by the Government under the City Municipal Act, (Mad.) Act III of 1904, whereby a Presidency Magistrate was to decide as to the competency of a candidate for a Municipal election. It was held that the Magistrate's order was passed by him as a "referee" between the President of the Corporation and the candidate and not as a Court. This case is again no authority in the present case as the language to be construed was not the same and the considerations that prevailed there do not arise here. On the other hand it was held in *Vasudeva Aiyar* v. *The Negapatam Devasthanam Committee*, (8) that an order of the District Court under S. 10 of the Religious Endowments Act was revisable by the High Court and this view was confirmed by the Privy Council in *Balakrishna Udayar* v. *Vasudeva Ayyar* (9). The authorities therefore do not conclude the case before us.

The answer to the argument based on the use of the word "final" in S. 57 is the same as in the case of election rules and need not be repeated. As I am holding that both in the case of S. 57 and in that of the election rules, jurisdiction is given to the District Judge as the District Court and is really a supplemental jurisdiction conferred on an existing tribunal and as the District Court is subordinate to the High Court and subject to its appellate jurisdiction, it is open to us to revise its orders both under S. 115, Civil Procedure Code and under S. 107 of the Government of India Act. It is not therefore necessary to consider the applications for the issue of *writ of certiorari*.

The last argument of the respondent is that there is no question of jurisdiction or irregular exercise of it in the present case to justify our interference. What happened in this case is that by an erroneous construction of R. 10 of the Transitory rules taken with S. 55, Cl. 2 (v) the District Judge assumed jurisdiction to declare the membership of Mr. Gounder as void and as a necessary consequence his presidentship also and he then went on to declare that Mr. Iyer was duly elected without giving any one an opportunity to show that his election was vitiated by the commission of election offences as alleged in the written statement of Mr. Gounder. That I am inclined to think amounts to acting with material irregularity or illegality in the exercise of his jurisdiction. To assume jurisdiction, to do a certain act by taking an erroneous view of law when there is really no jurisdiction, raises a case for interference under S. 115, Civil Procedure Code. *See* the observations in *Atchayya* v. *Sri Seetaramachandra Rao* (10). Mr. Justice Channel observes in *Reg* v. *Manchester Justices* (11):

> "It seems to me to be clear that a tribunal cannot give itself jurisdiction which it has not got by taking an erroneous view of the law."

I think the order on O. P. No. 51 falls within the rule and we must set it aside and C. R. P. No. 342 of 1922 is therefore allowed with costs here and in the Court below and O. P. No. 51 of 1922 is dismissed. As regards O. P. No 47 of 1922 it falls with O. P. No. 51, as the order in it is based on the order in

7. (1915) 38 Mad. 581.
8. (1915) 38 Mad. 594.
9. (1917) 40 Mad. 793=44 I. A. 261 (P. C.).
10. (1916) 39 Mad. 195.
11. (1899) 1 Q. B. 571 at p. 574.

the latter. There is further the material irregularity pointed out above. C. R. P. No. 341 must be allowed and the order on O. P. No. 47 of 1922 must be reversed and the petition remanded to the District Judge to be disposed of according to law on the merits. The costs of the petitioner in the High Court in that petition will be paid by respondents 1 and 2. The costs in it in the lower Court will abide and follow the result.

Civil Mis. Pents. Nos. 1869 and 1870 of 1922 are dismissed but without costs.

VENKATASUBBA RAO : J.,—The District Judge of Coimbatore has set aside the appointment of Mr. Ramaswami Gounder as a member of the Taluk Board of Gopichetti Palayam and has further declared his election as the President of the Taluk Board illegal and the District Judge has made a further order declaring Mr. Venkatesa Aiyar to have been duly elected President of the Taluk Board. The propriety of these orders is questioned by Mr. Ramaswami Gounder before us.

Before entering on a discussion of the questions of law raised, I may briefly state the facts that led to the passing of the above orders.

Under the Madras Local Boards Act, 1920, the Local Government is required to fix by notification the date on which the first re-constituted Taluk Board in any taluk shall come into existence. Accordingly by a notification, dated 3rd January 1922, the re-constituted Taluk Board of Gopichetti Palayam was brought into existence with effect from the 1st March 1922. Under R. 10 of Sch. 10 to the Act the term of office of the members of the Taluk Board holding office at the commencement of the Act would, subject to an exception presently to be noticed, expire on the date fixed in the notification, *viz.*, 1st March 1922. Contemporaneously with the expiration of the terms of office of the old members, the members elected or appointed under the Act for the first time were to assume office as the members of the re-constituted Taluk Board (*See* R. 9 of Sch. 10). The result is that there is no interval of time between the going out of the old members and the coming in of the new members. To achieve this object it is further provided that the President of the District Board shall in respect of the Taluk Board in his jurisdiction make appointments and cause arrangements to be made for election of members, so that the newly-appointed or elected members may come into office on the date specified in the notification (*See* R. 12 (ii), Sch. 10). The elections and appointments were accordingly completed by the 21st February, 1922 and Mr. Ramaswami Gounder was under S. 9 (*b*) of the Act appointed a member of the Taluk Board by the President of the District Board. Under R. 12 (iii) of Sch. 10 on the first re-constitution of the Taluk Board or as soon as may be after such re-constitution, a meeting should be held at a time to be fixed by the President of the District Board for the election of the President of the re-constituted Taluk Board. In pursuance of this provision the 15th March 1922 was fixed for the election of the President, Mr. Ramaswami Gounder and Mr. Venkatesa Aiyar being the candidates that stood for election. The election was held and Mr. Ramaswami Gounder was elected President.

Two petitions were filed before the District Judge of Coimbatore, O. P. No. 47 of 1922 and O. P. No. 51 of 1922. In O. P. No. 47 of 1922 two of the elected members of the Taluk Board Muthu Velappa Gounder and Kaliana Gounder called into question the election of Mr. Ramaswami Gounder as president and joined as respondents to that petition Mr. Ramaswami Gounder and Mr. Venkatesa Aiyar. This petition was filed under S. 199 (*c*) of the Act and under the rules made under that section in respect of the conduct of inquiries, etc., relating to elections.

O. P. No. 51 was filed by Srinivasan Chettiar questioning the appointment of Mr. Ramaswami Gounder as a member of the Taluk Board and to that petition the latter alone was made a respondent. This petition was filed under S. 57 of the Act.

The District Judge dealt with O. P. No. 51 and came to the conclusion that Mr. Ramaswami Gounder's appointment as a member was invalid and set aside the said appointment.

Before dealing with the grounds of the District Judge's decision it must be noted that Mr. Ramaswami Gounder had been

a member and the President of the Taluk Board constituted under the old Act. I shall first refer to the provisions of the Act on a construction of which the District Judge has come to this conclusion.

S. 55, so far as it is relevant to the present purpose is in the following terms:

"A person shall be disqualified for appointment as a member of the Local Board if such person is at the date of appointment already a member of the Local Board whose terms of office will not expire before his appointment can take effect.

R. 10 (1), (2), (3) of Sch. X (Transitory Provisions) runs thus: (1) The term of office of the President of a Taluk Board holding office at the commencement of this Act shall extend until a new President elected or appointed under R. 12 (3), assumes office.

(2) The term of office of the other members of a Taluk Board holding office at the commencement of this Act shall expire on the date fixed in the notification under R. 9.

(3) Such President and members shall during the period specified in Sub-Rr. 1 and 2 have all the powers and be subject to all the duties of the President and members respectively of a Taluk Board under this Act."

The District Judge has held that under R. 10 (1) the term of office as member of Mr. Ramaswami Gounder became extended and that, as on the date his appointment could take effect he was already a member of the Local Board, he was disqualified to be appointed a member of the new Board under S. 55 (5).

It seems to me that this decision is clearly wrong. On a reading of R. 10 (1) and (2) together, the intention of the Legislature appears to be that the term of office of all the members as members should expire but that the term of office of the President as President should extend for a further period. The object of this exception in favour of the President is obvious. On the date fixed in the notification, the new Taluk Board comes into existence, the old members go out and new members assume office, but there is bound to be an interval of time between the coming into existence of the re-constituted Board and the election of the President. The interval in this case happened to be a fortnight.

It is necessary that the executive work of the Taluk Board should be carried on without a break and for this contingency a provision was inserted that the President of the old Taluk Board should continue to be the President until the new President elected or appointed should assume office. The rules in Sch. 10 are termed "Transitory Provisions" and are made under S. 238 of the Act which occurs in the chapter headed "Transitional and Transitory Provisions." These provisions and rules were enacted to meet difficulties that may arise in connection with the first constitution of the Boards. As it was felt that the continuance of the President was essential, a special rule was made extending his term of office. It does not follow that, because his term of office as President was extended, his term of office as a member was also necessarily extended. As a matter of fact there is no need to do so and it would be contrary to the intention of the Legislature that the President whose term of office was extended necessarily also continued to be a member. It is true that R. 10 (1) and (2) could have been more skilfully drafted, but I think on a reasonable construction of the terms of these provisions, no other conclusion than what I have stated above is possible. The District Judge's reason for rejecting this construction is that both under the old and the new Act, only a member can be appointed or elected as a President and no person can be a President unless he is also a member and the District Judge refers to Ss. 15 and 22 (2) of the old Acts and Ss. 12 (2) and 15 of the new Act. In adopting this line of argument the District Judge seems to have ignored S. 238 of the Act which is as follows:

"In their application to the members and presidents of the Local Boards in office on the date of commencement of this Act and the first re-constitution of such Boards in accordance with this Act, the provisions of this Act shall be read subject to the rules contained in Sch. X."

From this section it is clear that in the transitional stage there may be a President of the Taluk Board who is not a member thereof. It therefore seems to me, both on a consideration of the principles underlying the transitory provisions and of the construction of the various sections and rules referred to above, that the office of Mr. Gounder as member of the Taluk Board did expire on the 1st March 1922 and that only his term of office as president was extended for a further period.

If the view of the District Judge were correct it would follow that the President

of the old Taluk Board would be disqualified to be a member of the re-constituted Board; that is to say, the person who occupied the most important position in regard to the Taluk Board which became dissolved would by reason of the very fact that he occupied that important position, be placed under a disability and would be prevented from being even a member of the Taluk Board. This result would be preposterous and the Courts would not adopt a construction which would lead to such a result unless driven to do so by the plain language of the provisions of the Act.

I am therefore clearly of opinion that the appointment of Ramasami Gounder as a member was valid and the order passed in O. P. No. 51 of 1922 by the District Judge declaring the appointment invalid is wrong.

As I observed, the District Judge had before him two petitions, 51 of 1922 challenging Mr. Gounder's appointment as a member and 47 of 1922 disputing his election as President. O. P. No. 51 of 1922 was filed under S. 57 which deals with the disqualifications specified in Ss. 55 and 56. But S. 57 is confined in terms to objections to election or appointment as member and therefore, although the petition contained a prayer for setting aside the election of Mr. Gounder's as President on the ground that the validity of his election as President was dependent on the validity of his appointment as a member, the District Judge rightly decided that he could not in that petition adjudicate on the validity of Mr. Gounder's election as President. O. P. No. 47 of 1922 was an election petition presented under the rules made under S. 199 for the decision of election disputes challenging the election of Mr. Gounder as President and it contained various charges of corruption, etc., of which he was alleged to be guilty but did not allege that his election as President was invalid because he was not validly appointed a member. The District Judge having decided in O. P. No. 51 of 1922 that Mr. Gounder's appointment as member was invalid, recorded a decision in O. P. No. 47 of 1922 that his election as President was invalid because he was not a validly appointed member. In other words the District Judge considered it unnecessary to enquire into any of the allegations made in O. P. No. 47 of 1922 and decided against the validity of the election of Mr. Gounder as President solely on a ground not taken in the said petition but taken only in O. P. No 51 of 1922.

It has been argued before us that the District Judge was in error in having in these circumstances set aside the election of Mr. Gounder as President and I am of the opinion that this argument is sound.

Exception is taken to the orders of the Judge on another ground which seems to me to be a very substantial ground. As I have already pointed out in O. P. No. 47 of 1922 both Mr. Ramasami Gounder and Mr. Venkatesa Aiyar were respondents, but relief that was asked, was merely that the election of Mr. Gounder as President of the Taluk Board should be declared void and a re-election ordered. In the written statement of Mr. Gounder it was alleged:

"The 2nd respondent and his supporters have committed various corrupt and illegal acts in connection with this election and are guilty of such acts but it is not necessary to detail them here as the petition is not for declaring the 2nd respondent as duly elected."

The District Judge however declares by his order that the 2nd respondent Mr. Venkatesa Aiyar had been duly elected President of the Taluk Board. In so doing the District Judge has contravened the very clear provisions of the rules made under S. 199 (2) (*c*) referred to above. R. 9 says:

"Where at any enquiry into an election petition any candidate other than the returned candidate claims the seat for himself, the returned candidate or any other candidate to the proceeding may give evidence to prove that the election of such candidate would have been void if he had been the returned candidate and a petition had been presented complaining of his election."

R. 3 is in these terms:

"The petitioner may if he so desires in addition to calling in question the election of the returned candidate, claim a declaration that he himself or any other candidate has been duly elected."

It is clear that no such declaration was asked for in the petition and from the papers before us, it does not appear that Mr. Venkatesa Aiyar claimed the seat for himself. In any event Mr. Gounder had a right to adduce evidence in support of the allegations of corruption. etc., made by

him against Mr. Venkatesa Aiyar and without giving the former an opportunity to adduce such evidence, the District Judge has made a declaration, that the latter was duly elected.

The District Judge disposes of the matter in these words:

"There will be some justification for ordering a fresh election if the 2nd respondent had been able to get only a few votes as against the 1st respondent. A fresh election means a delay and I should think that the 2nd respondent should have the benefit of his fairly large number of votes at the election of the 15th March."

This ground is utterly untenable and the order of the District Judge on this point is wrong.

To sum up I hold;

(1) That the District Judge's view of the law is wrong and that by taking a wrong view he declared Mr. Gounder's appointment as member and election as the President invalid and gave a further declaration that Mr. Venkatesa Aiyar was the duly-elected President. His decision is tantamount to removing Mr. Gounder from membership and from his office as President, and restraining him from acting as member or President and in addition directing the Taluk Board to accept Mr. Venkatesa Aiyar as the President.

(2) That the District Judge acted with material irregularity, if not illegally in adjudicating in O. P. No. 47 of 1922 that Mr. Gounder's election as President was invalid on a ground not taken in that petition.

(3) That the District Judge acted in contravention of the plain provisions of the rules relating to trial of election-petitions by declaring, without enquiry into the allegations of corruption, etc., urged against Mr. Venkatesa Aiyar, that the latter was validly elected as the President.

With these observations I shall proceed to consider the next question that has been argued before us namely, are we justified in interfering with the orders of the District Judge in the exercise of our revisional powers?

S. 115, Civil Procedure Code, is in the following terms:

"The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such Subordinate Court appears,

(*a*) to have exercised a jurisdiction not vested in it by law, or

(*b*) to have failed to exercise a jurisdiction so vested, or

(*c*) to have acted in the exercise of its jurisdiction illegally or with material irregularity: the High Court may make such order in the case as it thinks fit."

There can be no doubt that the District Judge acted with material irregularity under Cl. (*c*) above in setting aside the election of Mr. Ramasami Gounder in O. P. No. 51 of 1922 on a ground not taken in the petition and in declaring Mr. Venkatesa Aiyar to have been duly elected in contravention of the rules pertaining to the conduct of election-petitions. Even if the words "with material irregularity," should be held to refer to "faults of procedure" as held by Jenkins, C. J., in *Sheo Prosad* v. *Ram Chunder* (12) and the word "procedure" should be understood in the language of Rankin, J., in *Hindley* v. *Joynarain Marwan* (13) in the restricted sense of "method of conducting a case," still, the irregularity committed by the District Judge would amount to "material irregularity" within S. 115, Cl. (*c*).

As regards the portion of the order of the District Judge which proceeds upon a misconstruction of the provision of the Local Boards Act including the Transitory provisions, I am also of the opinion that we have power to deal with it under either Cl. (*a*) or Cl. (*c*) of S. 115. In regard to the scope of these clauses there has been an almost irreconcilable divergence of judicial opinion. I may instance the cases of *In the matter of Sheoraj Nanda Singh* v. *Gopal Suran Narain Singh* (14) and, *Sheo Prosad* v. *Ram Chunder* (12). In the former a certain property was attached in the hands of the petitioner before the High Court on the ground that he had become a trustee for the judgment-debtor by virtue of a certain alleged agreement. The petitioner preferred a claim and the Subordinate Judge rejected it and he thereupon applied to the High Court to set aside the order of the Subordinate Judge. It was contended on behalf of the decree-holder that the order of the Sub-

12. (1914) 41 Cal. 323.
13. (1919) 46 Cal. 962 at p. 971.
14. (1891) 18 Cal. 290.

ordinate Judge was not made without jurisdiction. The ground of the decision of the Subordinate Judge was that the petitioner had agreed to pay the decree-debt by the document which transferred the property to him and in consequence thereof he became a trustee of the property for the judgment-debtor and therefore the property was liable to attachment in the petitioner's hands. It will thus be seen that the Subordinate Judge in disallowing the claim proceeded upon a wrong view of the law. The High Court (Sir Comer Petheram, C. J. and Amir Ali, J.) however held that they had power to interfere with this order in revision. In the latter, that is in *Sheo Prosad* v. *Ram Chunder* (12) an application (under S. 41 of the Presidency Small Cause Courts Act) for the recovery of possession of certain immoveable property was refused by the Presidency Small Cause Court on the ground that the relationship of landlord and tenant had not been established. Fletcher, J., to whom an application was made by the landlord under S. 115 of the Civil Procedure Code, to set aside the judgment of the Small Cause Court, holding that "it is quite impossible to understand what the learned Judge (of the Small Cause Court) means when he says that the plaintiff is not entitled to evict the defendant because the lease to the plaintiff does contain a covenant authorizing him to do so" interfered with the judgment in question and directed that it should be set aside. On appeal from the judgment of Fletcher, J., Jenkins, C. J., and Woodroffe, J., came to the conclusion that the exercise of revisional powers on the part of the High Court was not justified as the Small Cause Court was entitled to come to the conclusion to which it did, even though the conclusion was erroneous and if it did come to that conclusion it could not be said that the Court had failed to exercise the jurisdiction vested in it by law.

It may be interesting to note that in the former of the two cases referred to above, that is. In the matter of *Sheoraj Nandan Singh* v. *Gopal Suran Narain Singh*, (14) Petheram, C.J. and Amir Ali, J., while being in agreement as regards the decision to be given in the case, differ in respect of the grounds upon which their respective decisions were based. Patheram, C. J., says:

"It seems to us that the Subordinate Judge was acting beyond his jurisdiction in directing that this property which belongs to a person other than the judgment-debtor should be attached and sold".

[thus acting under Cl. (*a*) of S. 115 whereas Amir Ali, J., acts under Cl. (*c*) for he observes:

"I am clearly of opinion that the lower Court has acted illegally and with material irregularity in the exercise of its jurisdiction in directing execution to issue against the properties held by the petitioner".

A mere error of law does not justify interference in revision for, as observed in *Amir Hassan* v. *Sheo Baksha* (15), a Court may have jurisdiction to make an order which in fact or in law is wrong. But no Court can act illegally, although it is very difficult to say when merely an error of law has been committed or when the Court has acted illegally. There being as I observed a conflict of opinion in the statement of the principles on this subject it seems to me that I may usefully examine the facts of some of the cases binding upon us with reference to the decisions given in those cases. In *Manisha Eradi* v. *Siyali Koya* (16) the Court consisting of five Judges unanimously came to the conclusion that the High Court had power in revision to set aside the decree of a Small Cause Court which had jurisdiction to entertain suits for rent only where the claim is founded on a contract when it erroneously assumed that a sub-tenant by entering on lease became liable by an implied contract to pay the rent and passed on that footing a decree against the sub-tenant. In *Balakrishna Udayar* v. *Vasudeva Ayyar* (9) this question had to be considered. The facts were as follows: Under S. 10 of the Religious Endowments Act if a vacancy occurring among the members of the Committee is not filled up by election within three months after it has occurred, the Civil Court may appoint a person to fill up the vacancy or may order that the vacancy be filled up by the remaining members of the Committee. After the period of three months mentioned in the section was over in pursuance of an order made by the District Court an election was held by the remaining members of the Committee, a certain person was declared duly elected and the District Judge

15. (1885) 11 Cal. 6=11 I. A. 237 (P.C.).
16. (1888) 11 Mad. 220 (F.B.).

accepted him as a member of the Committee on the ground that upon the true construction of S. 10 the remaining members of the Committee should hold an election and the vacancy should be filled up in that way. The Privy Council agreeing with the High Court held that this construction of the section was wrong, that it was not competent to the remaining members to fill up the vacancy by means of an election and that the terms of the section did not warrant the course adopted by the District Judge. It will be noticed that the District Judge had jurisdiction in the ordinary sense, that is a jurisdiction, local, pecuniary, personal or with reference to the subject-matter of the suit (*See* judgment of Woodroffe, J. in *Sheo Prosad* v. *Ram Chunder* (12). If the jurisdiction therefore means merely propriety of forum, the District Judge had certainly jurisdiction to deal with the matter that arose before him under the Religious Endowments Act. But as their Lordships of the Privy Council set aside the order of the District Judge as made without jurisdiction, it cannot be said that they were using the word "jurisdiction" in the narrower sense referred to above. The same question again arose for decision in *Sundaram* v. *Mama Rauthar* (17). The lower Courts held that the judgment-debtor, who after the Court sale, had transferred his interest in the property sold in execution of a decree, had no *locus standi* to apply under O. XXI, R. 89, and rejected his application. Against this decision the judgment-debtor filed a revision petition to the High Court. The Full Bench held that the judgment-debtor retained sufficient interest to entitle him to apply under the rule. In regard to the point whether any question of jurisdiction was involved, they answer the reference in the affirmative, following *Balakrishna Udayar* v. *Vasudeva Ayyar* (9).

In the above cases referred to by me the error of law committed by the lower Courts was held to have affected their jurisdiction. On the authority of these decisions the proper conclusion in my opinion seems to be that the order of the District Judge made in O. P. No. 51 of 1922 also comes within the scope of S. 115 of the Civil Procedure Code.

17. (1921) 44 Mad. 554=40 M. L. J. 497 (F.B.)

It has next been argued before us on behalf of Mr. Venkatesa Aiyar that the District Judge exercised his powers under the Act not as a Court of law but merely as a *persona designata* whose decisions are not to be treated as the judgments of a legal tribunal and the High Court cannot therefore interfere with the orders of the District Judge in revision. Whether the District Judge is a Court or not must be determined on a consideration of the language of the various provisions which define his powers, his duties and the procedure to be followed by him. The presumption is, when any existing tribunal is given a right to determine certain matters, that tribunal is to determine such matters as a Court. The party who contends that the matters referred to the tribunal were not referred to it as a Court of law must make good that position by referring to the various sections which establish that his contention is correct. This point was expressly decided by the House of Lords in *National Telephone Company Limited* v. *Postmaster-General* (5). Lord Parker of Waddington observes that where by a statute matters are referred to the determination of a Court with no further provision, the necessary implication is that the Court will determine the matters as a Court. It is pointed out in the judgments that the jurisdiction of such a tribunal is enlarged, but all the incidents of such jurisdiction, including the right of appeal from its decision, remain the same.

Balakrishna Udayar v. *Vasudeva Ayyar* (9) to which I referred above in another connection is also an authority upon this point. It was contended in that case that the order of the District Judge which was under consideration was not a judicial but merely an administrative or ministerial act. That contention was based upon an argument that the Civil Court exercised its powers not as a Court of law but merely as a *persona designata*. Their Lordships of the Privy Council after examining the language of the various sections of the Religious Endowments Act overruled that contention. The decision of the Privy Council affirms the judgment of the High Court in the same case reported in *Vasudeva Aiyar* v. *The Negapatam Devasthanam Committee* (8). Sir Arnold White, C.J., in dealing with

this question refers to certain sections of the Religious Endowments Act and arrives at the conclusion that in regard to those sections the District Judge undoubtedly exercises judicial functions as a Civil Court and not as a *persona designata* and he then observes :

"It seems to me it would be inconvenient if for certain purposes the District Judge is a Civil Court exercising judicial functions under the Act and for other purposes under the Act is a *persona designata* not exercising judicial functions."

These observations apply with great force to the present case. No doubt an application may be made to the District Judge under S. 57 for an enquiry in respect of the allegations of disqualification arising under S. 55 or S. 56. But this is merely an enabling provision because the right of the applicant to call in question an election on any of the grounds specified in Ss. 55 and 56 by an election-petition under the rules remains unaffected. The first rule runs as follows :

"Save as provided in S. 57 of the Madras Local Boards Act, 1920, no election held * * * * shall be called in question except by an election-petition presented in accordance with these rules."

The result is that the party considering himself aggrieved may at his option, apply under S. 57 or present an election-petition. If in dealing with an election-petition the District Judge acts as a Court and not as a *persona designata*, it would be indeed very inconvenient in the words of Sir Arnold White, C. J., if for certain purposes the District Judge is a Court and for certain other purposes he is a *persona designata*. The indications are perfectly clear that when dealing with election-petitions he acts as a Court and if this position is correct, in my opinion, it follows that he acts as a Court even when he deals with applications under S. 58. The rules provide that a petition if presented to the District or Subordinate Judge having jurisdiction, the petition shall be signed and verified in the manner prescribed in the Code of Civil Procedure. If the provisions are not complied with, it is the District or the Subordinate Judge that is to dismiss the petition. It is further provided that the District or Subordinate Judge may direct any Court subordinate to him to hold an enquiry. R. 6 provides that every election-petition shall be enquired into as nearly as may be in accordance with the procedure applicable under the Code of Civil Procedure to the trial of suits. It is also provided that at an enquiry, the Local Board concerned may appoint a legal practitioner to attend the enquiry and take such part therein as the enquiring authority may allow. I think what I have stated is sufficient to show that the Legislature intended that the District Judge should determine questions referred to him in his capacity as a Court.

The cases cited for the respondent do not have much bearing on the matter as they turn upon the language of other Acts, but I may observe in regard to *Vijiaraghavulu Pillai* v. *Theagaroya Chetti*, (7) on which reliance was placed that it was decided before the decision by the Privy Council reported in *Balakrishna Udayar* v. *Vasudeva Ayyar* (9). The decision of the High Court which was then under appeal to the Privy Council was cited to the learned Judges and in their judgment they state that they were informed that that decision was under appeal to His Majesty in Council. I therefore hold that the District Judge was acting as a Court and not as a *persona designata* and that his decisions can be revised by the High Court in the exercise of its powers of revision.

There remains one more argument to be dealt with. On behalf of the respondent, it was argued that under R. 12 (3) of the rules made for the conduct of election enquiries, as well as under S. 57 (2) of the Act, the decision of the District Judge or other enquiring authority is said to be final, and that therefore the decisions in question are not open to revision. In *Matangini Debi* v. *Girish Chunder Chongdar*, (3) it was pointed out that when a section says that a certain order shall be final it only means and intends that it shall not be open to appeal and that the intention is not to make the order absolutely final so as to make it not open to revision. Observations to a similar effect occur also in the judgment in *Valli Ammal* v. *The Corporation of Madras* (4). I reject the contention and hold that the orders of the District Judge are liable to be revised by the High Court.

For these reasons I agree in the conclusion arrived at and in the orders proposed by my learned brother.

Case remanded.

1923 Madras. 204

VENKATASUBBA RAO, J.

Konammal and another ... Petitioners.

v.

Annadana Jadaya Goundan ... Respondents.

Civ. Mis. Pet. No. 642 of 1922 dated 19th April 1922.

Civil P. C., O. XLI, R. 10—Security for costs—Appellant's poverty.

What the appellant, in order to succeed, is bound to show is that mere want of means is a sufficient ground for dispensing with security. Whether circumstances exist which would entitle the respondent to relief under the provision, is a question to be decided with reference to the facts of each case and one of the circumstances entitling the respondent to relief is stated to be non-payment of the costs incurred in the lower Court. (1886) 8 All. 203; (1896) 2 Q. B. 375 Foll.

A. Krishnaswami Aiyar and M. S. Venkatarama Raju—for the Appellant.

T. M. Krishnaswami Iyer—for the Respondents.

ORDER :—This is an application by the respondents (in the appeal) that the appellant should be directed to give security for the costs already incurred and the costs which are likely to be incurred. On behalf of the appellants the chief fact that has been relied upon in resisting the application is his poverty. Mr. T. M. Krishnaswamy Iyer has argued that in view of the fact that his client is not in a position to pay the costs that have been incurred, no order should be made directing him to give security, as such an order would practically have the effect of putting an end to the appeal. Various cases have been cited which have attempted to interpret O. XLI, R. 10 and the corresponding provision in the Civil Procedure Code of 1882. But I do not think any decision that has been cited to me has laid down any hard and fast rule in regard to the exercise of judicial discretion. Reference has been made to the corresponding provision of the Supreme Court Rules, and a good deal of argument has been based upon the wording of that rule. O. LVIII, R. 15 of the Supreme Court Rules directs that "the deposit or other security for the costs to be occasioned by an appeal should be made or given as may be directed under special circumstances by the Court of Appeal." It will be seen that the Courts in India have even wider power than the Court of Appeal in England. No reference to special circumstances is made in O. XLI, R. 10. The reason for the rule in England has been very clearly stated in the judgment of Lord Justice Lush in *Harlock* v. *Ashberry* (1). He observes: "In the Court of Chancery it was the practice to require security to a certain amount for the costs of an appeal to be given in every case. That was not the practice in the Courts of Common Law: there poverty alone was not considered a sufficient reason for requiring security to be given." Referring to the rule under the Judicature Act he proceeds to say, "This was intended to alter the whole practice both of the Court of Chancery and of the Courts of Common Law, and to leave it in the discretion of the Court whether security should be given under special circumstances. I understand that it has been the practice to hold that poverty or inability to pay the costs of the appeal if it should be unsuccessful is a special circumstance." The argument of Mr. T. M. Krishnaswamy Iyer is that this rule has never been adopted by the Indian Courts and therefore poverty should not be held to be a special circumstance which would entitle a respondent to an order under O. XLI, R. 10. Even under the Judicature Act the English Courts have not invariably said that poverty by itself would be a sufficient ground for an order directing security to be given. In *Hood Barrs* v. *Heriot* (2) Lord Esher M. R. while stating that poverty would be a special circumstance adds, "There is no authority which shows that the Court is in any case obliged as a matter of law to make an order that security shall be given for the costs of an appeal. It is a matter absolutely in the discretion of the Court. Where the liberty of the appellant is in question, or where highly penal consequences will be entailed upon the appellant by the order appealed against so far from thinking that the Court is bound in any case to make an order for security of costs, I think as a general rule the Court would not do so."

Cockburn, C. J., takes a similar view in *Usil* v. *Brearley* (3) where an appellant was ordered to give security for the costs of the appeal. The learned Chief Justice

1. 19 Ch. Dn. 84.
2. (1896) 2 Q. B. 375.
3. 3 C. P. D. 206.

makes the following observation: "If the Court were of opinion that the plaintiff had any reasonable ground for going on with his action, they should not allow mere poverty to stand in the way of his appeal. But we are justified in looking at the peculiar circumstances of the case. * * * * * We may fairly take into consideration the character of the action and the question involved—and we cannot help noticing that it was a vexatious proceeding on the part of the plaintiff to bring three actions, all for the same cause of complaint, at the same time, when one would have been sufficient for his purpose."

In *Ex parte Isaacs*, (4) Bret, L.J., refers to the extreme poverty of the appellant as a special circumstance; and In Re *Ivory, Khankin* v. *Turner* (5) Cotton L. J., observes that the insolvency of an appellant is *prima facie* a sufficient reason for ordering him to give security though in some cases the Court may not order him to do so.

Earl Cairns, L.C., in the same case makes the following observations: "It is not necessary to decide, and I do not wish to decide what does not arise, whether in every case where the appellant is a pauper the Court will require a security for costs; but, certainly where a pauper comes forward to engage in such contest as this there are special circumstances which will induce the Court of appeal to order him to give security."

I understand the rule under the Judicature Act thus: In special circumstances, the Court may direct security to be given, but the Court is not bound to do so. The words in the rule are "as may be directed." These indicate that the Court has a discretion to refuse to order security even if poverty on the part of the appellant is made out. In the case already cited (1896) 2 Q. B. 376, Lord Esher, M. R., arrives at this conclusion; and to my mind it appears to be, if I may say with respect, the right construction of the rule under the Judicature Act.

It may be observed however that the respondent does not urge that the appellant's poverty is a special circumstance which must induce me to make the order. On the contrary the appellant relies on his own poverty as a defence to the application. In my opinion what the appellant in order to succeed is bound to show is that mere want of means is a sufficient ground for dispensing with security, I do not think that any case has gone that length. On the other hand, whether circumstances exist which would entitle the respondent to relief under the provision, is a question to be decided with reference to the facts of each case and one of the circumstances entitling the respondent to relief is stated to be non-payment of the costs incurred in the lower Court. There is nothing in *Jiwan Ali Beg* v. *Basa Mal* (6) which is a decision of Full Bench of the Allahabad High Court which is inconsistent with what I have said. Mr. Justice Straight who referred for the decision of the Full Bench the question whether poverty alone would entitle the respondent to an order in his favour, states at page 204: "It has been ruled on three occasions in this Court—twice by myself and once by Mr. Justice Mahmood—that mere poverty alone is not a sufficient ground for requiring security for costs from an appellant, and I have certainly been under the impression that that was the recognised rule in the English Courts, which also has been followed by the Bombay High Court. Mr. Hill has, however, called my attention to two rulings of the Court of Appeal in England, which seem at least to modify the old decisions, and to show that poverty or insolvency is a good ground for requiring security for costs from the appellant. As the question is one of practice, and of considerable importance to those engaged in appeals in this Court, I refer it to the Full Bench for determination." I observe that four of the five Judges who composed the Full Bench gave an answer in very guarded terms because they say that "the mere fact of the poverty of an appellant standing by itself, and without reference to any of the general facts of the case under appeal, ought not to be considered sufficient alone to warrant his being required to furnish security for costs." Mr. Justice Tyrrell is even more cautious in the expression of his opinion.

With reference to these principles, I shall examine the facts of the case. It is unnecessary to refer in very great detail to the affidavits that have been filed. The facts are patent. Property of great value

4. 9 Ch. Dn. 271.
5. 10 Ch. Dn. 372.
6. (1886) 8 All. 203 (F. B.)

is involved in this litigation and the appellant has spent quite a considerable amount of money in the attempt to establish the title to the *jaghir* in question. Since the disposal of the suit, various applications have been made to the High Court and here again the appellant has incurred or must have incurred heavy expenses in relation to these proceedings and he has paid a large Court-fee upon his own appeal. The costs of the respondent awarded is after all a fraction of the costs that have been really incurred by him. The respondent has moreover taken every possible step to realise the amount from the appellant and he has been unable to recover the costs. It seems to me that in the circumstances the just order would be to direct that the appellant should give security for the costs that are likely to be incurred in the appeal. I am not prepared to direct security in regard to the costs already incurred. I shall fix the costs likely to be incurred in the appellate Court at Rs. 1,000 and direct the appellant to give security for that sum to the satisfaction of the lower Court within a week from the re-opening of that Court after the long vacation. If the appellant makes default, the appeal will be posted under O. XLI, R. 10 (2) for disposal.

1923 Madras. 206.

OLDFIELD AND DEVADOSS, JJ.

Ghulam Mohideen Quraishi Sahib. (Petitioner) Respondent.

v.

Ahamadulla Begum Sahiba ... (2nd Petitioner) Respondent.

Civ. Mis. Pet. No. 1030 of 1922 dated 26th October 1922, from the order of Dt. Judge, South Arcot, in O. P. No. 68 of 1921 dated 31st October 1921.

Criminal P. C., S. 195—Application for sanction—Legal representative cannot continue—Fresh application.

The Court is not entitled to grant the sanction to the legal representative on a petition presented by that representative's predecessor. It is no doubt open to the legal representative separately to apply for sanction if so advised.

L. S. Veeraraghava Aiyar—for the Petitioner.

S. Ranganatha Aiyar—for the Respondent.

ORDER :—The petitioner asks us to revoke the sanction granted by the District Court, South Arcot, for his prosecution for an offence punishable under S. 193 of the Indian Penal Code. Sanction was originally refused by the District Munsiff and was afterwards granted by the District Court. During the pendency of the proceedings in the District Court the original applicant for the sanction died and the application was continued by his widow, as his legal representative; and she is here to support the District Court's order.

The question, which it is necessary for us to decide is, whether a legal representative is in such circumstances entitled to continue an application originally made by her predecessor-in-interest. The general rule is that any person whatever can institute a complaint of an offence other than certain offences clearly specified in the Code, such as defamation. An offence under S. 193, Indian Penal Code, is not one of those excepted offences. There would therefore be no objection to an application for sanction by the legal representative of a person directly affected instead of that person himself; and that was the basis of the order of the District Judge. That however takes no account of another principle of equally general application, that criminal proceedings instituted by a private complainant abate on such person's death. It is not necessary to give authority in support of that principle. We may, however, point out that, when an exception is intended, as in the case of proceedings under S. 145, Criminal Procedure Code, such exception is specified clearly. We have not been shown that an application for sanction differs from other Criminal proceedings. It is suggested that an application for sanction is merely preliminary to the making of a substantive complaint and that is true; but, at the same time we must regard it as part of a Criminal proceeding, since there is no justification for holding that it is not an essential stage in one.

In these circumstances we cannot agree with the lower Court that it was entitled to grant the sanction to the legal representative on a petition presented by that representative's predecessor. We must therefore revoke the sanction granted. We add only that it is no doubt open to the legal representative herself to apply for sanction if so advised; and we express no opinion as to the prospects of such application.

Sanction revoked.

1923 Madras. 207.

COUTTS-TROTTER AND RAMESAM, JJ.

Kanakammal and others ...Defendants—Appellants.

v.

C. Baktavatsulu Naidu and another ...Plaintiffs—Respondents.

F. A. No. 101 of 1920 dated 5th May 1922 from the judgment of Seshagiri Aiyar, J. in C. S. No. 366 of 1919, dated 21st September 1920.

Hindu Law—Will — Bequest to a Hindu widow—Absolute or limited estate.

Where a Hindu testator, after providing for certain legacies and giving certain directions to the executors, stated in the Will: "the executors should deliver over the aforesaid my properties and cash and the other properties to my wife Kanchi Pushpammal after she attains the age of 20 years."

Held: the widow got an absolute estate in the residue of the testator's properties under the Will. Courts are not to presume that a testator who sat up to write a Will has not cared to say what is to become of the bulk of the property.

V. V. Srinivasa Aiyangar—for the Appellant.

T. Ethiraja Mudaliar—for the Respondents.

RAMESAM, J.:—The only point arising for decision in this appeal is the construction of the Will (dated 29th August, 1905) of Chennakesavulu Naidu, the last male owner who died on 4th September, 1905 leaving a widow and a daughter. It provides for certain legacies in favour of his sister and others (Cls. 12, 5 and 13). It directs that, until the widow attains proper age, the executors should pay for the domestic expenses of the widow and the daughter, Rupees twenty per month from the interest and the rents of the houses (Cl. 7) that if any special expenses require to be incurred for the daughter or the wife, the executors should consider what is proper and what is improper and should pay only what is proper (Cl. 11). Finally it provides,

"The executors should deliver over the aforesaid my properties and cash and the other properties to my wife Kanchi Pushpammal after she attains the age of twenty years."

this age being apparently what the testator meant by 'proper age' in Cl. 7. The executors took out probate in 1906 and delivered the properties to the widow in June, 1909. The daughter died in 1906 and the widow died in 1918 leaving another Will. The defendants claim as legatees under the latter Will. The plaintiff sues on the ground that the widow had, under her husband's Will, only the estate of a Hindu widow taking as an heir, that she was incompetent to dispose of it by her own Will and that he succeeds as reversioner. Seshagiri Aiyar, J., who heard the case on the Original Side held:

(1) that the Will of Chennakesavulu purported to dispose of all his interest in the property and there was no intestacy and (2) that the widow took only a life-estate. He decreed the plaintiff's suit.

The defendants appeal.

Before us, it was conceded by both sides that the learned Judge's judgment cannot be supported as it stands. The real issue is—"Was there a disposition of the residue of the property, after the payment of the legacies?"

If Cl. 14 is a clause disposing of the residue of the property to the widow, then, as there are in it no words cutting down her estate to a life-estate or a Hindu widow's estate she takes absolutely. A devise of an estate to *A* is *prima facie* a devise of an absolute estate. And there is no presumption that, where the devisee is a Hindu female, the estate is the limited estate of a Hindu widow, daughter or mother taking by inheritance. This has been the rule now well established in this Court, vide *Ramachandra Rao* v. *Ramachandra Rao* (1), following *Surajmani* v. *Rabi Nath Ojha* (2) to which Seshagiri Aiyar, J., was a party and in which all the cases were collected, and my judgment in *Soundararajan* v. *Natarajan* (3).

Consequently, the Vakil for the plaintiff-respondent while supporting the decree of the learned Judge, was driven to contend before us that the learned Judge erred in holding that there was no intestacy. He laid considerable stress on the word 'deliver' in Cl. 14 and contended that the object of the Will was to provide for the legacies only and that Cl. 14 is not a dispositive clause. According to him, the residue after the payment of the legacies was undisposed of; the testator's intention was that the widow should inherit the residue as heir and should take

1. (1919) 42 Mad. 283.
2. (1908) 30 All. 84=35 I. A. 17 (P. C.).
3. (1921) 44 Mad. 446.

only the widow's estate, the direction in the clause being merely to hand over the property to her in recognition of her title as heir of her husband. It will be at once noticed that this contention is inconsistent with the testator's desire to postpone the estate to be taken by his widow (whatever its nature may be) until she attained the age of 20 and with the provision in Cl. 11. If the clause merely postponed her estate till she attained majority, it would not be inconsistent with her title as heir, as such a clause may be regarded as a provision for management during her minority. But when it postponed her estate till she attained the age of 20, it is inconsistent with her succession as heir, on the death of the husband. On account of this difficulty, the Vakil for the respondent was also driven to contend that the Cl. 14 postponing the delivery of the residue to her until she attained the age of 20 was void and that she might have insisted on the delivery of the property earlier if she so wished. He also relied on *Mahomed Shamsool Hooda* v. *Shewakram* (4) for the proposition that a devise to a Hindu widow must be construed as a devise of a widow's estate only. As to this last case, it may at once be observed that the case is an authority only for the proposition that, where there is an ambiguity in a Will, it may be well to remember in construing it that a Hindu would desire to devise only the limited estate of a Hindu female taking as an heir. Though that case was cited before their Lordships of the Judicial Committee in *Surajmani* v. *Rabi Nath Ojha* (2) [followed in *Ramachandra Rao* v. *Ramachandra Rao* (1).] it was held by their Lordships that the devisee in the latter case took an absolute estate. If the effect of a deed of gift or of a Will, on its natural and proper construction, is *prima facie*, to give an absolute estate, I do not think the case in *Mahomed Shamsool Hooda* v. *Shewakram* (4) ought to be used for cutting down the estate to the limited estate of a Hindu female taking as an heir.

The question is thus reduced to whether Cl. 14 of the Will is a dispositive clause. It is at this stage that the principle that there is a presumption against intestacy comes to our aid. *Re Bright-Smith* v. *Bright-Smith* (5), *Re Harrison Turner* v. *Hellard* (6), *Re Salter, Farrant* v. *Carter* (7), *Re Henton, Henton* v. *Henton* (8). Courts are not to presume that a testator who sat up to write a Will, has not cared to say what is to become of the bulk of the property. In this case, it must be remembered that he refers to the residue of his property, in directing its being handed over to the widow, and yet, it is contended for the respondent, he does not dispose of it. I think this is not natural. If he was anxious that his wife should not be the absolute owner of the property, there was nothing to prevent him from saying so, instead of leaving it to be inferred from a too strict reading of the word 'deliver' with the result that his direction to postpone the estate till she attained the age of twenty becomes nugatory. A residuary clause ought to be easily inferred (*Vide* S. 89 of Indian Succession Act, Act X of 1865) which is applicable to Hindus by reason of the Hindu Wills Act (Act XXI of 1870).

I have only to notice two cases relied on by the learned Judge. *Radha Prasad Mullic* v. *Ranee Mani Dassee* (9): the terms of the Will in that case are so entirely different that it affords no guide in this. *Caralapathi Chunna Cunniah* v. *Cota Nammalwariah* (10): this case was decided at a time, when the trend of the Madras decisions against limiting a female's estate beginning with *Sambasiva Ayyar* v. *Venkateswara Ayyar* (11) was not well established. The conclusion of the learned Judges in that case was that there was no intestacy but that the widow did not take an absolute estate. I find it difficult to follow the learned Judge's statement at p. 92. Having said:

> "We cannot now apply this rule to cases to which S. 82 of the Succession Act applies,"

they proceed to say,

> "We can restrict the widow's interest therefore only if the other terms will justify such restriction."

There was no clause in that Will, actually cutting down the estate of the devisee to a limited estate. Yet no effect

4. 2 I. A. 7=22 W. R. 409. (P.C.).

5. (1886) 31 Ch. D. 314.
6. (1885) 30 Ch. D. 390.
7. (1881) 44 L. T. 603.
8. (1882) 30 W. R. 702.
9. (1908) 35 Cal. 896=35 I. A. 118 (P.C.).
10. (1910) 33 Mad. 91.
11. (1908) 31 Mad. 179.

was given to S. 82—a process I find it difficult to follow. In this case, the respondent's contention is rather that there was no disposition of the residue at all and the decision in *Sambasiva Ayyar* v. *Venkateswara Ayyar* (11) cannot be invoked in favour of the respondent.

I would therefore hold that, on a proper construction of Chennakesavulu's Will, his widow got an absolute estate in the residue. The appeal will be allowed and plaintiff's suit dismissed with costs throughout.

COUTTS-TROTTER, J.:—I agree.

Appeal allowed.

11. (1908) 31 Mad. 179.

1923 Madras. 209.

PHILIPS AND RAMESAM, JJ.

S. *Kandaswami Iyer and another* ... (Plaintiffs) Appellants.

v.

Siva Chithambaram Chettiar and another ... (Defendants) Respondents.

F. A. No. 170 of 1920 dated 21st April 1922, from the decree of the Sub. J., Trichinopoly, in C. S. No. 13 of 1915.

(a) *Hindu Law—Religious Endowment—Hereditary trustee—Deeds.*

From documents members of the family of Annavu were the persons who took the greatest interest in the *kattalais* and they were successively the trustees of the *kattalais* from 1816 to 1909 and there was nothing in the succession inconsistent with their being hereditary trustees.

Held : it was a proper inference to draw from the documents, that the members of the defendant's family were holding as hereditary trustees.

(P. 210, Col. 1.)

(b) *Religious Endowments Act, S. 3—Right of supervision over trustees by Devasthanam Committee.*

The word "religious endowment" in S. 3 covers the case of *kattalais* and unless the *kattalai* itself was such that its trustee was to be nominated by the Government or a Public Officer or the nomination was subject to the confirmation of the Government or a Public Officer, S. 3 could not apply to the *kattalais*.

Devasthanam Committee was held to have no right of supervision over the *kattalais*.

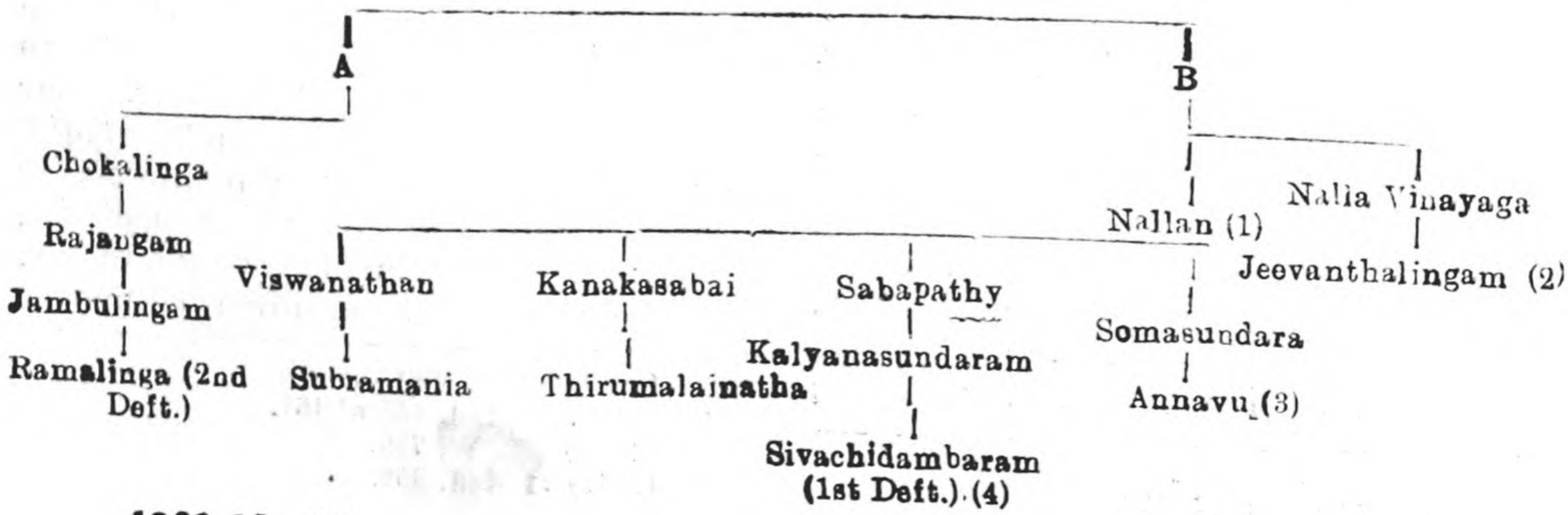
(P. 210, Col. 2.)

P. R. Ganapathi Aiyar and P.S. Venkatarama Aiyar—for the Appellants.

T. V. Muthukrishna Aiyar and N. Muthuswami Aiyar—for the Respondents.

RAMESAM, J.:—This appeal arises out of a suit brought by three plaintiffs, under S. 92, Civil Procedure Code, after obtaining sanction of the Advocate-General. It relates to certain *kattalais* in the temple of Sri Mulanadaswami of Poovalur within the Trichinopoly District. One Annavu Chetti was admittedly managing the *kattalais* till his death in December 1909. He left a Will (Ex. X dated 17th November 1893) by which he appointed the defendants to manage the *kattalais* besides leaving other directions. The present suit was instituted on the ground that the defendants are not legally constituted trustees of the suit *kattalais*. The Subordinate Judge finding that the defendants are the hereditary trustees and that the charges of misconduct alleged against them have not been made out, framed a scheme. The plaintiffs appeal.

The first and most important point that arises in the appeal is the subject of the 8th issue. On this issue, the plaintiffs' case is that the Vellan Chetti community were the founders of the *kattalais* and that they did not appoint Annavu as a trustee and that consequently neither Annavu nor defendants are lawful trustees. With the help of the oral evidence and Ex. (1) (a partition-deed) the following pedigree of the defendants' family may be constructed.



(It is suggested for the respondents that Nallan and Nalla Vinayagam are the same person. The suggestion is likely but is opposed to the evidence of D. W. 1. The point is not material). The earliest item of evidence that is available is that Nallan No. 1) purchased 4 acres of land in July 1816 and that the land was enjoyed by him on behalf of the *sayarakshai* and *ardhajamam kattalais* (*See* Ex. IV). The next document is Ex. II a *patta* issued in 1860 by the Collector of Trichinopoly to Jeevanathalinga Chetty "of the *sayarakshai* and *ardhajamam kattalais* of Sri Moolanathaswami." It is not clear to what *kattalais* Ex. D series relate and therefore they do not help us in this case. We then find a series of documents connected with Annavu ranging from 1865 to 1908 in many of which Annavu No. 3 was described as the *Kariyam* or agent of the *sayarakshai* and *ardhajamam kattalais* of Sri Moolanathaswami (*See* Ex. A dated 5—9—1877, A2 dated 28—11—'81, A3 Vd dated 26—1—'85. V2 dated 4—8—'80, A4 dated 2—4—'87 and A5 dated 17—5—1904). Ex. II is a *patta* issued "to Annavu Chetty for Sri Moolanathaswami" by the Collector of Trichinopoly in 1878. It is a fair inference from these documents that members of the family of Annavu were the persons who took the greatest interest in the *kattalais* and they were successively the trustees of the *kattalais* from 1816 to 1909 and as there is nothing in the succession inconsistent with their being hereditary trustees, I think it is a proper inference to draw from these documents, that the members of the defendant's family were holding as hereditary trustees *Ramadoss* v. *Hanumantha Rao* (1). The recitals in Ex. X also seems to support this inference, but as it is objected that they are not legal evidence (*Bansi Singh* v. *Mir Amir Ali* (2)) I prefer not to rely on them. Neither Ex. VIII nor Ex. D. series nor the incident deposed to by P. W's. 1, 2, 4, and 5 relating to an assembly of the Vellan Chettis consequent on a misunderstanding between Annavu and the defendants (assuming the incident to be true) supports the appellants' argument that the whole of the Vellan Chetti's community must be regarded as the founders or the trustees of the *kattalais*. The case in *Appasami* v. *Nagappa* (3) cannot help the appellants, as the evidence in that case disclosed circumstances inconsistent with the hereditary right set up.

On this finding that the trusteeship of the suit *kattalais* was hereditary, it follows that 1st defendant who is the heir of Annavu on his death in 1909 is entitled to be the trustee of the *kattalais*. No doubt, the 2nd defendant has no such right and it is urged for the appellant relying on *Narayana* v. *Lakshmanan* (4) that we should give directions so as to prevent the 2nd defendant from having anything to do with the suit *kattalais*. As the 1st defendant who is the lawful trustee is willing to associate the 2nd defendant with himself in carrying out the work of the *kattalais*, the facts of this case do not resemble those in 39 Mad. 456 and it is unnecessary to give any directions relating to the 2nd defendant.

In view of the finding as to the hereditary nature of the trusteeship, the question whether Annavu could acquire (See *Palaniyandi Malavarayan* v. *Vadamalai Odayan* (5)) and did acquire the office of trusteeship by prescription does not arise and need not be discussed.

It appears that some of the lands in the suit (*viz.*, items 32, 33 and 42 covered by Ex. Vcc., items 34 and 39 covered by Vbb. items 38, 41 covered by Vdd., item 60 covered by Ex. A 4 items 66 and 68 covered by Ex. Vaa. and items 53 to 59) were not connected with the *sayarakshai* and *ardhajamam kattalais*. The defendants are not estopped from contending that they do not relate to the *sayarakshai* and *ardhajamam kattalais*. The decisions in *Srinivasamoorthy* v. *Venkata Varada Iyengar* (6) and in Appeals Nos. 285 and 381 of 1917 do not apply. The various title-deeds mention the specific purposes for which these lands were purchased. It is clear from the plaint that the plaintiffs intended to obtain relief in respect of these lands also, though they made an erroneous allegation that they were attached to the *sayarakshai* and *ardhajamam kattalais*. I think the interests of the temple are best covered by modifying the decree of the Court below by directing that the accounts to be submitted by the

1. (1913) 36 Mad. 364.
2. (1906) 11 C. W. N. 703.
3. (1884) 7 Mad. 499.
4. (1916) 39 Mad. 456 at 461.
5. (1915) 2 L. W. 723.
6. (1911) 34 Mad. 257.

defendants should include the income of those lands attached to other minor *kattalais*, subject in the case of items 32, 33 and 42 to the result of the suit instituted in respect of them. The appellants next contended that the suit *kattalais* are subject to the Davasthanam Committees. Their argument is that, as the temple itself is not governed by S. 4 and is subject to the supervision of the Devasthanam Committee, the *kattalais* must be similarly subject, but we have got to do, not with the temple, but with the *kattalais* which are independent trusts. The word 'religious establishment' in S. 3 covers the case of *kattalais* and unless the *kattalai* itself is such that its trustee is to be nominated by the Government or a Public Officer or the nomination is subject to the confirmation of the Government or a Public Officer, S. 3 cannot apply to the *kattalais* (See *Venkatabalakrishna Chettiar* v. *K. Rama Iyengar* (7)). It therefore follows that the Devasthanam Committee has no right of supervision over the *kattalais*. This leads me to the memorandum of objections filed by the respondents.

The 1st clause of the scheme must be modified thus:—The defendants will submit their accounts once a year to the Court and a copy will be posted up in a conspicuous part of the temple.

The existing 3rd clause is unnecessary. The defendants will file accounts for all the suit lands. The 4th clause may be modified thus:—All the surplus funds above Rs. 1,000 shall be invested in securities authorised by the Indian Trusts Act except with the permission of the Court. There will be a clause added giving liberty to any interested parties or the Advocate-General to apply for any desirable modification of the scheme. But it is not desirable to provide that any breach of trust by the trustees may be dealt with by the Court on an application by the parties interested, as the appellants want to do.

There is no reason why the respondents or the *kattalais* should be deprived of their costs. I would modify the order of the lower Court by directing the appellants to pay the costs of the respondents throughout including costs of the former appeal.

PHILIPS, J.:—I agree.

7. 5. M. H. C. R. 48.

1923 Madras 211.

KRISHNAN AND RAMESAM, JJ.

Devasahayam ... (Plaintiff) Appellant.

v.

Devamony and another ... (Defendants) Respondents.

F. A. No. 296 of 1920 dated 16th October 1922, against the decree of D. J., Madura, in O. S. No. 16 of 1919.

Divorce Act, Ss. 15 and 37—Suit for dissolution—Wife's adultery — Dismissal—Grant of alimony.

If a husband's suit for dissolution of marriage on the ground of his wife's adultery is dismissed on the ground that the adultery alleged was not proved, the Court cannot as part of the decree in the suit grant permanent alimony to the wife.

(P. 212, Col. 1.)

K. V. Luke—for the Appellant.

C. Veeraraghava Aiyar—for the Respondent.

KRISHNAN, J.:—This is an appeal from the decree of the District Judge, Madura, in a suit brought by the plaintiff for dissolution of his marriage with his wife, the first defendant on the ground of her adultery with the second defendant, the co-respondent. Both the first and second defendants deny the alleged adultery, the first defendant also pleading that she was beaten and driven out of her house by her husband on more than one occasion.

The District Judge who tried the case after hearing the evidence came to the conclusion that the plaintiff had failed to prove the adultery alleged and dismissed the suit. Further he passed an order granting permanent maintenance to the first defendant at the rate of Rs. 10 a month.

The learned Counsel for the appellant has placed the evidence in his client's favour before us and we have carefully considered that evidence. It consists of the oral evidence of five witnesses and after hearing that evidence we agree with the District Judge that it is unreliable for the reasons stated by the District Judge. We agree therefore with the District Judge in holding that the adultery is not proved; the claim for dissolution of marriage must be rejected.

As regards the granting of alimony at the rate of Rs. 10 a month, the contention of the Counsel for the appellant is sound that it was an order that could not have

been passed in this case. Permanent alimony can be granted under the Indian Divorce Act only under S. 37. The circumstances justifying such a grant have not arisen here, the suit for dissolution of marriage having been dismissed. It is however argued for the respondent (the wife) that under S. 15 of the Act it was open to the lower Court to grant maintenance on finding that the wife had been treated cruelly and had been driven out of the house. We do not think that section justifies this. It says, "in a suit instituted for dissolution of marriage" in certain cases, "the Court may give to the respondent on her application the same relief to which she would have been entitled in case she had presented a petition seeking such relief". It is perfectly clear that this refers to a petition which could have been filed under the Indian Divorce Act. Thus she might, in answer to her husband's suit, claim if there are circumstances which justify such a relief, a decree for judicial separation or for dissolution of marriage. In case such a decree is passed at her instance, the Court would be in a position to act under S. 37. It is not contended that a bare application for maintenance can be put in by the wife against the husband under the Indian Divorce Act. If she wants maintenance without either judicial separation or divorce, she can have the remedy only by filing a suit or an application under the Criminal Procedure Code. The order therefore granting maintenance to the wife is *ultra vires*. It must therefore be set aside. In the result we vary the decree of the lower Court by striking out the order for maintenance and otherwise dismiss the appeal with costs.

Decree modified.

1923 Madras 212.

AYLING AND ODGERS, JJ.

Sami Mudaliar and another ... (Defendants) Appellants.

v.

Muthiah Chetti alias *Veerappa Chetty* ... (Plaintiff) Respondent.

S. A. No. 1219 of 1920 dated 11th April 1922, from the decree of the D. J., Coimbatore, in A. No. 182 of 1919.

(a) *Civil P. C., S. 11—Execution-proceeding—O. XXII, Rr. 1 and 4.*

Where one of the defendants in mortgage-suit died in January 1912 after the preliminary but before the final decree, and the legal representative was brought on record in 1916 in connection with application for transfer of the decree and was served with a notice but he did not appear and brought a suit when some of the properties were brought for sale in execution.

Held: his failure to plead abatement in 1916 did not operate as *res judicata*.

(b) *Civil P. C., O. XXII, Rr. 1 and 4—Final decree without bringing legal representative on Record—Execution.*

After a preliminary decree in a mortgage-suit fourth respondent died in April 1912. The final decree was passed without bringing his legal representative on record in January 1913. Fifth respondent as the legal representative was brought on record in 1916 when an application was made for transfer of the decree and a notice was served on him but he did not appear. The decree was transferred and certain properties were brought for sale in execution. The fifth respondent instituted a suit.

Held: the decree against the deceased was a nullity and that was not a matter which could have been gone into in execution. The present plaintiff was perfectly within his right in bringing the suit.

T. R. Ramachandra Aiyar, P. S. Narayanaswami Iyer and C. S. Swaminathan—for the Appellants.

C. V. Ananthakrishna Aiyar—for the Respondents.

JUDGMENT:—The facts antecedent to this appeal are fully set out in the order of the Subordinate Judge in M. P. No. 991 of 1920 printed in the C. M. A. No. 33 of 1921. The short question before us is this: In a mortgage suit (Original Suit No. 34 of 1911, Palghat Sub-Court) in which a preliminary decree for sale had been passed in 1911, the 4th defendant died in April 1912; the final decree was dated 30th January 1913. No legal representative was brought on the record in the application for a final decree and no such application for the purpose of bringing him on was in fact made till September 1916, when notice was issued to 5th respondent (4th defendant's son) in connection with a petition (M. P. No. 2348 of 1916) for transfer of the decree for execution to the Coimbatore Sub-Court, to show cause why he should not be brought on as legal representative of his father. The notice was affixed but the son did not appear. The decree was transferred from Palghat to Coimbatore for execution, and in September 1917 the

plaintiffs applied for execution and brought certain properties in Pollachi to sale. In March 1918 the 5th respondent instituted the suit (Original Suit No. 204 of 1918) of which this is the second appeal, for a declaration that the decree was not binding on him and for an injunction to restrain plaintiffs (in the mortgage-suit) from executing it on his allegation that he came to know of the decree in February 1918. The District Munsif dismissed the suit; the District Judge reversed the District Munsif's decree and granted an injunction, holding that the decree was a nullity as far as plaintiff was concerned owing to the failure to bring him on record when the final decree was passed in Original Suit No. 34 of 1911. Hence this second appeal. The question is, was the learned District Judge right in the view he took of the law. Mr. Ramachandra Iyer's first point for the appellants is that plaintiff should have pleaded abatement of the suit as far as he was concerned at the earliest moment, *i.e.*, in M. P. No. 2348 of 1916—September 1916, when plaintiffs in Original Suit No. 34 of 1911 applied to have him brought on record as legal representatives of the 4th defendant and that his failure to thus plead in 1916 bars him as it operates as *res judicata*. Mr. Ramachandra Iyer admits that S. 11 of the Code of Civil Procedure does not apply in terms but he says the principle does and quotes the 4th explanation to the section. It appears to me that the very words in the section itself 'in issue in a former suit' which prevent the section applying would also prevent the explanation applying as the words "former suit" are repeated in the explanation. The Privy Council case in *Mangul Pershad Dichit* v. *Girja Kant Lahiri* (1), is relied on for the position that a judgment-debtor, not having appealed from an order of attachment as being time-barred but in fact having acknowledged its validity, cannot be heard to say that after that the decree was dead at the time the order for attachment was made.

There is no doubt that that was a stronger case than the present. Here the 5th respondent was found under the circumstances to have been duly served with notice by affixture, but in the Privy Council case the judgment-debtor actually applied for and obtained three months' stay of sale. In *Rajah of Ramnad* v. *Velusami Tevar* (2), also a Privy Council case, it was laid down that it is incumbent on a judgment-debtor to bring forward a plea of limitation before the executing Court if he intends to rely on it. In this case the question of limitation was raised and decided, not as in *Manjunath Badrabhat* v. *Venkatesh Govind Shanbog* (3) where the objection was not taken and the whole proceeding was *ex parte*. In *Beni Prasad Kunwar* v. *Mukhtesar Rai* (4), (also quoted for respondent) it was contended that plaintiffs when brought in, in 1881, as representative judgment-debtors liable under a decree of 1877, should have at once raised the objection that they were not then brought in, but such objection was too late. It was held that this did not apply to a case where there could be no representative (he having died meanwhile) and therefore no question as to who was the representative. Mr. Ramachandra Iyer's strongest argument however was based on *Jungli Lall* v. *Laddu Ram Marwari* (5) which held that "neither the executing Court nor any other tribunal is bound to take notice of a nullity though it may take the form of a decree. In any case if the decree is void it can and ought to be disregarded without any formal proceeding to set it aside and the Court had no jurisdiction to execute it against the property of a deceased defendant." The decision apparently dissents from *Kalipada Sarkar* v. *Hari Mohan Dalal* (6).

Mr. Ananthakrishna Iyer's answer to the arguments based on the cases above quoted is that a decree against a dead man is a nullity and is void; and that the validity of a decree cannot be discussed in execution. He quotes *Zamindar of Ettiyapuram* v. *Chidambaram Chetti* (7) where it was held that the words "or of the jurisdiction of the Court which passed it" which occurred in S. 225 of the old Civil Procedure Code and which are omitted in the present Code were so omitted because it was felt that it was

1. (1882) 8 Cal. 51=8 I. A. 123. (P. C.).

2. (1921) 48 I. A. 45=40 M. L. J. 197. (P. C.).
3. (1881) 6 Bom. 54.
4. (1899) 21 All. 316.
5. (1919) 4 Pat. L. J. 240.
6. (1917) 44 Cal. 627.
7. (1920) 43 Mad. 675 at 687.

not for the executing Court to go into questions of the jurisdiction of the Court to pass the decree. 44 Cal. 627 is quoted in the judgment of Wallis, C. J. (in which Ayling and Coutts-Trotter, JJ. concurred), as authority for the proposition that a Court executing the decree cannot go behind it. It would thus seem that there is a conflict between this decision and that in 4 Pat. L. J. 240. We are bound by the former. I am further unable to see any real distinction in Mr. Ramachandra Iyer's contention that 43 Mad. 675 dealt only with pecuniary (I think he meant territorial) jurisdiction. If the executing Court is unable to go behind the decree it is called upon to execute, the particular mode in which the decree is invalid or ineffective cannot make any difference.

In support of his contention Mr. Ramachandra Iyer further quoted in reply *Rangasami Naicken* v. *Tirupathi Naicken* (8) and *Lakshmanaswami Naidu* v. *Rangamma* (9). In the former there is a single sentence at page 27 which is clearly *obiter* and is not necessary for the decision, to the effect that in the case of a decree passed without jurisdiction, a party to the proceeding may impeach it as a nullity even though not set aside on appeal or otherwise. In 26 Mad. 31, it was held that the sale of the office in question being opposed to public policy, in so far as the decree embodied unlawful terms of a compromise it is inoperative and will not be enforced. There the Court had adopted the terms of the compromise and part of its terms were unlawful; therefore the Court had no jurisdiction to pass such a decree under S. 375 of the former Code of Civil Procedure. No authority is quoted for the proposition that the lawful character of the decree can be questioned in execution-proceedings and apparently the learned Judge felt no doubt on the matter. They cancelled the sale of the office which had been ordered in execution. The case seems clearly opposed to the Full Bench ruling in 43 Mad. 675 which in my opinion would govern it. If I am right the decision in 26 Mad. 31 must be regarded as overruled.

It seems therefore clear that as far as this Court is concerned the executing Court cannot go behind the decree. The cases *Radha Prasad Singh* v. *Lal Sahab Rai* (10) and *Bani Prasad Kunwar* v. *Mukhtesar Rai*, (4) were also relied on. In the former it was held that in a suit in which mesne profits were decreed in 1856, the amount of the same was not settled till 1877. Execution was taken against the plaintiffs on the ground that they were heirs of the original judgment-debtors. Held by the Privy Council they were not liable under the decree, as the alleged ancestor died before the issue of an executable decree, as they were not made parties to the suit in which the decree was pronounced, just as in this case no final decree for sale was obtained till after 4th defendant's death. It is contended for the appellants that the only effect of the decision is that a person not a party and whose representatives are not parties cannot be bound by the decree.

In my opinion, however, the decision goes further as the ground of the decision is expressly based on the death of the alleged ancestor before the issue of the money-decree for mesne profits; 21 All. 316 has already been dealt with and would appear to be against the appellants. Finally in *Raghunathaswami Iyengar* v. *Gopaul Rao* (11) Ramesam, J. said: "But there is no substance in the distinction that, where the decree was duly obtained against the deceased judgment-debtor, the sale in execution, after a decree without the heir of the judgment-debtor properly on the record, is not a nullity."

The result of the authorities by which we are bound seems to be clearly against the appellants and I must hold that the District Judge was right in his decision that the decree against the deceased was a nullity and that that was not a matter which could have been gone into in execution. The present plaintiff was perfectly within his right in bringing this suit from which this is a second appeal. *See* 21 All. 316 already quoted. The decision of the learned District Judge is right and the second appeal must be dismissed with costs.

Appeal dismissed.

8. (1905) 28 Mad. 26.
9. (1903) 26 Mad. 31.
10. (1891) 13 All. 53=17 I. A. 150 (P. C.).
11. (1921) 41 M. L. J. 547.

1923 Madras. 215.

SCHWABE, C. J., OLDFIELD AND COUTTS-TROTTER, JJ.

Pudiava Nadan ... (Appellant) Defendant.

v.

Pavanasa Nadan and others ... (Plaintiffs) Respondents.

S. A. No. 2024 of 1920 dated 25th April 1922 against the decree of Addl. Sub. J., Tinnevelly, in S. No. 120 of 1920.

(a) *Interpretation of statutes—Law Enforceability.*

A law does not cease to be operative because it is out of keeping with the times. A law does not become obsolete because it is an anachronism or because it is antiquated or because the reason why it originally became the law would be no reason for the introduction of such a law at the present time. To hold the contrary would be an entire misunderstanding of the meaning of the legal maxim *cessat ratio cessat lex.*

(b) *Hindu Law—Succession—Blindness.*

A Hindu who is congenitally blind is excluded from the inheritance and the rule has not become obsolete. Texts and Case law discussed. 43 Mad. 4 foll.

S. Ramaswami Aiyar and C. Sankara Aiyar—for the Appellant.

T. R. Venkatarama Sastri and K. S. Ramabhadra Aiyar—for the Respondents.

OPINION :—THE CHIEF JUSTICE.—The question referred to the Full Bench is "Is a Hindu who is congenitally blind thereby excluded from the inheritance, or has the rule become obsolete?"

In *Subbayya* v. *Subbamma* (1) Sadasiva Ayyar and Napier, JJ., answered this question by saying that the rule had become obsolete. This case having been tried before that decision was known, the point was not taken at the trial or on first appeal; but the appellant was allowed to raise the point by the Referring Bench. This Court was told in the course of the arguments that it is alleged that the man in question is not, in fact, congenitally blind and it will be for the Referring Bench to consider hereafter whether that matter is one which is now proper to be enquired into. For the purpose of this reference we must assume that he was congenitally blind and treat this case as, in effect, an appeal from *Subbayya* v. *Subbamma.* (1)

1. (1920) 43 Mad. 4.

It is argued that under the Hindu Law, a congenitally blind man never was excluded from inheritance and secondly that, if there was a rule or custom to that effect, it has now become obsolete and is no longer law. It has long been established that in this Presidency the most authoritative statement of, what I may call, the Hindu Common Law is to be found in the Mitakshara, a commentary by Vignaneswara on the institutes of Yagnavalkya published about A. D. 1080. In Chapter II, S. 10 the author quotes the text of Yagnavalkya as follows :—"An impotent person or outcaste and his sons, one lame, a mad man, an idiot, a blind man, and person afflicted with an incurable disease, and others (similarly disqualified) must be maintained, excluding them however, from participation." It is made clear by reference to the whole chapter that the author is here dealing with exclusion from the inheritance. I think the law as stated by him amounts to this :—A man born blind does not become on birth entitled to a share in the family property, and, therefore, he gets no share at a subsequent partition; nor, if he is the sole surviving member of that family, does he acquire the property by right of survivorship; he is not, however, excluded altogether from an interest in the property because he is himself entitled to be maintained, and can transmit to his sons his full share in the property. But it is argued first that these directions are merely precepts or advise and not statements of law. It is true that there are precepts given in the Mitakshara which either by reason of the words in which they are couched or by reason of the nature of the matter dealt with, have been held to be mere moral precepts, but I can find no such reason for holding that the statement of the exclusion of a blind man from the inheritance is anything but a statement of a rule of law. It is further argued that this statement of the law in the Mitakshara is a statement of the law as it had been in the past and not as it then was; and for this, reliance is placed on the writings of Visvarupa which were discovered in Malabar some few years ago. He is stated to have lived shortly before the author of the Mitakshara. He gives the same text from Yagnavalkya and in commenting on the text, without any suggestion that it is other than law, a

passage occurs which has been translated as follows :—" The blind and the rest, who are not outcastes, however, have a right to the grandfather's estate. Such is the custom." We have been referred to the Sanskrit and I have no doubt that the words which have been translated as 'have a right to the grandfather's estate' would be more properly translated as 'have an interest in the ancestral property' and refer to what follows immediately, namely, the right to maintenance and the right to transmit referred to above. In my judgment, when properly understood, there is no difference at all between the rules in question as stated in the Mitakshara and as published by Visvarupa, assuming that the published version is genuine.

The next question is whether, assuming a blind man's exclusion to have been the law at the date of the Mitakshara, it has since become obsolete. This, in my judgment, is a question of fact. A law does not cease to be operative because it is out of keeping with the times. A law does not become obsolete because it is an anachronism or because it is antiquated or because the reason why it originally became the law, would be no reason for the introduction of such a law at the present time. To hold the contrary in my judgment, would be an entire misunderstanding of the meaning of the legal maxim *cessat ratio cessat lex* which is relied upon in support of the contrary contention. If authority were required for this proposition, it is to be found clearly stated by their Lordships of the Privy Council in *Rao Kishore Singh* v. *Mussamat Gahenabai* (2) in the following words:—" Their Lordships therefore are of opinion that the principle embodied in the expression *cessat ratio cessat lex* does not apply where the custom outlives the condition of things which gave it birth." In *Subbayya* v. *Subbamma* (1) Sadasiva Aiyar, J., dealing with the matter now under consideration says, 'I need not say that a rule becomes obsolete when the reason of the rule disappears through change of circumstances and environments in the society which was governed by that rule', and Napier, J., at p. 31 agreeing with that judgment says that owing to improved methods of education there is no reason why such a disqualification should still continue and that it was open to the Court to enunciate this rule by declaring the law to be obsolete. In my view, this involves a fundamental error in considering the question and vitiates the whole of the judgments in that case. In considering whether the custom has become obsolete in the sense of its having ceased to exist, the fact that it is an anachronism may be a proper matter to be taken into consideration, if there were evidence both ways, in weighing that evidence, but otherwise it is of no importance. In this case, in my judgment, the evidence is all in favour of the custom having continued. There is no oral evidence before the Court and no statement of any text writer or any judgment to which our attention has been called that this custom has become obsolete in the sense of its having been discontinued. The only semblance of evidence that the rule has become obsolete is to be found in Steele's "Law and Customs of Hindoo Castes," published in 1826, at page 224 where he states that as a result of enquiry among about 100 castes above Poona, it was the practice in 72 of them that 'blind persons' may take their share if married and if they have a family. Assuming this to be evidence, it is probably only an attempt to state the law as to the transmissibility of a share through the blind man. But even if it be as stated that in 72 castes in that district, the law had been modified by custom, it is of no value as establishing a custom to admit the blind man to a share in this Presidency.

Reliance was placed on a passage in Sarasvati Vilasa, a digest published by a king about A. D. 1510 which has been recognised by this Court as of authority. The passage relied on occurs in S. 149 and has been translated as "those who are born blind, and those who are born deaf, the pair thus mentioned, though a share certainly belongs to them, are to be nourished and cherished, notwithstanding their being endowed with a share, because they are marriageable." The translation to this effect was adopted by the Full Bench of this Court in 1885 in *Krishna* v. *Sami.* (3) With great submission I venture to doubt if that translation is correct

2. 37 M. L. J. 562 at page 574 (P. C.).

3. (1886) 9 Mad. 64 at page 76.

and whether the word translated as 'share' would not be more correctly translated as 'interest'. But whether that is so or not, a careful examination of Ss. 149 to 167 shows that the author is quoting as law the passage from Yagnavalkya and passages from some other writers to the like effect excluding the born blind from the inheritance without suggesting that the law is otherwise or that it is obsolete. If the proper translation of the passage is to the effect that the born blind takes a share, I think it is to be explained, as it was in the case referred to above in the Judgment of Sir Charles Turner, C. J., as meaning "that there are classes who though they may be unable to be relieved of their disqualification, are capable of transmitting heritable blood. Their right to share in the family wealth is latent or may come into existence at a future date as it does in the case of the after-born son. When it comes into existence, either in the person of the formerly disqualified heir or of his son, it is to be recognized. If capable of transmitting heritable blood, they are share takers though not at the time share enjoyers". In fact in this passage the Sarasvati Vilasa is using the expression 'take a share' to explain that though disqualified, such persons have a latent right which will become effective on the disqualification being removed, and can be transmitted. In my judgment, there is nothing in this to show that this law was then regarded as obsolete.

The evidence on the other side is overwhelming. Taking it in the order of date, one finds this law or custom stated as existing in Madana Parijata about the end of twelfth century, in Vivada Ratnakara about A. D. 1350, Dayabaga about A. D. 1400, Vivada Chintamani about A. D. 1450, Daya Tatva about A. D. 1500, Mayukha about A. D. 1600, Dattaka Chandrika about A. D. 1600, Viramitrodaya about A. D. 1625 and Dayakrama Sangraha about A. D. 1700. These are all texts of recognized authority and they all give the rule without any suggestion that it is no longer law.

Coming to the more modern writers, Sir W. Macnaghten writing in 1829, and Sir Thomas Strange, Chief Justice of Madras, writing in 1830, state that the blind are excluded. The latter's son, a Judge of the Sudder Court writing in 1856 says the same. Mr. Mayne in his well-known book on Hindu Law states it to be the law.

In 1862 in *Tirumamagal Ammal* v. *Ramasami Ayyangar* (4) a case of idiocy, Strange and Holloway, JJ. quote this part of the Mitakshara as being the law current in Madras. In 1864, *Kalidas Das* v. *Krishanchandra Das* (5) came before a Bench of five Judges of Calcutta presided over by Sir Barnes Peacock, C. J. In that case a man who was born blind was in 1832 in fact excluded from the inheritance to his father. He married and had a son in 1858. The passages in the Mitakshara and in Dayabaga which are to the same effect were fully discussed and the whole argument and judgment proceeded on the basis that a person born blind was himself excluded. No one then present had apparently any idea that the rule was obsolete. In 1876 in *Murarji Gokuldas* v. *Parvathi Bai* (6) Westropp, C. J., with Sarjeant, J. agreeing, fully discussed the text of Yajnavalkya and the Mitakshara commentaries on it and the texts of the other Rishis on the subject and holds that the rule is confined to the congenitally blind and does not extend to those who become blind. It was not suggested that the rule had become obsolete. In 1885, in *Krishna* v. *Sami*, (3) quoted above, there was no suggestion that the rule had become obsolete. Finally in 1917, the Privy Council in *Gunjeshwara Kunwar* v. *Durga Prasad* (7) states the rule of exclusion of the blind as an existing rule of law but confines the application to the congenitally blind.

It is impossible to believe that a custom to disregard the established rule, which it would be necessary to prove in order to show that it had become obsolete, existed without any of these Judges, or practitioners in these cases being aware of the fact. There is in my judgment ample evidence of the rule, and no evidence of such a custom to disregard it, as would be necessary to make the rule obsolete as a rule of law. It follows that the answer to the question must be that a Hindu who is congenitally blind is excluded from the inheritance and that the rule has not become obsolete.

4. 1 M. H. C. R. 214.
5. 2 B. L. R. 103.
6. (1875) 1 Bom. 177.
7. (1918) 45 Cal. 17=44 I. A. 229.

OLDFIELD, J.:—I agree and, having had the advantage of reading the judgment which Coutts Trotter, J. is about to deliver, desire further to associate myself with his observations on the commentary of Viswarupa and the principle underlying them.

COUTTS TROTTER, J.:—The short point raised by this case is whether or not it is a rule of Hindu Law that a congenitally blind member of an undivided Hindu family is to be excluded from inheritance or whether if such a rule existed, it has become obsolete. Sadasiva Ayyar, J., admits that such a rule once existed, but has held it to be obsolete. Krishnan, J., holds it to be an existing and positive rule of law.

It must not be forgotten that the Hindu Law is the result of many ingredients. In the first place we have the Smritis or Records of the pronouncements of Rishis, (Saints) among whom stands paramount Manu. We do not possess the original text of Manu and the version we have is placed by modern scholars as dating from about 200 B. C. but there is no doubt that a treatise known as the Laws of Manu in different recensions existed from many centuries before the date of our version. Next in authority to Manu of the Smritis is Yagnavalkya and the commentary on his work known as Mitakshara written by Vignaneswara stands as the governing authority for this part of India: and it is an accepted principle that the Mitakshara is final where it is unambiguous, and that recourse is to be had to the Smritis only where the Mitakshara is silent or obscure. The third element is that of custom, the importance of which was emphasised by Mr. Mayne when he entitled his book "Hindu Law and Usage." Since the British occupation of India another element has been added, that of judicial decisions of the Indian Courts and of the Privy Council on appeals from them. The rulings of the Privy Council are final and it is only in cases not covered by such rulings that recourse need be had to other sources.

The position with regard to the present question is that there is no express ruling of a Court of Law which says, in terms, that a congenitally blind man is excluded from inheritance. There are cases which definitely decide that blindness which is not congenital but is traumatic or supervenes on disease does not exclude. There are many cases which assume, without expressly deciding, that congenital blindness does exclude. That position is now challenged and it devolves upon us to say how the law on the subject stands in India at this day.

That which we call the Hindu Law, is composed of many incongruous elements; I am speaking, now, of its substance, and not of the sources, in which it is to be sought. It primarily lays down rules of law, which must be treated as of practical applicability to the India of to-day. Such rules there are in abundance, but they are interspersed with mandatory precepts which have been treated by Commentators and Judges as being merely of religious or moral force but which cannot govern the rights and duties of a member of a Hindu family with the force of a positive rule of law. I may refer in this connection to the words of the Judicial Committee in *Rao Balwant Singh* v. *Rani Kishori* (8), 25 I. A. 54 at 69. "All these old text books and commentaries are apt to mingle religious and moral considerations, not being positive laws, with rules intended for positive laws. In his preface to his valuable work on Hindu Law Sir W. Macnaghten says: "It by no means follows that because an act has been prohibited it should therefore be considered as illegal. The distinction between the *Vinculam juris* and the *Vincilum pudoris* is not always discernible." (Hindu Law, Principles and Precedents, p. VI of the preliminary remarks). He illustrates this position by the example of the very subject of the present discussion. It is, as their Lordships think, the most remarkable inference that the passage in S. 1 belongs to the former class of precepts, and those of Ss. 4 and 5 to the latter." It was argued in this case that the rule which excludes a blind man from inheritance was something other than a rule of positive law. It seems to me that that position is wholly untenable and that such a principle of exclusion can only belong to the domain of positive law, and not to that of either religion or morality. If it is not a rule of law, it must be meaningless. The only colour to the argument is derived from

8. (1897) 20 I. A. 267.

the fact that both Manu and the Mitakshara, to which for the moment I shall confine myself, include within the ambit of their prohibition, persons with disqualifications which are obviously based on moral grounds and on grounds which it would be impossible for a Court of Law to pronounce upon. The text of Manu is as follows :—

"Eunuchs and outcastes, persons born blind or deaf, madmen, idiots, the dumb and such as have lost the use of a limb are excluded from a share of the heritage" Chap. IX, S. 201. The relevant section of the Mitakshara is S. 10 of Chap. II. There the writer is commenting not directly on the text of Manu, as we have it, but on the text of Yagnavalkya in S. 140 which runs as follows :—

"An impotent person or outcaste and his issue, one lame, a madman, an idiot, a blind man and a person afflicted with an incurable disease as well as others (similarly disqualified) must be maintained, excluding them from participation."

Placitum 3 of S. 10 explains this as follows :—

Under the term 'others' are comprehended one who has entered into another order (*i.e.*, has become an ascetic) an enemy to his father, a sinner in an inferior degree and a person deaf, dumb or wanting an organ. Thus Vasishta says, 'They who have entered into another order are debarred from shares,' Narada also declares, "An enemy to his father, an outcaste, an impotent person, and one who is addicted to vice, take no share of the inheritance even though they be legitimate ; much less, if they be sons of the wife by an appointed kinsman. Manu likewise ordains, 'Impotent persons and outcastes are excluded from a share of the heritage and so are persons born blind and deaf, as well as madmen, idiots, the dumb and those who have lost a sense (or a limb)." This section incorporates quotations from Narada and Vasishta and produces categories of persons, who, in a Court of Law now-a-days would not be held disqualified from inheritance. They are brought under the text of Yagnavalkya who adds the Sanskrit word 'Adya' translated by Colebrooke as "as well as others"; its literal meaning being "and the like" or practically "et cetera." Under cover of the latitude afforded by this expression, placitum 3 brings in such intangible persons as "an enemy to his father" and "one who is addicted to vice"—disqualifications so vague, it is clear, that no Court of Law could now assert their validity. I do not think it right to say that these grounds of exclusion are obsolete or that they were originally intended to be moral rather than legal obligations : but rather that they are of so nebulous a character that they could never have been enforceable at any time when the enunciation of the rights of inheritance passed from the hands of family mediators or village panchayatdars to anything which can be dignified by the name of 'Court of Law.'

I do not think that any useful purpose would be served by enquiring into the meaning of such terms as 'Nirindriya' or 'Pangu'. They do not seem to me to assist the present discussion and I think it is probable that legislation will abolish the exclusion from inheritance based on these terms before the Courts are called upon to determine their exact meaning. Similarly I think it unnecessary to discuss whether Yagnavalkya meant anything more by using the word 'Andha' than what Manu meant by 'Jathyandha' 'Jati' comes from the same root as the Greek Yiyvorke, yevos, etc., and Latin 'Genus'. It is, I think, clear that both Manu and the Mitakshara explicitly lay down the rule of law that at least a 'Jathyandha' is excluded from inheritance and that the only way to escape from this is to do what Sadasiva Ayyar, J., has done and say boldly, "It is not a subsisting rule of law. It has become obsolete and abrogated."

In any system of law other than the Hindu Law, it would be almost a contradiction in terms to predicate of any proposition of law that it is obsolete. In the Hindu Law it is a possible state of things and it has been admitted to exist with regard to many maxims which cannot be treated as if merely moral or religious obligation. I need only instance the kinds of marriages and the classes of sons enumerated in the ancient writings and also the various rules for marriages between persons of different castes. There is a consensus of opinion that there are only two forms of marriages and only two

classes of sons now existing and intermarriages between persons of different castes have in practice long ceased to exist. It is not now possible to trace the steps by which this state of things came about, but it may be said generally, that, in the days when the Saddar Court had recourse to the opinions of the Pandits, the latter felt themselves quite free to say with regard to any rule of law that, in practice, it was regarded as obsolete and the Courts felt themselves equally free to act on such opinions. There is good evidence to show that, in the early days, the Pandits responded to some extent to the advance of popular sentiment and consciousness and stigmatised as obsolete, rules and practices, which, though enshrined in the early writings, did not accord with the sentiments of the people. The time has now gone by when this process was possible and if there is anything dignified by the name 'Rule of Law' enshrined in the Mitakshara, it can only be abrogated by positive evidence of custom to disregard it. It is not pretended that there is any such evidence of custom with regard to the exclusion of the congenitally blind and no such evidence was attempted to be produced in this case. No doubt, Mitakshara, Chap. II, S. 10, placitum 7 provides for the removal of the disqualification, on the removal by medicaments or other means of physical disability, and it is doubtless true that modern surgery can restore eyesight to many, who in the days of Mitakshara would have been blind for life. Sadasiva Ayyar, J. does not so much have regard to this consideration, as to the view that the texts are based on a primitive idea that blindness was either a visitation of God for some sin in a past existence or was an indication of mental incapacity to deal with practical affairs. Justly regarding these ideas as out of consonance with modern kinship-feeling he deduces the conclusion that the rule is therefore to be considered as *ipso facto* abrogated. To my mind before allowing a mandate, such as I conceive this to be, to be disregarded, it must either be proved by evidence to be actually disregarded in practice at the present time—and as I have already said there is no such evidence in this case—— or it must be shown by an examination of the Smritis and commentaries to have been obsolete at the time they were written and that the authors thereof merely repeated parrotlike the words of Manu and the Mitakshara as a maxim dignified by antiquity but not corresponding to the practice obtaining at the time either of the Mitakshara or of their own compilations. If it could be shown that commentators earlier than the Mitakshara had used language meaning or implying that the rule in this respect was obsolete, that might be a legitimate ground for the conclusion that the Mitakshara was merely repeating the words of Manu without inquiring whether the rule survived in force when the Mitakshara was written. If a commentator later than the Mitakshara used similar language, that might lead to a legitimate inference that, though in force at the date of the Mitakshara, the rule had subsequently become obsolete. It is argued that there is one of each suggested class of authorities Viswarupa of the first and Saraswati Vilas of the second. For practical purposes we may take Yagnavalkya as dating approximately 350 A. D. the Mitakshara as about 1000 A. D. Viswarupa as about 800 A. D. and the Saraswati Vilas as about 1500 A.D. There are some authorities who think that the Saraswati Vilas was of an earlier date, but in any event it is substantially later than the Mitakshara.

I shall deal first with Viswarupa. The existing text is inscribed on a cadjan found at Calicut in the late seventies and was translated by Mr. S. Sitaram Sastri. I am totally unable to ascertain that any competent Scholar has scrutinised its claims to be regarded as what it purports to be either from the point of view of paleographical, linguistic or historical standards. This is not a critical country and the moment it was produced, it was held at once to be what it purported to be and has apparently passed as such without question since. That such discoveries very often fail to stand the slightest critical test will be seen by any one who has the curiosity to peruse page 21 of Mr. Burnell's preface to the Vyvahara Nirnaya where he exposes the imposture of a treatise which had been readily accepted as a genuine record of the customs of South Kanara passing under the name of Aliyasantanada Kattu Kattale. I do not profess to have any beyond general grounds for questioning the authenticity of this single text of Viswarupa. I con-

tent myself with saying that I decline to act upon it until its pretensions have been scrutinised by some competent critic of Sanscrit texts.

It runs as follows (page 15) "The blind and the rest, who are not outcaste, however, have a right to the grandfather's estate. Such is the custom."

It is apparent that the author treats the mandate which he quotes as a mere moral maxim, opposed to the rule of law which he considers to be established by his text and if the expression "grandfather's estate" means no more than "ancestral estate", the text of Viswarupa need mean no more than that of the Mitakshara, and the right may be a mere right to maintenance or at most a capacity to transmit heritable blood.

With regard to Saraswati Vilas, the first observation to be made is that made by the learned Chief Justice in the course of the argument that, if the author wished to say that the text of the Mitakshara on this point was obsolete, he could perfectly well have said so in terms. Further in any event the true explanation of the passage in the Saraswati Vilas is to my mind undoubtedly that given by Turner, C.J. in *Krishna* v. *Sami*, (3) at 77, where he points out that the distinction which is being drawn is not that between those who are capable and those who are incapable of inheriting, but between those who are *share-takers* in the sense that they are persons capable of transmitting heritable blood though they may not themselves be able to enjoy the heritage owing to their disqualifications, and *share-enjoyers* who are not merely capable of transmitting heritable blood but also of enjoying their shares themselves in their lifetime.

As against these two very doubtful texts there is a mass of authority which is all the other way, which recognises to the full the exclusion of the blind in the sense of the congenitally blind and accepts the statement of the law contained in the Mitakshara. I will enumerate these texts (most of which are to be found in Setlur's collection) with their approximate dates:

Madana Parijata	...	1100 A. D.
Smriti Chandrika	...	13th Century
Vivada Ratnakara	...	1300 A. D.
Dayavibhaga of Madhava	...	1400 "
Dayabhaga of Jimutavahana	...	1400 "
Vivada Chintamani	...	1450 A.D.
Daya Tattva	...	1500 "
Viramitrodaya	...	1620 "
Dayakrama Sangraha	...	1750 "

and Jagannadha's Digest for what it is worth. Writers of modern text-books on Hindu Law also treat the rule as subsisting, Sir Thomas Strange in 1830, T. L. Strange in 1856, Mayne in 1878, Sarvadhikari in 1880 and Trevelyan in 1890. It is quite true that no express decision exists to the effect that a man blind from birth cannot inherit but there are several decisions that assume it, culminating in the pronouncement of the Privy Council in *Gunjeshwar Kunwar* v. *Durga Prasad* (7).

The only other matter which I need deal with is the argument that the rule of exclusion in the Mitakshara applies only to those who take by succession and not to those who take by survivorship. The answer to this line that Chap. II, S. 1 placitum begins with the statement that the rule of exclusion propounds an exception to *dayagrahana* (taking of daya) by the sons, widows and other heirs and the reunited members and this by necessary implication refers one back to the definition of *daya* in the beginning of Chap. I. Daya apparently means property considered in the light of something which in the natural course of events will pass from one person to another and includes both *Apratibandha daya* and *Saprati-bandha daya* (unobstructed heritage and obstructed heritage) the former passing by survivorship to the sons &c., and the latter passing by succession to widows and other heirs. This is the reference to *Vibhaga* or partition in placita 6 and 7 and placitum 8 also shows that the word *dayagrahana* includes within its scope both property which passes by survivorship and that which passes by succession.

For these reasons I am of opinion that it must be regarded as an unabrogated rule of Hindu Law that a congenitally blind person is excluded from succession and that it cannot be described as obsolete in any other sense than that of being repugnant to more modern and more enlightened ideas than those which prevailed at the time of the smritis and the commentators. It can of course be repealed by the Legislature and we are informed that a Bill to that effect is now before the Legislative Assembly, the author of

which was once a Judge of this Court. But until that step is taken and the proposal passes, into law, I feel constrained to say that the Courts of this country have no option but to enforce the rule with whatever reluctance and with whatever consciousness of its repugnance to the present sentiments of the Hindu people.

1923 Madras. 222.

SCHWABE, C. J. AND WALLACE, J.

Messrs. Louis Dreyfus & Co. ... Petitioners—Appellants.

v.

R. K. Rajagopala Aiyar & Bros. and another ... Defendants—Respondents.

O. S. A. No. 96 of 1921 dated 20th July 1922 from the judgment and order of Phillips, J. dated 6th September 1921.

(a) *Arbitration Act, S. 12—Extention of time.*

An award is bad if arbitrators extend, having no power to do so, the time for passing of the award when once the time for the award has expired, because under S. 12 of the Arbitration Act, the Court alone has got the power for extending the time even though the award has been completed.

(P. 223, Col. 1.)

(b) *Arbitration Act, S. 14—Award—Illegality.*

Award is vitiated by the legal misconduct of the umpire, if he proceeds with the reference without giving any notice to the parties of the enquiry by him.

(P. 223, Col. 1.)

(c) *Arbitration Act, S. 13—Remitting an award.*

Ordinarily an appellate Court will not interfere with the discretion of the first Court in declining to remit an award, but the discretion being a judicial one, the appellate Court will interfere where no grounds have been shown why the award should not be remitted to the arbitrators. In the absence of anything to show that the umpire was either prejudiced or was otherwise unfitted to hear and determine the case, the Court ought to remit the award to the arbitrators.

(P. 223, Col. 1.)

Brightwell and Moresby—for the Appellants.

K. Jagannatha Aiyar—for the Respondents.

SCHWABE, C. J.:—This case raises very difficult points under the Arbitration Act. The facts are shortly these:—Messrs. Louis Dreyfus & Co. entered into an agreement in April, 1918, with the firm of R. K. Rajagopala Aiyar & Bro. which firm consisted of R. K. Rajagopala Aiyar and Arunachella Aiyar. Under that agreement the latter firm acted as Dubashes for Louis Dreyfus & Co., on somewhat elaborate terms contained therein, one of those terms being a very full arbitration clause. In November, 1918, R. K. Rajagopala Aiyar was apparently on the point of death, and on the 3rd November, heads of agreement were come to between Arunachella Aiyar, Sundaresa Aiyar of the one part, certain persons described as sureties of another part and Messrs. Dreyfus & Co., the objects of the heads of agreement being to provide for certain things in the past and for the future acting as Dubashes in this country for Messrs. Louis Dreyfus & Co. Disputes having arisen, Messrs. Dreyfus called upon the old firm of R. K. Rajagopala Aiyar & Bro. to name an arbitrator and to proceed to arbitration. The firm refused to do so, alleging as they still allege, that the old agreement with the arbitration clause has been entirely superseded by the heads of agreement which contain no arbitration clause and to which also the old firm of R. K. Rajagopala Aiyar was not a party. Messrs. Dreyfus and Co., thereupon acting within their rights, assuming that the arbitration clause was still an existing valid clause, appointed two arbitrators and these two arbitrators, acting under the clause under the old contract, nominated Mr. Chettle as umpire. Unfortunately it would appear that the time limited by the submission to arbitration contained in that clause for the arbitrator's award was allowed to expire before any extension of time had been granted. Shortly after the expiration of that time, the arbitrators purported to extend their own time. The arbitrators having differed, the umpire took upon himself the burden of the reference. No information was given to the Dubashes' firm when the arbitrators differed, nor when the umpire was going to proceed, nor when the umpire proceeded to take fresh evidence. An intimation sufficiently clear had been given by the Dubash firm to the arbitrators that they did not propose to have anything to do with that arbitration. It was sufficiently clear, in my judgment, for the purpose of discharging the arbitrators from any duty to call upon the Dubashes again to attend but that does not apply to the umpire. On those facts this award is, in my judgment, bad. In the first place because the time was allowed to expire without being extended and in the second place because

the umpire was guilty of what is called legal misconduct in that he proceeded to hear evidence or received written evidence without informing one of the parties to the arbitration that he was about to do so. As regards the first point there is no power in arbitrators to extend their own time after their time has expired but there is undoubtedly power, in the Court under S. 12 of the Indian Arbitration Act, to extend the time even though the award has been completed. I think that this is a proper case for the exercise of that power by the Court and we propose to enlarge the time for making the award. The second point, the legal misconduct of the umpire referred to above, has been held by the learned Judge to be such an error, that he ought not to exercise his power to remit the award but he felt himself bound to set it aside. Now the words of the Act are that the Court *may* remit the award leaving the discretion to the Judge who hears the case, and that is a discretion which has been held by a very high authority with which I humbly agree, should not be interfered with on appeal unless there are very strong grounds for doing so, or perhaps it might be better put, unless it is clear that the learned Judge has not exercised a judicial discretion. In this case I ask, "What are the grounds on which the Judge exercised that discretion?" He gives none and I can find none; and none have been suggested. The umpire in this case must have been told that the Dubash firm was taking no part in the arbitration at all for that was their attitude. I am convinced, if he had said he was going on with the arbitration or was going to hear evidence, they would have taken no notice of it at all. Further there was nothing in the conduct of this umpire to show that he was prejudiced in any way or unfit to hear and determine this case, after giving an opportunity to these persons to be heard if they so desired. I therefore think that this is a case where the Judge should have exercised discretion by remitting this award to be heard by the umpire; and we propose to remit it to Mr. Chettle. It is true that Mr. Chettle has left this country. If he is not available the proper procedure under the Act is that there should be an application to the Court to appoint a suitable umpire to take his place.

That still leaves the really difficult point in this case, that is, whether this arbitration clause continues in existence or whether it has been taken away by the so-called substituted agreement of November. In my judgment, the contract of November cannot supersede the old contract altogether for the simple reason that R. K. Rajagopala Aiyar was not a party to the new agreement at all. His partner Arunachella Aiyar is a party but he is so on his own behalf and not on behalf of the firm. I cannot say that the old firm is a party to the new agreement and therefore the old agreement continues in force. Whether or not the claims made under the old contract are good claims is a matter which will be one of the chief questions which the umpire will have to decide. All I can say is that the old contract did not come to an end by the new contract of November. All such points are open to the umpire to decide and I want to say nothing which will in any way fetter his conduct of the arbitration or the parties' conduct before him. All such points are open to be taken before the umpire and no doubt will be properly argued before him. I have little doubt that in this arbitration the firm will not adopt the same attitude which they have adopted in saying "we do not think this arbitration clause applies and we will have nothing whatever to do with it." As a general rule it is much better to attend an arbitration and take points there or apply to the Court to stop an arbitration, for, the attitude that the defendants took up in this case, of holding aloof altogether has an element of danger in it.

There is one other matter for consideration and that is the question of costs. At the present time, this award is bad and as I have already stated Messrs. Dreyfus & Co. are receiving indulgence from the Court in having the matter revived by a remission of the award to the umpire. In those circumstances I think that they themselves are to blame and must pay the costs of the motion and of the appeal. The time for the making of the award will be extended by six months from this date. If Mr. Chettle is not available, proper steps will be taken. I do not want to be understood to hold that the document of the 3rd November was not a concluded contract between the parties. That is a question for the umpire to determine. It

has not been proved before us to be a contract to which the respondents to this appeal were parties.

WALLACE, J.:—I agree. I am clear that the old firm on which the notice of arbitration was served could not resist an appeal to arbitration merely because one member of it has signed on his own behalf while his partner was alive, the new agreement. I agree with the learned Chief Justice that the question whether the contractual obligations of the old firm under the old agreement have been discharged or superseded by the new agreement, is a matter not for this Court at present to settle, but for the arbitrators, and it is better to make no further pronouncement on this point. I agree that the award should be remitted on the terms proposed by the learned Chief Justice.

Award remitted.

1923 Madras. 224.

OLDFIELD AND RAMESAM, JJ.

C. Kuppuswami Mudaliar and others ... Petitioners—Appellants.

v.

Y. Subramaniam Chettiar and others ... Respondents.

A. F. O. O. No. 206 of 1921 Civ. Misc. Pet. No. 1408 of 1921 dated 11th August 1921 against the order of Sub. J., Madura, dated 30th April 1921 in I. A. No. 180 of 1921 in O. S. No. 63 of 1921.

Civil P.C., S. 92—Removal of trustee—Stranger as Receiver.

In a suit under S. 92 the Court has power to appoint a Receiver and take the management of the temple out of the hands of the trustees appointed by the Temple Committee pending the disposal of the suit even though there is no prayer for his removal and though he cannot be removed except on a proper enquiry.

T. Rangachariar, T. V. Gopalaswami Mudaliar and T. Nallasivam Pillai—for the Appellants.

T. R. Venkatarama Sastriar, K. V. Krishnaswami Aiyar, A. Krishnaswami Aiyar, N. Swaminatha Aiyar, K. Rajah Aiyar, K. Balasubramania Aiyar, T. M. Ramaswami Aiyar and V. Ramaswami Aiyar—for the Respondents

OLDFIELD, J.:—We have heard argument at considerable length on the facts and law involved in this appeal. But, as the majority of the issues raised will require consideration at the trial of the suit by the lower Court, we enter on no detailed discussion of them.

There is, we think, no doubt that the lower Court had power to supersede first defendant, notwithstanding that he was appointed manager by the Temple Committee and was only removable after regular enquiry. Such action was approved in *Veeraraghava Thathachariar* v. *Krishnasamy Thathachariar* (1), in similar circumstances against a trustee and manager, who was, no doubt, hereditary but who also would be removable only in the same way.

As regards the facts, we have been taken carefully through the history of first defendant's incumbency and, in particular of the last ten days, during which the important Chithrai festival should have been celebrated, and in our opinion it is just and convenient in the interests of the public, whom the plaintiffs represent, and of the institution that the immediate management should be in other hands, and, should, so far as the circumstances permit, be under the supervision and control of the Court during the pendency of the suit.

We, therefore, dismiss the appeal and the connected petition except that we add to the lower Court's order appealed against the provision already made in our order of 11th May, 1921, on C. M. P. No. 1618 of 1921 for the maintenance, subject to the Receiver's right and duty to consult the Court, when necessary, of his subordination to the Temple Committee.

Appellants will pay respondent's costs in the appeal.

RAMESAM, J.:—I agree. The case in *Veeraraghava Thathachariar* v. *Krishnasamy Thathachariar* (1), shows that in a suit under S. 92 of the Code of Civil Procedure, though there is no prayer to remove a trustee, a Receiver might be appointed during the pendency of the suit. The reason is, that, in this class of suits, it is not merely the defendant's rights that are the subject of consideration by the Courts but the interests of a public institution of far greater importance than the defendant's rights. It may be that the power of a Temple Committee to

1. (1910) 20 M. L. J. 633.

remove a trustee appointed by them is limited but it does not follow that a Court's power over the trustee are similarly fettered. Having regard to all the facts placed fully before us, I concur with my learned brother in thinking that the Receiver should continue to be in charge of the institution till the suit is disposed of. I agree with the order of my learned brother. *Decree varied.*

1923 Madras. 225.

KRISHNAN AND RAMESAM, JJ.

Tadepalli Lakshmi Narasimham and others ... Defendants—Appellants in 294 of 1921. (Respondent in A. No. 354 of 1921.)

v.

Velagaleti Rukmaniamma... Plaintiff—Respondent in 294 of 1921. (Appellant in A. No. 354 of 1921.)

F. A. Nos. 294 and 354 of 1921 dated 5th October 1922 against the decree of Sub. J., Bezwada in O. S. No. 17 of 1919 dated 14th April 1921.

(a) *Evidence Act, S.* 114—*Statement after suit.*

The making of a statement in a document after the suit had been launched and was pending is very different from stating on oath in the witness box, and the Court will not attach much weight to the statement even if it is admissible. (P. 226, Col. 1.)

(b) *Hindu Law—Adoption—Authority—Consent—Will—Construction.*

There is no authority for holding that a father-in-law can authorise his daughter-in-law to adopt under the Hindu Law, the only way in which a widow can adopt is either by the authority of her husband or by the consent of her nearest sapindas given *bona fide* and honestly. No sapinda is entitled to give by way of a Will to take effect after his death, a consent to an adoption by a widow. The consent has to be given with reference to the circumstances attendant upon the proposed adoption and usually at the request of the widow. Consent to a future adoption cannot validate the adoption. 36 Mad. 145, Ref.

(P. 226, Col. 2.)

A. Krishnaswamy Iyer—for Appellant.

JUDGMENT:—These two appeals arise from the decree in O. S. No. 17 of 1919 in the Subordinate Judge's Court of Bezwada. Appeal No. 294 is by defendants 1, 4, and 6 and Appeal No. 354 by the plaintiff.

The first question we have to consider in these appeals is whether the Will relied on by the defendants, Ex. I, is genuine or not. It purports to have been executed by the husband of the plaintiff, one Kanthiah Garu, on the 29th November 1915. The learned Subordinate Judge has found in favour of this Will relying mainly upon the oral evidence in its favour, consisting of the evidence of four of the attestors and of the writer, all of whom depose to the execution of the Will and say that they saw Kanthiah attach his signature to the Will. The signature of the testator in the Will differs somewhat from his usual signature, as he was at the time seriously ill. Some criticism has been made of the evidence of these witnesses by Mr. Varadachariar for the plaintiff, but we think that none of them is of any weight. It was the Karnam of the village who wrote the Will and the Village Munsif attested it, and some of the other persons who attested it were persons who would naturally be the persons attesting a Will by Kanthiah. It is not shown that they have got any special prejudice, or interest in favour of the defendants, to perjure themselves regarding the genuineness of the Will.

One point tried to be made out by the learned Vakil for the plaintiff was that this Will, though executed on the 29th November, was not presented for registration till sometime in April 1916 and that this delay is very suspicious. We think the delay has been explained as the Will was produced in some Magistrate's case as early as January 1916 and was referred to in the document executed by the first defendant Ex. VIIIA. There is thus no point in the supposed delay in getting the document registered. We, therefore, agree with the Subordinate Judge that the Will has been proved to be genuine.

The next question argued before us was whether the consent of the four sapindas, Venkatarayadu, Ramakrishniah, Dasaratharamiah and Pattabiramiah was obtained to the adoption of the sixth defendant by the fourth defendant before the date of the adoption. The Subordinate Judge has found on this point in favour of the consent; but on looking into the evidence carefully, we are not satisfied that such consent was given

antecedent to the adoption. The Subordinate Judge has referred mainly to the evidence of three witnesses, *viz.*, 7th, 8th and 9th witnesses, to support his conclusion that the consent was given as alleged. But, in the case of the 8th witness, who seems to be a witness of no status, he placed very little reliance. As regards the 7th witness, who is a High Court Vakil and a man of some position, we notice that he has made no statement whatever that he gave any authority to the widow prior to the adoption. When giving his evidence, he was not apparently asked any question about the authority, but in the cross-examination he was asked whether he gave any written authority and he said "No." His evidence, therefore, is of no value really in finding in favour of the consent. No doubt he has signed a document Ex. II. Strictly speaking, as evidence on this part of the case, the document would have been admissible only as corroborating any statement made by him in Court, but there is no statement so made by him and it is therefore not of any evidentiary value on this point. It is suggested that the omission to put the question to him about the oral authority which he gave was due to some inadvertence on the part of the defendant's Vakil, but we are unable to accept this suggestion as, if it was due to inadvertence, he could easily have been recalled and examined about it. It seems to us to be very significant that no question was asked of him about the oral authority which he is supposed to have given beforehand. The making of a statement in a document subsequently as in Ex. II and that after the suit had been launched and was pending, is very different from stating on oath in the witness box, and we are not therefore prepared to attach much weight to the statement of the 7th witness in Ex. II even if it is admissible. Then as regards the 9th witness, no doubt, he says he gave the consent beforehand, but he is not a witness of any very great respectability so far as we can see, and we are not prepared to come to an affirmative finding on the question on his evidence uncorroborated by any other evidence. As we have already stated we do not attach much weight to Ex. II as it was a document got up for the purpose of this suit and long after the suit had been launched.

One point that tells against the defendants, and that point has been noticed by the Subordinate Judge as one of some force—is that there is no mention in Exs. V or IX of the consent of the sapindas whereas the authority said to have been given by the deceased is mentioned there. This omission, is, we think a fair ground for inferring that the subsequent case put forward, of consent by the sapindas, was a later development. We have therefore come to the conclusion that the defendants have not discharged the burden of proving that the consent of these four sapindas was given before the adoption took place. It is not argued before us that any subsequent ratification can take the place of the antecedent consent.

It was, however, argued by Mr. A. Krishnaswamy Ayyar for the defendants that, even if there was no consent of the sapindas, he could support the validity of the adoption on the language of Ex. I, the Will. That Will says "So for the purpose that the line of my family may continue, I hereby authorise my daughter-in-law Venkayamma to be taking in adoption boys until the purpose of adoption namely continuation of the line of descent is served. If within five years after my demise Venkayamma does not take either a boy among my gnatis or if such a boy is not found, any other boy in adoption or if she refuses to take anyone in adoption, I hereby authorise my wife Rukmani Amma to be taking in adoption boys until the purpose of adoption is served". On the language used it is perfectly clear what the testator intended to do. He proposed to authorise his daughter-in-law to adopt just in the same manner as he was authorising his widow to adopt if the daughter-in-law failed to adopt within a certain time. No case has been brought to our notice which will support the argument that a father-in-law can authorise his daughter-in-law to adopt as, under the Hindu Law, the only way in which a widow can adopt is either by the authority of her husband or by the consent of her nearest sapindas given *bona fide* and honestly. On account of this difficulty Mr. Krishnaswamy Aiyar suggested that we should take the statement in the Will as amounting to a giving of consent to Venkayyamma to adopt, by the testator as her nearest sapinda. He was no doubt

a near sapinda for the purpose of giving consent and his consent may be a very good basis for the validity of the adoption: but we cannot look upon the statement in Ex. I. as anything in the nature of giving consent at all. On its own terms it was an authorisation, which was invalid.

Next, we are of opinion that no sapinda is entitled to give, by way of a Will to take effect after his death, a consent to an adoption by a widow. The consent has to be given with reference to the circumstances attendant upon the proposed adoption and usually at the request of the widow. Here there was no such thing. She never applied for any consent, nor was he considering whether his consent as a sapinda should be given to his daughter-in-law. In these circumstances we do not think that the argument of Mr. A. Krishnaswami Aiyar that the statement in Ex. I should be looked upon as giving consent to a future adoption and that it validated the adoption, can be accepted.

It has been held by this Court in *Mami* v. *Subbarayar* (1), that, where a sapinda gives his consent to an adoption, such a consent should be treated as having become ineffectual on the death of that sapinda. We need not go so far in this case as here, even if we treat the statement in Ex. I as a consent, the consent does *not* take effect during the lifetime of consentor. We think such a consent is quite useless.

Our attention was also drawn to the case of *Suryanarayana* v. *Ramadoss* (2), where certain observations have been made throwing some doubt upon the decision in I. L. R. 36 Mad. 145 but we need not go into the question in this case. We must therefore hold that the adoption is not valid.

At the end of the argument in the case, Mr. A. Krishnaswami Aiyar raised a point that, as executor, the first defendant was not bound to give over possession of the properties as it was possible that an adoption might be made by the widow of Kanthiah and he might become entitled to the property. This point has not been raised either in the lower Court or in the grounds of Appeal here and we do not think that we can give effect to that contention at this stage.

As a result of our findings, both the appeals fail and are dismissed with costs.

Appeals dismissed.

1. (1913) 36 Mad. 145.
2. (1918) 41 Mad. 604.

1923 Madras. 227.

SPENCER AND VENKATASUBBA RAO, JJ.

Muniswami Naickan ... Defendant—Appellant.

v.

Muniswami Naickan ... Plaintiff—Respondent.

F. A. No. 366 of 1921 dated 20th October 1922 against the order of Sub. J., Vellore, dated 22nd July 1921 in A. S. No. 88 of 1921.

Civil P. C., O. 41, Rr. 22 to 25—Remand—Legality—First Court's findings on all issues—Reversing the finding on one issue—Remanding the suit for fresh disposal.

Where the trial Court decided all the issues in the case but dismissed the suit on the basis of its finding on one issue that the suit was not maintainable and on appeal the Appellate Court decided that issue in favour of the plaintiff and remanded the suit to the trial Court for fresh disposal but without in any way disturbing the findings of the First Court on the other issues.

Held: that the order of remand was bad. The Appellate Court should have dealt with the other issues and disposed of the case, or if it was of opinion that the evidence on record and the findings of the first Court were not sufficient for the disposal of the case, it should have called for fresh findings under O. 41, R. 25.

V. C. Seshacharriar—for the Appellant.

Krishnaswami Aiyar—for the Respondent.

The Judgment of the Court was delivered by

SPENCER, J.:—The District Munsif in this suit decided all the issues in this suit and finally dismissed the suit on his finding on issue VIII that the suit was one in effect for partial partition. The Subordinate Judge decided only the eighth isiue, which related to the question of maintainability of the suit as being one for partial partition, rightly taking the view that the suit was not bad on that account, and he remanded the suit to the lower Court for fresh disposal. This order of remand to the lower Court for a fresh disposal on the merits cannot be supported. It is inconsistent with the learned Subordinate Judge's view that the suit was not one for partial partition as he found in the first part of his judgment. It is clear that no amend-

ment of the plaint was necessary. He should therefore have disposed of the appeal under O. XLI, R. 24, Civil Procedure Code, as the evidence upon the record had been found sufficient by the District Munsif to find upon all the issues. Issue IV raised the question, "What are the family properties and debts, if any, to be divided?" The District Munsif, in paragraph 17, says that he has mentioned all the properties and debts to be divided but that they cannot be particularised until a Commissioner has gone to the spot and reported.

If the finding of the District Munsif and the evidence upon this issue was not sufficient for passing a preliminary decree, the proper course for the Subordinate Judge to adopt was to call for a finding from the lower Court under R. 25 of O. 41 before disposing of the appeal.

We must set aside the Subordinate Judge's Order remanding the whole case for fresh disposal and direct him to hear and determine the appeal, except on Issue VIII, in the light of our remarks. The costs of this Miscellaneous Appeal will be costs in the cause.

Case remanded.

1923 Madras. 228.

WALLACE, J.

Perumalla Venkatasubbaiah ... Petitioner.

Civ. Rev. No. 7 of 1922, dated 27th October 1922 revising the order of District Munsif, Markapur, in Dis. No. 619 of 1921, dated 12th December 1921.

Criminal P. C, Ss. 195 and 476—Sanction on evidence of witnesses—Petitioner having no opportunity to cross-examine—Notice—Revision.

In a mortgage-suit the plaintiff (petitioner) did not appear on the date of the hearing but the Court after examining some witnesses for the defence granted sanction under S. 476, Cr. P. C. to prosecute the plaintiff for bringing a false claim under S. 209, I. P. C. on the ground the suit was on a discharged mortgage.

Held: the lower Court in granting sanction without notice to the petitioner (plaintiff) and on the evidence of witnesses whom the petitioner had no opportunity to cross-examine acted with material irregularity in the exercise of its jurisdiction. The order granting sanction must be set aside. There is no rule of law which precludes a Court taking action against a person under S. 476, Cr. P. C. even before the Civil proceedings had come to an end.

S. Swaminathan—for the Petitioner.

The Public Prosecutor—for the Crown.

ORDER:—The Lower Court has, acting under S. 476, Criminal Procedure Code, made a report against petitioner for an offence under S. 209, Indian Penal Code, fraudulently making in a Court of Justice a claim which he knew to be false. The lower Court was of opinion that petitioner sued to recover money on a mortgage already fully discharged, knowing that it had been discharged.

2. The first point taken for petitioner is that the lower Court had no legal evidence on which to base its order and that the evidence on which it is based was recorded improperly and contrary to law. The petitioner, as plaintiff in the mortgage suit, did not appear on 12th December, 1921, the date to which the suit had been adjourned for trial, and the lower Court proceeded nevertheless to file documents both for the plaintiff and the defendant to examine the defendants' witnesses, the important part of the defence case being the production and proof of a receipt, Ex. 1, purporting to be in full discharge of the mortgage and said to have been written by petitioner himself. Undoubtedly the basis of the lower Court's opinion that petitioner committed an offence under S. 209, Indian Penal Code is this Ex. I.

3. Petitioner contends that Ex. 1 is more than a receipt and evidences a settlement of the mortgage and is not registered and therefore inadmissible in evidence. As Ex. 1 is not produced here, I am unable to decide whether that is a good point or not.

4. The next point is that the lower Court ought when petitioner did not appear in his suit, simply to have dismissed his suit and was not entitled in law to take evidence in the suit. O. XVII, R. 2 read with O. IX, R. 8, of the Code of Civil Procedure upholds that contention. However that may be, I do not see anything which prevented the lower Court from taking the evidence in order to satisfy itself whether or not it was a fit case for taking action under S. 476, Criminal Procedure Code, and I am not therefore prepared to hold that the evidence was improperly or illegally taken for that purpose, which is the purpose for which the lower Court has used it.

5. Petitioner then contends that it was not open to the lower Court to initi-

ate proceedings under S. 476, Criminal Procedure Code, while the Civil Suit was undisposed of. I can see no force in that contention, nor any reason why a Court, when any of the offences noted in S. 195, Criminal Procedure Code, is committed before it in a Civil Suit, should delay proceedings under S. 476, Criminal Procedure Code, until the suit is disposed of, which disposal may not occur until months or years later. The Full Bench ruling in *Aiyakannu Pillai* v. *Emperor* (1), which is the leading case on the matter of Court's taking prompt action under S. 476, distinctly lays down that such action may be taken "in the course of the judicial proceeding" in which the alleged offence has occurred.

6. The final and in my view, most important point taken by petitioner is that he was given no notice of the lower Court's intention to take action against him. Now such notice is not, as a matter of law, necessary, but in a case like the present where the prosecution has been ordered on evidence by witnesses whom petitioner had no opportunity to cross-examine and whose evidence has thus not been tested, I am of opinion that it was a materially irregular exercise of the lower Court's jurisdiction to direct such a serious step as a criminal prosecution in this matter without giving petitioner any chance to know and meet the case against him. The case is similar to that reported in In re *Kolli Appiah* (2) in which the order under S. 476 was set aside.

7. I think the proper order in this case is to set aside the lower Court's order and direct it to rehear the matter of passing an order under S. 476, Criminal Procedure Code, after giving petitioner an opportunity of cross-examining the witnesses and meeting the case against him, and I hereby order accordingly.

Case remanded.

1. (1909) 32 Mad. 49.
2. (1912) M. W. N. 400.

1923 Madras. 229 (1).

KRISHNAN, J.

Kothandarama Reddy and another ... Petitioners.

v.

Jagathambal Ammal ... Respondent.

Civ. Rev. No. 72 of 1922, dated 11th October 1922, against the order of D. J., Chingleput in O. P. No. 25 of 1919, dated 17th November 1921.

The Succession (Property Protection Act) Ss. 3 and 5—Curator—Appointment of.

The Court has no jurisdiction to act under the Act and to appoint a curator for the properties of a deceased unless it is satisfied that otherwise the applicant will be materially prejudiced and that the application is *bona fide* and in the absence of any such finding, the order can be set aside in revision. 12 Mad. 341 Ref.

E. Duraiswami Aiyar and T. R. Srinivasa Aiyangar—for the Petitioners.

T. Narasimha Aiyangar—for the Respondent.

JUDGMENT:—To apply the Act XIX of 1841 to any particular case it is a condition precedent that the judge should find or be satisfied that the applicant was likely to be materially prejudiced if left to the ordinary remedy of a regular suit and that the application was made *bona fide*. *See* S. 3 of Act XIX of 1841. There is no finding here by the Court that these conditions are fulfilled. Without that finding the Court had no jurisdiction to act under the Act and its order is revisable; see *Papamma* v. *The Collector of Godavari* (1).

The revision has been confined by the petitioners to B and C schedule properties only. The order of the lower Court with regard to these properties is set aside. Each part will bear his or their own costs.

Petition allowed.

1. (1889) 12 Mad. 341.

1923 Madras. 229 (2).

SCHWABE, C. J. AND KRISHNAN, J.

S. Ramanujam Chetty ... Petitioner—Appellant.

v.

P. R. Padmanabham Pillai ... Respondent.

Civ. Mis. Pet. No. 477 of 1922 dated 17th February 1922 against the judgment of Coutts-Trotter, J. dated 28th September 1921.

Civil P.C., O. XLI, R. 5—Stay of execution as to costs—Respondent insolvent—Proper order.

In an application for stay of execution of the decree as to costs, where the respondent is an insolvent, the Court should make an order directing the appellant to pay the costs to the respondent's solicitor, on the latter personally undertaking to repay the same to the appellant in the event of the success of the appeal. Practice of the Court of Appeal in England followed.

M. P. Sundararaja Aiyar—for the Petitioner.

ORDER :—In this case, in view of the insolvency of the respondent, it is not desirable that pending the appeal the amount which he has to recover for costs should be paid to him, because if the appeal is successful, it is obvious that the successful appellant would not get back the costs which he would be entitled to. Therefore it is a case where it is right that there should be a stay of the execution of the decree for costs on terms. The terms as I understand it, usually imposed here are terms of payment into Court. The terms as far as costs are concerned which are usually imposed by the Court of Appeal in England are payment to the solicitor of the respondent on his personal undertaking to repay in the event of the appeal being successful ; that personal undertaking being one by an officer of the Court against whom it can be enfored in a summary way under the powers that the Court has over its own officers ; it is a very convenient practice. There is no reason why a solicitor who, as far as these costs are concerned, to a greater extent is entitled thereto should be kept out of the money pending the appeal and if he is a responsible person, no harm will be done to the appellant in view of the undertaking he has given. I see no reason why the practice should not be adopted here in proper cases. I think that this is a proper case.

The order of the Court will be that there will be a stay of execution on the terms of the taxed costs being paid over by the appellant to the respondent's solicitor within 14 days on the personal undertaking of the solicitor for the respondent to repay them in the event of the appeal being successful. Costs of this application will be costs in the appeal.

KRISHNAN, J.:—I agree.

Petition allowed.

1923 Madras. 230.

KRISHNAN AND VENKATASUBBA RAO, JJ.

Nandigam Gangayya ... Appellant.

v.

Madupalli Venkataramayya and others ... Respondents.

Civ. Rev. No. 660 of 1922 dated 11th September 1922 against the order of Addl. Sub. J., Ellore dated 26th July 1921 in A. S. No. 38 of 1921.

(a) *Civil P. C., S. 64—Attached property privately sold and price paid to decree-holder—Agreement that decree-holder should not proceed against—Transferee of decree with knowledge of.*

One of the properties attached in execution of a decree was purchased by the petitioner on payment of the price to the decree-holder. An agreement was arrived at between the purchaser, the decree-holder and the judgment-debtor that the decree-holder should not execute the decree against the property purchased. A transferee of decree with knowledge of the agreement applied for execution against the very item purchased :

Held S. 64 was really intended for the benefit of the decree-holders and that the same could be waived by them ; the agreement in the case amounted to such a waiver and the decree-holder having been bound by the agreement, the transferee of the decree with knowledge of the agreement was also bound by it. 42 Mad. 338 Dist.

(P. 231, Col. 2.)

(b) *Civil P. C., S. 115—Failure to exercise jurisdiction—Erroneous view of law.*

Where a Court by an erroneous view of the law refuses to exercise a power which it has got or exercises a power which it assumes it has but it has not, really got, the case would be one falling under S. 115.

(P. 232 Col. 2.)

C. Rama Rao—for the Appellant.

V. Suryanarayana—for the Respondents.

KRISHNAN, J.:—This case arises from an application put in by the appellant before us to exclude from Court-sale a property which he had purchased while it was under attachment under an agreement made between him, the decree-holders, and the judgment-debtor that, on the purchase-money Rs. 200 being paid to the former, he should no longer execute the decree against the property purchased and that the attachment should be withdrawn. The decree-holders have now transferred their decree to one Venkataramayya, the first respondent and he is now trying to execute the decree by selling this very property. He has also applied for execution against the other properties as well : but we are not concerned with that portion of his execution application. The main question that has to be decided in this case on the facts found, is whether, because the property was under attachment at the time that the appellant purchased it, S. 64 of the Civil Procedure Code is a bar against his plea that the property should not be proceeded against in execution.

The District Munsif held that the section was not a bar as it did not make the alienation absolutely void but only

void to the extent of the claims enforceable under the attachment and that the decree-holders, having entered into an agreement and received full consideration for it that they would not proceed against the appellant's property, they were bound by that contract and could not rely upon S. 64 and insist in selling the property again. According to him, S. 64 being a section enacted for the benefit of decree-holders, it was open to them to waive such a benefit.

Against the order of the Munsiff there was an appeal to the Subordinate Judge. He also found all the facts in favour of the purchaser, namely that the sale-deed Ex. A, by which he purchased the property had full consideration, that the agreement set up by him was true and that the purchase-money was paid to the decree-holders in pursuance of that agreement. There seems to have been at the same time an agreement that the purchase-money was to be taken in full satisfaction of the decree. That was however an arrangement primarily for the benefit of the judgment-debtor : that arrangement, as it amounted to an adjustment of the decree between the parties, would fall under O. XXI, R. 2 and could not be pleaded in execution : but, so far as the appellant's claim is concerned, his plea is only that the property purchased by him should not be sold and the only objection that could be raised against him is that S. 64 bars his plea.

The Subordinate Judge in appeal, though he found all the facts in favour of the present appellant, nevertheless came to the conclusion that ' it could not be disputed that as no satisfaction of the decree had been recorded, the decree continued in force and was executable against all the attached properties '. He thought that the transferee decree-holder was entitled to sell again to present appellant's property as if it had not been sold to him at all. It is not however clear whether he puts the case under O. XXI, R. 2 or under S. 64 of the Civil Procedure Code. If it is the former, it is clear that that rule has no application so far as the purchaser, the appellant is concerned. He is not interested in insisting upon any adjustment of the decree. All that he is concerned with is that his property should not be sold in execution. It does not matter to him whether the decree should be executed or treated as adjusted so long as the contract between him and the original decree-holders is enforced as against the latter and their transferee. O. XXI, R. 2 does not therefore bar his contention.

As already stated the question that really arises is one of the construction and effect of S. 64, Civil Procedure Code. We are inclined to think that the view taken by the Munsif of this section is the correct one. The section is really one intended to benefit the decree-holders so that they may not be impeded by any alienation pending attachment in executing their decrees. That benefit being for the decree-holder, we are inclined to think that he could waive the benefit ; and as, in the present case, the decree-holders had entered into an actual contract with the purchaser, they cannot be permitted to go back upon their contract and insist upon the application of S. 64 in their favour. To allow them to do so would be clearly to perpetrate a fraud. We see nothing in S. 64 that necessitates such a construction as that.

Numerous authorities have been cited to us regarding the application of O. XXI, R. 2 but none of them have got any bearing on the present case and therefore we do not propose to refer to any of them. No case has been cited as regards the construction of S. 64. We have, therefore, to decide the question arising here on the language of that section. There is no particular public policy underlying the section which makes it incumbent on the Court to avoid an alienation pending an attachment, the section being intended only to help the decree-holder to realise his decree amount.

It was finally argued that whatever obligation there might be upon the decree-holder to act according to his agreement, such obligations did not pass to the transferee decree-holder and that it was open to him to sell the property in execution. We are unable to accept this argument for the transferee decree-holder in this case is proved to have had knowledge of the agreement between the decree-holders and the purchaser before transfer. Furthermore a transferee decree-holder can be allowed to put forward only such rights as the decree-holder had at the time of the transfer ; and as in this

case the decree-holder was bound by the arrangement, we must take it that the transferee was also bound by it. The case cited in *Krishna Ayyar* v. *Savurimuthu Pillai* (1) has no bearing on the present case at all, for there the transferee decree-holder was entirely within his rights, because the decree-holder himself had the right of executing the decree in spite of the anterior adjustment with the judgment-debtor as that adjustment had not been certified to the Court under O. XXI, R. 2. If we may respectfully say so, it was rightly held that there was no cause of action against the transferee. The cause of action against the decree-holder was based on his failure to perform his statutory duty of certifying to the Court the adjustment that he had entered into with the judgment-debtor. Such a duty did not devolve upon the transferee at all.

The point has also been taken before us that no second appeal lies in this case as the matter arises in the execution of a small cause decree. This seems to be so and the second appeal must therefore be dismissed : but we are prepared to allow the second appeal to be converted into a revision petition under S. 115 of the Civil Procedure Code. It is argued for the appellant that in that view we should set aside the decree of the lower Court as well. But S. 102 does not affect the right of appeal from such a decree but only the right of second appeal. It is not necessary to decide if there was a right of appeal in this case under S. 47 of the Civil Procedure Code on the ground that the purchaser of a property attached is a representative of the judgment-debtor in disputing the right of the decree-holder to sell it, as we are setting aside the Subordinate Judge's order on another ground.

Assuming the appeal was a competent one we must still hold that the order of the Subordinate Judge was one falling under S. 115 of the Civil Procedure Code as he entirely misconstrued the legal position in the case and refused to release the property from attachment as he should have done. Having found that there was an agreement as pleaded by the purchaser, and having found all the facts in his favour, the Subordinate Judge, has, by a mistake of law that he made, declined to give effect to his findings and to release the property, from attachment as he should have done. Where a Court by an erroneous view of the law refuses to exercise a power which it has got or exercises a power which it assumes it has but it has not really got, the case would be one falling under S. 115 of the Civil Procedure Code. We may refer to the most recent decision of the Full Bench of this Court in *Sundaram* v. *Mamsa Mavuthar* (2) for this view.

In these circumstances we think this is a fit case for interference under S. 115 of the Civil Procedure Code and we set aside the order of the Subordinate Judge and restore that of the District Munsif. As regards costs, we think it right to make the parties bear their own costs in the lower Appellate Court and in this Court.

Petition allowed.

1. (1919) 42 Mad. 338 (F. B.).

2. (1921) 44 Mad. 554 (F. B.).

1923 Madras. 232.

SCHWABE, C. J. AND COUTTS TROTTER AND KUMARASWAMI SASTRI, JJ.

B. Raja Rajeswara Sethupathi alias *Muthu Ramalinga Sethupathi Avergal, Rajah of Ramnad* ... Petitioner.

v.

Tiruneelakantam Servai and another ... Respondents.

Civ. Mis. Nos. 1740 and 1741 of 1922 dated 8th November 1922 against the judgment of High Court in L. P. A. Nos. 21 and 22 of 1920.

Civil P. C., S. 109 (c)—Very small value.

The duty of the Court if it thinks that the case is a fit one for consideration by His Majesty in Council where it would not be right to call upon one party whose financial interest in the matter is small to incur the risk of the costs of the appeal, is to refuse leave and to leave the appellant, if so advised to apply to the Privy Council for special leave.

(P. 233, Col. 2.)

PER COUTTS TROTTER, J:—Where amounts at stake in the cases are in themselves small, the most satisfactory order would be to allow the appellant to appeal and get his principle settled for him on terms of paying all the other sides' costs in any event ; but this Court has no power to make such an order. It is best to regard their Lordships of the Judicial Committee when they speak of " private importance " as meaning private importance to both parties to the litigation and not only to one of them.

(P. 234, Cols. 1 and 2.)

S. Soundararaja Aiyangar and P. S. Chandrasekara Aiyar—for the Appellants.

C. V. Ananthakrishna Aiyar—for the Respondents.

SCHWABE, C. J.:—These are two applications for leave to appeal to his Majesty in Council against the decisions of this Court constituted as at present. The actual pecuniary amounts involved in the two appeals are Rs. 400 and Rs. 600 respectively. Under Ss. 109 and 110 of the Code of Civil Procedure of 1908 leave to appeal has to be granted where the amount or the value of the subject-matter of the suit is Rs. 10,000 or upwards and the amount or value of the subject-matter in dispute on appeal to his Majesty in Council, is the same sum or upwards or property of like amount or value is involved directly or indirectly, provided where the decree affirms the decision of the Court immediately below some substantial question of law is involved. In this case by reason of the value of the subject-matter, the above provisions do not apply. There is, however, further a power under S. 109 (*c*) of the Code of Civil Procedure in this Court to give leave to appeal by certifying that the case is a fit one for appeal to his Majesty in Council. What is contemplated is a class of cases in which there may be involved questions of public importance, or which may be important precedents governing numerous other cases or in which, while the right in dispute is not exactly measureable in money it is of great public or private importance. See *Banarsi* v. *Kashi Krishna Narain* (1), *Hirjibhai* v. *Jamshedji* (2). We are informed that there are many other persons in the Zemindari in question holding under the Zemindar whose rights are governed by documents in the same or similar terms to those construed by the Courts in these cases. The result of these decisions is that the plaintiff Zemindar cannot recover the arrears for the last few years alleged to be due to him in respect of certain Swathanthrams. According to our judgment, there are other means open to the plaintiff to recover such payment or their equivalent for the future. The plaintiff contends that this is a case of great public or private importance because, if our decision is wrong, he would be entitled to recover from many persons for the past amounts aggregating to a large sum. It is obviously unjust that the defendants in these two cases should be put to the expense of fighting this matter in the Privy Council so that, if our judgment is wrong, the plaintiff may recover these small amounts from them, and thereafter in the aggregate a large amount from other persons. In similar cases on applications for special leave to appeal made to their Lordships of the Privy Council, a condition has been imposed upon the appellant that, whatever be the result of the appeal, he should pay the costs of the other party as between solicitor and client. See *Spooner* v. *Juddon*, (3) In re *Sibnarain Ghose* (4) and *Indian Irrigation Trust Board of Natal* v. *Govindaswami* (5). I think that this is a proper case for such an order if it is a matter upon which I am entitled to express an opinion. The question has been raised before us whether we have power to impose such a condition. In *Clarke* v. *Brajendra Kessore Raj Choudhuri* (6) Jenkins, C.J., and Caspersz, J., held that no such power existed in the Indian Courts but was confined to the Privy Council. The result of such finding is curious. According to the direction of the Privy Council in *Moti Chand* v. *Gangi Pershad* (7) quoted in the judgment in 13 C. W. N. 1127 in all cases where leave to appeal is desired, although the subject-matter is under Rs. 10,000 such applications must in the first instance, be made to the Indian Court as that Court if it thinks that it is a case fit for appeal to His Majesty in Council, can certify to that effect under S. 109 (*c*). What is the duty of the Court if it thinks that the case is a fit one for consideration by His Majesty in Council but that it would not be right to call upon one party whose financial interest in the matter is small, to incur the risk of the costs of the appeal. Assuming the decision in *Clarke* v. *Brajendra Kissore* (6) is right, and in my judgment, in view of the fact that that case went before the Privy Council and special leave to appeal was granted and it was not then suggested that the Calcutta High Court could have itself imposed any condition, it is not possible

1. (1901) 23 All. 227, at 231=28 I. A. 11.
2. (1913) 15 Bom. L. R. 1021.
3. (1846) 4 M. I. A. 353 at pp. 360 and 361.
4. (1847) 5 M. I. A. 322 at p. 325.
5. (1921) A. C. 433 at p. 438.
6. (1908) 13 C. W. N. 1127.
7. (1902) 29 I. A. 40=24 All. 174.

for this Court to hold otherwise, the only course open to us is to refuse leave and to leave the appellant, if so advised to apply to the Privy Council for special leave.

During the hearing of these applications we asked the appellant whether he would be prepared to agree to a condition that he should be liable for the costs of the defendants as between solicitor and client in any event. This by his counsel he definitely refused. It is, possible that it would not have been right for us to give leave with such a condition even if agreed to, as, if the decision in *Clarke* v. *Brajendra Kissore* (6) is correct, it might be said that to hold so would be usurping a power reserved to the Privy Council. I venture to express the hope that some day this matter will be discussed in the Privy Council and that a definite pronouncement may be made on the subject. But meanwhile, I think in such cases the only safe course is to refuse leave stating, if it be the case, that the point in issue appears to be one of general importance but not of sufficient importance to the proposed respondent to warrant this Court in putting him to the expense of an appeal to the Highest Tribunal.

These applications must accordingly be dismissed with costs.

COUTTS TROTTER, J.:—These cases have given me very great difficulty and I do not know now whether I have resolved that difficulty aright; but I desire to formulate it in my own words as it presents itself to my mind.

We can only grant leave to appeal if at all under S. 109 (*c*) of the Code of Civil Procedure because the amounts at stake in the cases are in themselves small. But the Zemindar who wishes to appeal, asserts that the cases will govern a very great number of other cases in which he seeks to recover *swathanthrams* from other ryots, and that therefore it is for him "a matter of great private importance," to quote the language of the leading case. The reply of the ryots is that to them individually it is a matter of a few hundred rupees, and that they could not possibly afford to contest such an appeal. Obviously the most satisfactory order would be to allow the Zemindar to appeal and get his principle settled for him on terms of paying all the other sides' costs in any event; but it is said that this Court has no power to make such an order. After a careful consideration of the section and the cases referred to I have come to the conclusion that this contention is well-founded. We have in a sense a discretion as to granting leave to appeal; but it is strictly circumscribed by the section. I do not think that we can impose a condition as to costs unless it is to be found in so many words in the Code: it would be in my opinion an invasion and usurpation of the powers of the Privy Council to do so, and an unwarranted attempt to fetter their Lordships' decision as to costs.

This being the position, what is our duty: to grant leave because the matter is of great importance to the one party, or to refuse it because it is of trifling importance to the other? If we take the former view, the responden will probably either pay at once or at any rate fail to appear to argue the case; and the ryots of this country have not for the most part reached the stage of realizing that they could advantageously combine to fight a test case. I think on the whole that it is best to regard their Lordships of the Judicial Committee when they speak of "private importance" as meaning private importance to both parties to the litigation and not only to one of them. I therefore concur in the order proposed that we should refuse leave. The Zemindar can apply to their Lordships for special leave to appeal, when if their Lordships see fit, they can impose the terms that we should have desired to impose, had we felt ourselves able to do so, or such other terms as may commend themselves.

KUMARASWAMI SASTRI, J.:—These are applications by the Rajah of Ramnad for leave to appeal to the Privy Council against the decision of the majority of the Full Bench. The question turns on the construction of two cowles executed by the respondents. The Rajah claimed that he was under the cowles entitled to recover from the respondent the *Manibha Swatantrams*, paid by the ryots to the respondents. The appeals by the Rajah first came on before Wallis, C. J., and Sadasiva Aiyar, J., who differed. In consequence of this difference the above Letters Patent Appeals were filed. The Chief Justice and Coutts-Trotter, J., were

of opinion that the Zemindar was not entitled to the *Swatantrams* while I agreed with Sadasiva Aiyar, J., that he was entitled.

The present applications are for leave to appeal to the Privy Council against the decisions of the majority of the Full Bench. It is alleged by the Rajah that though the value of the *Manibha Swatantrams* in dispute is only Rs. 409-2-4 and Rs. 159-3-0 respectively in Letters Patent Appeals 21 and 22 of 1920, the judgment and decrees of the High Court will have far-reaching consequences in the Ramnad zemindari and that the judgment which will be binding authority on the question of law decided by the Courts will affect his right to collect the *Manibha Swatantrams* from other ryots and would entail on him a loss of Rs.20,000 a year. It is contended that the judgment and decree of the High Court involve directly and indirectly a sum of over Rs. 10,000.

As regards the value of the appeal it is clear that so far as the petitioner and respondents are concerned it is far below Rs. 10,000. Even taking into account the amounts which will become payable on the unexpired term of the leases the amount will not be over Rs. 4,000 in both the Letters Patent Appeals. For the purposes of S. 110 of the Civil Procedure Code, the amount or value of the subject-matter of the suit and in the appeal in the Court of first instance and the appellate Court must be Rs. 10,000 or upwards in order to render an appeal under Cls. (*a*) and (*b*) of S. 109 competent. The question is therefore not what the indirect consequences of the decree may be to the petitioner but what the value of the subject-matter is as between the parties when an application is made for leave on the ground that the pecuniary value is over the sum of Rs. 10,000 required by Cls. (*a*) and (*b*) of S. 110. I am of opinion that the subject-matter of the suits and appeals is far below the sum of Rs. 10,000 even if we consolidate the appeals.

It is argued that even if Cls. (*a*) and (*b*) of S. 109 do not apply, leave should be granted under Cl. (*c*) which enables the High Court to grant leave in cases not falling under Cls. (*a*) and (*b*) if the Judges consider that the case is a fit one for appeal to His Majesty in Council. It is pointed out that special leave has been given in cases where though the amount in dispute in individual cases was small, leave was granted when the question related to tenures or the construction of leases and grants which applied to tenants generally. It does not however appear that the questions raised affect other Zemindars in this presidency.

There is no doubt that the questions raised in these Letters Patent Appeals are of great importance to the Zemindar of Ramnad and that he will lose a large sum, should the matter stand where it is. This however is not the only consideration. We have to view the case from the stand-point of the respondents who are tenants without means at their disposal to incur the heavy costs and charges which the granting of leave will entail on them. The case is one which while of great importance to one party is, so far as the other is concerned, of small pecuniary interest. In fact the respondents state that if leave to appeal is granted it would be more profitable for them to pay the *Manibham Swatantrams* disallowed rather than incur the expenses involved in defending the appeals to the Privy Council.

The considerations which ought to weigh with us in such cases were stated by Lord Langdale while granting leave to appeal in *Spooner* v. *Juddow* (3) where he observed as follows: "The question appears to be of very considerable importance, but you observe the sum at issue is only a sum of Rs. 250 and for the purpose of deciding that you put the respondent to the expense of this appeal. The question is whether this prosecution being by the East India Company, and no doubt important to have decided, for the benefit of the whole country, the whole expenses of this appeal should not be borne by them. However important it may be to establish the law upon a question of this kind, it would be very wrong to put the party to so great an expense in cases when so small a sum is at issue". Leave to appeal was granted on the appellant undertaking to pay all costs, charges and expenses which might be incurred on behalf of the respondent as well as the appellants. In *Beni Ram* v. *Kundah Lal* (8) where the suit was between the landlord and tenant and the question was

8. (1899) 21 All. 496=26 I. A. 53.

whether it was a good ground of defence in a suit for ejectment that the predecessors in tenancies had erected permanent buildings on the land without the landlord having interfered to prevent the building which was within their knowledge. Special leave was granted by their Lordships of the Privy Council on terms that the appellant should be liable to pay the respondents' costs in any event if directed to do so.

We asked the petitioner if he will undertake to pay all the costs, charges and expenses likely to be incurred by the respondents in any event should leave be granted under S. 109, Cl. (*c*) but he declined to be liable and we do not think leave should be granted on any other terms.

We have however no power to impose any terms on the petitioner as a condition precedent to granting leave to appeal to His Majesty in Council. Ss. 109 to 112 and O. XLV, of the Civil Procedure Code, which deal with appeals to the King in Council do not give us any such power. Costs of the appeal, once leave is granted is a matter entirely within the discretion of their Lordships of the Privy Council and except by consent of the parties I do not see how we can make any order fettering the discretion of their Lordships when they ultimately deal with the appeal. I do not think S. 151 of the Civil Procedure Code can be invoked for the purpose.

The provisions of the Civil Procedure Code, as to costs are contained in S. 35 and so far as suits are concerned, there is no power to direct a plaintiff to pay in advance the costs, charges and expenses likely to be incurred. O. XXV or XLI, R. 10 provides for security for costs in certain cases. S. 107, Cl. 2 dealing with appeals enacts that the Appellate Court shall subject to the provisions of Cl. (1) have the same power and perform as nearly as may be the same duties as are conferred or imposed by the Code on Courts of Original Jurisdiction in respect of suits. Treating the High Court as a Court acting in its appellate jurisdiction when granting the certificate under S. 109, Cl. (*c*) it cannot have any higher powers simply because it has to consider whether it should grant the certificate required by the Section. It is no doubt true that Courts in India have power to direct the petitioner in Divorce cases to pay in advance costs, charges and expenses likely to be incurred by the wife but this power is given by S. 7 of the Divorce Act which confers on Indian Courts the same power which Courts for Divorce and Matrimonial cases in England have. As regards security for costs R. 7 of O. XLV requires the appellant to give security and all that the respondent in appeals is entitled to is to require that security be furnished. I can find no case in India, where the High Court has imposed conditions such as those imposed in *Spooner* v. *Juddow*(3). The power of their Lordships of the Privy Council to grant special leave are not fettered by any enactments and it is therefore open to them to impose such terms as they think just and equitable when special leave is granted. In cases when the High Court refused leave on the ground that it had no such power, special leave was obtained before the Privy Council and their Lordships when granting leave have not suggested that the High Court had power. I agree with the view taken by Jenkins, C. J., and Caspersz J., in *Clarke* v. *Brujendra Kishore Roy Choudhry* (6). The learned Chief Justice after referring to the remarks of Lord Langdale in *Spooner* v. *Juddow*(3) observes: "It is true that ultimately their Lordships admitted the appeal but that was upon terms, which we cannot impose, and, indeed it is part of the applicant's argument here before us, that we have no power to impose any condition upon the applicant or upon the Government at whose instance and costs the application is being preferred Without giving any further ground, I think this affords a sufficient reason for us to hold that we cannot, without limited powers, certify this to be a fit case for appeal to His Majesty in Council". Special leave was afterwards obtained and the appeals were disposed of on the merits by their Lordships (See *Clarke* v. *Brojendra Kishore Roy* (9).) It was nowhere suggested that the refusal by the High Court to grant leave was erroneous owing to the High Court having power to impose terms.

I would dismiss these applications for leave to appeal to the Privy Council with costs.

9. (1912) 39 Cal. 953; 39 I. A. 163.

1923 Madras. 237 (1).

AYLING AND VENKATASUBBA RAO, JJ.

Dakoju Subbarayadu ... (Counter-petitioner) Appellant.

v.

Musti Ramadasu ... (Petitioner) Respondent.

A. A. O. No. 24 of 1921 dated 6th December 1921, against the order of Sub. J. of Cocanada in A. S. No. 37 of 1919 dated 23rd February 1920.

Civil P.C., O. 22, R. 3—Right to sue, meaning of.

R. 10 of O. XXII only applies to cases which do not fall under the preceding rules of the same order. The right to sue obviously from the terms of the rule includes the right to proceed with the suit until the latter terminates and in the case of a mortgage-suit, where a preliminary decree and a final decree are both necessary, the right to sue must include the right to obtain a final decree after the passing of a preliminary decree.

C. Rama Rao—for the Appellant.

G. Lakshmanna—for the Respondent.

JUDGMENT :—In this suit one Venkamma sued on a mortgage and obtained a preliminary decree. Subsequent to this she died on 28th April 1916 leaving a Will by which the present petitioner claims to be entitled to succeed to her interests in the mortgage. The preliminary decree was passed on 30th March 1916 and the period for redemption expired on 30th July 1916. No action was taken by the petitioner till 26th March, 1919, when he filed the present petition asking to be brought on record as the legal representative of Venkamma and to be given a final decree. The question is whether the application should be dismissed as time-barred.

The District Munsif held that it should be on the ground that the suit has abated under O. XXII, R. 3. The Subordinate Judge on appeal held that R. 10 of the same order applied and that the application was not time-barred. In our opinion the District Munsif is right and the Subordinate Judge wrong. R. 10 of O. XXII admittedly only applies to cases which do not fall under the preceding rules of the same order and the matter therefore turns on whether the case falls under R. 3. This runs as follows (omitting superfluous words): "Where a sole plaintiff dies and the right to sue survives, the Court on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit. Where within the time limited by law, no application is made under sub-R. 1, the suit shall abate." It seems to us that everyone of these words applies to the present case. The plaintiff died after obtaining a preliminary decree and the respondent must contend that the right to sue survived to him otherwise he has no *locus standi* in the matter at all. The right to sue obviously from the terms of the rule includes the right to proceed with the suit until the latter terminates and in the case of a mortgage-suit, where a preliminary decree and a final decree are both necessary, the right to sue must include the right to obtain a final decree after the passing of a preliminary decree. The case therefore clearly falls within the purview of the section, and, as the plaintiff admittedly did not apply to be made a party as provided in sub-rule (1) within the time allowed, the suit must be held to have abated under sub-rule (2).

We have been referred on respondent's behalf to the judgment in *Bhugwan Das Khettry* v. *Nilakanta Ganguli* (1). The facts of the case are distinguishable in that there a final decree had been passed and we need only say that, if any of the remarks in the judgment were intended to conflict with the view of the applicability of the rules which we have just enunciated, we must respectfully dissent from them.

We must therefore set aside the order of the Subordinate Judge and direct the dismissal of the application with costs throughout.

Order set aside.

1. (1904) 9 C. W. N. 171.

1923 Madras. 237 (2).

DEVADOSS, J.

Maruthayee and others ... Petitioners.

v.

Appavu Pillai ... Respondents.

Cr. R. C. No. 311 of 1921 dated 20th April, 1922, and Cr. R. P. No. 245 of 1921 against the judgment of the Court of the Sub-Div. Magistrate of Ramnad in Cr. A. No. 6 of 1921.

Criminal P. C., S. 522—Unlawful possession—Order restoring possession—Criminal force.

Taking advantage of temporary absence of the owner from the house, the wife, who had deserted him, along with some others broke open the outer lock of the house and entered into unlawful possession of the house, and when the husband returned he was driven out by force.

Held, an order restoring possession under S. 522, Cr. P. C. is a very proper order to pass.

It is a question whether an order under S. 522 could be passed when dispossession was not caused by the use of criminal force to any person in possession of the property.

K. S. Ramabhadra Ayyar for the Petitioner.

F. S. Vaz for the Respondent.

ORDER:—In this case the petitioners seek to revise the order of the Second Class Magistrate of Aruppukottai who convicted them under S. 448 and passed an order under S. 522 of the Criminal Procedure Code. On appeal the conviction was upheld and the order under S. 522 was left undisturbed. This Revision Petition has been admitted only as regards the order under S. 522, Criminal Procedure Code.

Mr. Ramabhadra Ayyar for the petitioners has addressed a very elaborate argument as regards the question whether an order under S. 522 could be passed when dispossession was not caused by the use of criminal force to any person in possession of the property, and he contended that in this case the complainant was not dispossessed of the property by the use of criminal force and therefore the Magistrate acted without jurisdiction in passing an order under S. 522, Criminal Procedure Code. Without expressing any opinion on the question of law raised, it is sufficient for the disposal of this case to see what the finding is. In paragraph 6of the appellate judgment there is a clear finding that the owner was dispossessed by the commission of criminal trespass and the use of criminal force. It is not proper that in revision ordinarily the Court should go behind the finding of the lower Courts whichin this case is a concurrent one. Even if the contention raised by Mr. Ramabhadra Ayyar is right as regards the question of law, I am not prepared to interfere with the order of the Magistrate as I consider it to be eminently a just order.

The first petitioner who was the wife of the complainant deserted him, according to the evidence, years ago and was leading an immoral life. Taking advantage of his temporary absence from the house, she, along with some others, broke open the outer lock of the house and entered into unlawful possession of the house, and when the husband returned he was driven out by force. In these circumstances I consider the order under S. 522, Cr. P. C. is a very proper order to pass; and further this order was passed so far back as the 28th January 1921 and it would not be right to upset an order more than a year after, on the mere technical ground, even if that be a good one, that the Magistrate should not have passed an order because there was no use of criminal force.

I dismiss the petition.

Petition dismissed.

1923 Madras. 238.

RAMESAM, J.

Kelu Nair ... Petitioner.

v.

Viyathan Mahadevi alias *Valia Thamburatti* ... Respondent.

Civ. Rev. Pet. No. 536 of 1921 dated 20th April 1922 from the decree of the Sub. J., South Malabar in Suit No. 522 of 1920.

Madras Act (IX of 1887), S. 19—Agreement for—Compensation—Trees.

Where the act of felling down the trees is an act of improvement, the imposition of a small Kuzhi Kanam fees does not, but the imposition of fee equal to the full value of the tree, does contravene S. 19. But where the felling down the trees is not an improvement, the question does not arise. If the trees are in existence at the end of the tenancy, the tenant is entitled to compensation, but not otherwise, and if he chooses to enjoy the benefit of the tree by cutting it down during the tenancy, no question of compensation arises and consequently it is difficult to see how an agreement to pay some fee (small or large) for each tree cut can limit the right of tenant to make improvements and to claim compensation for them within the meaning of S. 19 of the Act. Where the agreement amounted to an undertaking to wait till the end of the tenancy when the tenant could get his compensation,

Held: a breach of the undertaking deprives the landlord of his right to have the full grown trees at the end of the tenancy by paying their value to the tenant.

K. I. Subramania Iyer—for the Petitioner.

K. P. Ramakrishna Aiyar—for the Respondent.

JUDGMENT:—As pointed out in *Raja of Cochin* v. *Kittunni Nair* (1) it may be that the cutting of trees may itself be an act of improvement. But Phillips, J., points out that, very often, it is not. We thus have two cases:—

(1) Where the act of felling down the trees is an act of improvement.

(2) Where it is not:

In the first case, the imposition of a small Kuzhi Kanam fee does not contravene the provisions of S. 19 of the Act (as held by the Full Bench). If, on the other hand, the fee imposed is the full value of the trees, it does contravene the provisions of S. 19 of the Act.

But if a case falls under the second category, I do not see how any question that the clause in the *kychit* contains the provisions of S. 19 of the Act, arises. I agree with Phillips, J's remarks at page 611. The tenant can wait till the end of the tenancy. Nobody expects him to cut down the trees before the end of the tenancy.

If the trees are in existence at the end of the tenancy he is entitled to compensation, but not otherwise, and if he chooses to enjoy the benefit of the tree by cutting it down during the tenancy, no question of compensation arises and consequently it is difficult to see how an agreement to pay some fee (small or large) "for each tree cut can limit the right of a tenant to make improvements and to claim compensation for them within the meaning of S. 19 of the Act." In *Vasudevan Nambudripad* v. *Valia Chathu Achan* (2), the question discussed related to the rights of the tenants under the general law and the construction of a clause in a contract between the parties was not in question. In *Narayaniamma* v. *Kunhikuttiamma* (3) the clause which was the subject of consideration was one to the effect that the landlord may cut and remove the trees during the tenancy. Such a clause was held to limit the right of the tenant to compensation at the end of the tenancy, I agree with it. But the clause before me is different. It amounts to an undertaking to wait till the end of the tenancy when the tenant can get his compensation. A breach of the undertaking deprives the landlord of his right to have the full grown trees at the end of the tenancy by paying their value to the tenant.

It is next suggested that I should give the petitioner a further opportunity to adduce evidence to show that, in this case, the felling of the trees was for the purpose of effecting improvements or doing an act of improvement. It does not appear that he tendered any evidence and that it was wrongly shut out by the Subordinate Judge.

The petition fails and is dismissed with costs.

Petition dismissed.

(1) (1908) 40 Mad. 603=32 M. L. J. 295=(1917) M. W. N. 249=5 L. W. 550=21 M. L. T. 282=38 I. C. 503. (F. B.)

(2) (1901) 24 Mad. 47=10 M. L. J. 321 (F. B.)

(3) (1917) 32 M. L. J. 541=21 M. L. T. 271=(1917) M. W. N. 309=40 I. C. 247.

1923 Madras 239.

SCHWABE, C. J.

A. V. Srinivasalu Reddiar and another ... (Accused) Petitioners.

v.

Govinda Goundan ... (Complainant) Respondent.

Cr. Rev. No. 259 of 1922 and Cr. Rev. Pet. No. 230 of 1922 dated 24th November 1922 from the Judgment of Dy. Ist. Class Magistrate Cuddalore, Cr. App. No. 1 of 1922.

Penal Code S. 379—Applicability.

If there is a taking under a colour of right or in other words, under a *bona fide* claim, the taking cannot be dishonest or felonious, that is to say, it is not theft. It is immaterial whether the claim is good or bad. It may be material in considering as a question of fact whether the claim was a *bona fide* claim, to consider whether or not there was any right at all.

T. Rangachariar and E. V. Sundara Reddi—for the Petitioners.

S. T. Srinivasagopalachari—for the Respondent.

The Public Prosecutor—for the Crown.

ORDER:—In this case the first accused, a landowner, and the second accused, his agent, have been found guilty of theft. The facts of the case, so far as they are relevant are these: The first accused bought some land from P. W. 2. That land is situated in a village. There is a large tank in that village where there is grown a large quantity of vilal grass used for purposes of thatching. The landowners of that village have rights to that

grass and it appears to be the custom to allow the grass to grow for several years and then cut it and divide it, first allowing so much of the cut-grass to the actual cutters of the grass and so much to persons employed to watch the grass during the years in which it has been growing. There are apparently some ten persons entitled to share in this grass. P. W. 2 was one of them. He having sold his land to the first accused, the first accused claimed, no doubt *bona fide*, that with that land went the right to the share of this grass. P. W. 2, on the other hand, contends that he sold the land without his right and that the right is severable from the land and that, although he sold the land, he kept the right to the grass. In this he has the support of the other sharers, and it is quite clear that he and they intended that the first accused should have no share whatever in that grass. When the repairing had proceeded for a comparatively short time, some three days out of the usual fifteen occupied, the first accused taking the law into his own hands, either went himself or sent the second accused with a large body of men with instructions to remove a quantity of the grass that had already been cut and stacked. Both the accused have been convicted of theft and fined.

That is defined in the Indian Penal Code thus: "whoever, intending to take *dishonestly* any moveable property out of the possession of any person without that person's consent, moves that property in order to such taking, is said to commit "theft" and Ss. 24 and 23 define the meaning of the word "dishonestly", with small and for the purposes of the present case immaterial, variations, that definition is a statement of the Common Law of England as to larceny as it existed at the time of the Code. The definition of larceny in the Common Law of England is correctly stated thus in Archbold's Criminal Pleading: "The wrongful or fraudulent taking and carrying away personal goods of another, from any place, with a felonious intent to convert them to the taker's own use, and making them permanently his own property, without the consent of the owner." The word "felonious" in this definition means that there is no colour of right to excuse the act: and the "intent" being to deprive the owner, not temporarily, but permanently, of his property. In the Penal Code the word "dishonestly" takes the place of the words "with a felonious intent" in the English Common Law definition. If there is a taking under a colour of right or in other words, under a *bona fide* claim, the taking cannot be dishonest or felonious, that is to say, it is not theft. It is immaterial whether the claim is good or bad. It may be material in considering as a question of fact whether the claim was a *bona fide* claim, to consider whether or not there was any right at all, because the complete absence of right and circumstances such as the Court would be justified, in saying could not have led any reasonable man to a belief that he had a right, would be cogent matters to consider in arriving at the conclusion whether the claim was a *bona fide* claim or not. In this case it is to be observed that the learned Magistrate disposed of the matter by saying that the question of *bona fides* cannot arise where the matter affects third parties. He took the view that such question might well arise as between the first accused and P. W. 2, from whom he brought the land, but as there were third parties who were also entitled to a share in the grass in question, the question of *bona fides*, could not arise. I have no doubt that this is an entire misconception of the principle to be applied to such cases. On that alone I should be satisfied that this conviction could not stand. But here, I have before me all the necessary facts, indeed they are not disputed and am consequently in a position to dispose of the matter. That the first accused claimed a gift to a share of this grass there can be no doubt, for he claimed it openly. That P. W. 2 and other sharers meant to prevent him from having any share of that grass is equally clear and admitted. I am satisfied that he went there himself or sent his men to take the grass as being his or rather claiming it as his. It is suggested that he took so much that he could not have been exercising a *bona fide* claim: but I cannot find that from an examination of the evidence and the findings in this case. In such matters the Court cannot go into niceties of calculation and arithmetic. It has to look at the broad question of whether this was theft, and whether this man was a thief or not? The fact that he took a large amount of

grass which under no calculation could be the right amount would be a very cogent thing to consider; but, whether, in taking what he did, he made a proper allowance for the watchman or whether he allowed the right amount in his calculation for the exact number of shareholders, considerations of that kind are in my judgment entirely outside the purview of the Court considering this question. In my judgment this case is a case that ought not to have been brought. The parties have got their civil rights. I do not wish it to be understood that I, in any way, approve of the high-handed action of the first accused and the second accused: but in my judgment it is quite an erroneous view of this case to hold that it is theft.

On these grounds this Revision Petition must be allowed, the convictions must be set aside and the fines refunded.

Petition allowed.

1923 Madras. 241.

KUMARASWAMI SASTRI AND DEVADOSS, JJ.

Nagabhushanam Tadepalli (dead) and others ... Plffs.-Appellants.

v.

Siram Ramachandra Rao and others ... Defts.-Respondents.

S. A. Nos. 1626, 1719, and 1773 of 1919, dated 24th January 1922, against the decree of the D. J., Kistna at Masulipatam, in A. S. No. 240 of 1918.

(a) *Civil P. C., O. 21, R. 79—Private Transfer and Court sale.*

Where the right of the private transferee is merely a right in equity to compel the vendor to execute a proper conveyance and the transaction evidenced by the transfer is merely an agreement to convey, capable of being perfected into an absolute conveyance by complying with the rules laid down in the Companies Act and the Articles of Association, he has no such priority over the auction purchaser in a Court sale who has given notice to the Company of his purchase.

As regards purchasers in Court sales where the sale is confirmed and the provisions of the Act are complied with, there is nothing further to be done by the transferee or by the Court.

(P. 244, Col. 2.)

(b) *T. P. Act, S. 54—Mode of transfer.*

The provisions of S. 54 of the Transfer of Property Act which provide for the mode of transfer of immoveable property are imperative and Courts would not be justified in disregarding them on equitable grounds.

(P. 244, Col. 1.)

(c) *Companies Act—Share—Transfer.*

The necessity for the sanction of the Directors is to prevent undesirable persons or debtors of the company from getting transfers of the shares. There is a discretion in the Directors to recognise or not purchasers in execution of decrees.

(P. 242, Col. 2.)

P. Narayanamurthi—for the Appellants in S. A. 1626.

T. S. Raghunatha Rao—for the Respondents in S. A. 1626.

V. Suryanarayana—for the Appellant in S. A. 1719.

T. M. Krishnaswami Aiyar—for the Appellants in S. A. 1773.

P. Narayanamurthi—for the Respondents in S. A. 1719, and 1773.

KUMARASWAMI SASTRI, J.—These appeals relate to the validity of the transfer of certain shares in limited companies governed by the Indian Companies Act.

One Venkatasubba Rao owned shares in Sri Krishna Cotton Press Co., Ltd., Guntur, Sri Krishna Jute and Cotton Mills Co., Ltd., Ellore, Bezwada Tripurasundari Cotton Press Co., Ltd., Bezwada and Sri Krishna Mill Co., at Masulipatam. He was indebted to Thadipalli Venkataramayya and in consideration of the money due to him he executed a deed of transfer Ex. L. dated the 20th April 1912 whereby he transferred the shares mentioned in that document for a sum of Rs. 3,000. The deed is in the usual form and is signed by Venkatasubba Rao only. Notice was given of this assignment to the various companies whose shares were transferred but the transferee was not registered as a share-holder owing to objection being taken as to the form of the transfer not complying with the articles of association and owing to prohibitory orders having been received by the Companies in respect of the shares. It appears that after the sale and before notice to the Companies, these shares were attached by prohibitory orders in execution of decrees against the transferor, and they were subsequently sold in execution and purchased by strangers. The competition is between the auction purchasers at the Court sales and the transferee under the deed of assignment Ex. L.

As regards the shares held in limited companies, it is important to consider the provisions of the Civil Procedure Code as

regards the attachment and sales of shares held by judgment-debtors in companies governed by the Indian Companies Act. O. 21, r. 46 enacts that in the case of a share in the capital of a corporation, attachment shall be made by a written order prohibiting the person in whose name the shares may be standing from transferring the same or receiving any dividend thereon and a copy of the order being sent to the proper officer of the corporation. R. 76 provides that where the property to be sold is a share in a Corporation, the Court may instead of directing the sale to be made by public auction authorise the sale of such instrument or share through a broker. R. 79, clause (3) provides that where the property sold is a share in a Corporation the delivery thereof shall be made by a written order of the Court prohibiting the person in whose name the share may be standing from making any transfer of the share to any person except the purchaser or receiving payment of any dividend or interest thereon and the manager, secretary or other proper officer of the Corporation from permitting any such transfer or making any such payment to any person except the purchaser. Rule 80 provides that where the execution of a document or the endorsement of the party in whose name a negotiable instrument or a share in a Corporation is standing is required to transfer such negotiable instrument or share, the Judge or such officer as he may appoint in this behalf may execute such document or make such endorsement as may be necessary and such execution or endorsement shall have the same effect as an execution or endorsement by the party. In the present case the shares were attached by prohibitory orders in form required by the Code and they were sold and necessary notice was given to the companies concerned. So far therefore as the Court purchasers are concerned, it is clear that the provisions of the law necessary to transfer the shares to them have been complied with, the only formality remaining is the actual transfer of the shares in their names in the companies' books. Both under the Companies Act and under the Articles of Association of the various Companies the Directors have a discretion to transfer the shares in the names of the auction purchasers. It is argued by Mr. Krishnasawmy Iyer that when there is a Court sale and a purchaser under it, there is no discretion left for the directors; and they are bound to transfer the shares. It is argued by Mr. Narayanamurthi for the other side that there is nothing in the Companies Act or the Articles of Association to make any difference between private sales and sales in execution of decrees, the necessity for the sanction of the Directors being to prevent undesirable persons or debtors of the company from getting transfers of shares. The reason applies with equal force to private or Court purchasers. We agree with the view taken in *Manilal Brijlal* v. *The Gordhan Spinning and Manufacturing Co., Ltd.* (1) that there is still a discretion in the Directors to recognise or not purchasers in execution of decrees. So far as regards the transferee from the shareholder under Ex. L is concerned, it is clear that the document of transfer does not conform with the provisions of the Companies Act or with the Articles of Association of the Companies. The present case is governed by the Companies Act of 1882 and by the Articles of Association of the various companies. It is clear that both under the Act and the Articles of Association the instrument of transfer of the shares of the Company has to be executed both by the transferor and transferee and in the form prescribed. So far as the transferee is concerned, the form contains a statement by the transferee that he agrees to take the shares subject to the conditions on which the vendor himself holds the shares. The Act also provides that the transferor shall be deemed to remain the holder of the shares until the name of the transferee is entered in the Companies registers (*See* Table A I schedule). S. 44 of the Companies Act of 1882 enacts that the share or other interest of any member in a company shall be moveable property capable of being transferred in manner provided by the regulations of a Company. As observed by Channell, J. in *Torkington* v. *Magee* (2) shares which can only be transferred in a manner provided for in the Companies Act are not choses in action. S. 137 of the Transfer of Property Act excepts shares in Companies

1. (1916) 41 Bom. 76.
2. (1902) 2 K. B. 427.

from the chapter dealing with transfers of actionable claim. S. 26 of the English Act of 1866 requires that the deed of transfer should be executed by the transferor and transferee and duly entered in the register of transfers while Article 18 of Table A of the English Companies Act of 1908 makes a slight alteration and directs that the instrument of transfer should be executed both by the transferor and transferee and states that the transferor shall be deemed to remain the holder of the share until the name of the transferee shall be entered in the register. So that both under the English and Indian Law, the deed of transfer has to be executed both by the transferor and transferee. The question therefore is whether a deed not complying with the terms of the Act, and the Articles of Association is valid to transfer shares as against a person who has acquired the right to them by a Court sale in the manner required by the provisions of the Civil Procedure Code. The contention for the Court purchaser is that where the law prescribes a mode of transfer, that is the only mode which is capable of passing property and that any other mode, although it may as between the transferor and transferee give him a right to complete his purchase by compelling the transferor to execute the necessary transfer as required by the Act, will not avail against third parties. For the private transferee it is contended that his acquiring an equitable title is good not only against the transferor but against third persons also. We are of opinion that the contention of the Court purchaser is well founded and that where the law prescribes a mode of transfer, compliance with that mode is necessary before property can pass so as to confer title against third persons. In *Mc. Euen* v. *West London Wharves and Warehouses Company* (2*a*) where there was a transfer of shares but not in manner required by Act of Parliament it was held that the transfer of those shares in any other form would at least amount to an equitable contract and that even if the company act upon the transfer and receive payments from the person who entered into that equitable contract and issue documents and treat him as a share-holder, it would not have the effect of making him a real share-holder. Sir George Mellish, L. J., observed "If a share-holder in a company whose shares by Act of Parliament can only be transferred by deed and by an alteration in the register, thinks fit to sell them in another way, which can only make an equitable contract at most, and the company so far act upon it that they receive payments from the person who has entered into that equitable contract and perhaps issue documents treating him as their share-holder and calling him their share-holder, does that have the effect of making him the real share-holder? Now it is obvious that if we were to hold that it had that effect, the consequence would be that the provisions of the Act of Parliament that shares should only be transferred by deed would be entirely eluded; and any person who examined the register, whether a creditor who wished to know who the share-holders were in the Company, or a share-holder who wished to know who his Company share-holders were, would be entirely deceived. None of the numerous cases cited appear to me to establish the proposition that when a person has once become a legal share-holder he can be freed from his liability to pay the calls simply by showing that he has made a contract which is void at law, but possibly may amount to an assignment in equity, and that the company to a certain extent has adopted that contract." In *Moore* v. *North Western Bank* (2*b*) where the competition was between two persons claiming title to shares registered in the name of a third person in a company Romer, J.: observed, "As between two persons claiming title to shares in a company like this, which are registered in the name of a third party, priority of title prevails, unless the claimant, second in point of time, can show that as between himself and the company and before the company received notice of the claim of the first claimant he, the second claimant has acquired the full *status* of a share-holder or at any rate that all formalities have been complied with and that nothing more than some purely ministerial act remains to be done by the company, which as between the company and the second claimant the company could not have refused to do forthwith; so that as between himself and

2 (*a*). (1871) 6 Ch. A. 655.

2 (*b*). (1891) 2 Ch. 599 (602—3.)

the company he may be said to have acquired in the words of Lord Selborne 'a present absolute unconditional right to have the transfer registered before the company was informed of the existence of a better title'. For that proposition the case of *Societe Generale de Paris* v. *Walker* (3) and *Roots* v. *Williamson* (4) are sufficient authorities and I need not refer to the cases cited by the defendants in argument which were decided previously to *Societe Generale de Paris* v. *Walker* (3)". This case has been followed in *R. D. Sethna* v. *National Bank of India* (5) and the principle applied to the facts of that case. *Societe Generale de Paris* v. *Walker* (3) is also a case of competition between two transferees neither of whom was registered in the books of the company and it was held that the person who had the prior equitable title was entitled to preference. Lord Selborne, after observing that a merely inchoate title by an unregistered transfer would not for the purpose of the case be equivalent to a legal estate in the shares and be sufficient to give priority against a prior transferee who had given notice of the prior equitable title to the company so as to compel the company to register the shares in the name of the applicant, observed as follows :—" If indeed all necessary conditions had been fulfilled to give the transferee as between himself and the company, a present absolute unconditional right to have the transfer registered before the company was informed of the existence of a better title, the case might be different " and on the facts of the case he held that no such right was acquired by the subsequent transferee so as to give him priority. Where the law prescribes a mode of transfer, any transfer otherwise than by the manner prescribed by law will not confer a valid title. So far as the Madras High Court is concerned it has set its face against what may be called the equitable construction of statutes. In *Kurri Veerareddi* v. *Kurri Bapireddi* (6) it was held that the provisions of S. 54 of the Transfer of Property Act which provides for the mode of transfer of immoveable property are imperative and that Courts would not be justified in disregarding them on equitable grounds. This decision was followed by another Full Bench of this Court in *Ramanathan* v. *Ranganathan* (7) where the observations of the Privy Council in *Mahomed Musa* v. *Aghore Kumar Ganguli* (8) and *Venkayyamma Rao* v. *Appa Rao* (9) are explained as not overruling the principle laid down in *Kurri Veerareddi* v. *Kurri Bapireddi* (6) Though a different view has been taken in Calcutta and Bombay in *Akbar Fakir* v. *Intail Sayal* (10) *Syamkisor* v. *Dineschandra* (11) and *Bapu Apaji* v. *Kashinath Sadoba* (12) the decision of our High Court is binding on us and we do not think we can hold that a transfer otherwise than as is provided by the Companies Act and the Articles of Association can be valid. Treating the right of the private transferee therefore as merely a right in equity to compel the vendor to execute a proper conveyance and the transaction evidenced by the transfer as merely an agreement to convey, capable of being perfected into an absolute conveyance by complying with the rules laid down in the Companies Act and the Articles of Association, the question is whether he has any priority over the auction-purchaser in a Court sale who has given notice to the company of his purchase. We do not think he has any such priority.

As regards purchasers in Court sales where the sale is confirmed and the provisions of the Act are complied with there is nothing further to be done by the transferee or by the Court. When an order is issued under sub-clause 3 of R. 79 of O. 21, C. P. C., the company acting through the secretary or proper officer

3. (1885) 11 A. C. 20.
4. (1888) 38 Ch. D. 485.
5. (1911) 36 Bom. 334.
6. (1906) 29 Mad. 336=16 M. L. J. 395=1 M. L. T. 158 (F. B.).
7. (1917) 40 Mad. 1134=33 M. L. J. 253=6 L. W. 300=22 M. L. T. 173=(1917) M. W. N. 757=43 I. C. 138.
8. (1915) 42 Cal. 801=42 I. A. 1=17 Bom. L. R. 420=21 C. L. J. 231=28 M. L. J. 548=19 C. W. N. 250=13 A. L. J. 229=17 M. L. T. 143=2 L. W. 258=(1915) M. W. N. 621=28 I. C. 930 (P. C.).
9. (1916) 39 Mad. 509=43 I. A. 138=20 C. W. N. 1054=14 A. L. J. 797=31 M. L. J. 58=(1916) 2 M. W. N. 23=20 M. L. T. 137=4 L. W. 58=18 Bom. L. R. 651=24 C. L. J. 279=34 I. C. 921 (P. C.).
10. (1915) 29 I. C. 707.
11. (1918) 24 C. W. N. 463=31 C. L. J. 75=55 I. C. 154.
12. (1916) 41 Bom. 438=19 Bom. L. R. 100=39 I. C. 103.

could not make a transfer of the shares to anybody else. It has either to recognise the transfer or refuse to recognise it. Form 34 of App. E. of the Civil Procedure Code is the prohibitory order contemplated in R. 79, clause 3. It is addressed to the Secretary of the Company and recites the fact of the purchase by the auction purchaser of the shares specified in the order and prohibits the company from making any transfer of the shares to any person except the purchaser or from receiving any dividend thereon or from permitting any transfer or from making any payments to any person except the purchaser. It is issued under the seal of the Court and signed by the Judge.

We do not think that on the confirmation of the sale and the issue of the order any further steps are required to be taken by the Code. There is no provision in the Code which requires the execution of any further documents by the Court. In the view we take of the case the Court purchaser in the present case has taken all the necessary steps and brought matters to a stage where all that remains is for the Company to signify or withhold its assent and he is therefore entitled to priority over the transferee from the shareholder who has not got an assignment in manner required by law and is merely in the position of a person who holds an equitable contract. In Second Appeal No. 1719 there is the further fact that the Court purchaser applied for the registration of the transfer and got his transfer recognised by the Company.

Second Appeals Nos. 1719 and 1773 of 1919 are allowed with costs throughout and Second Appeal No. 1626 of 1919 is dismissed with costs of 2nd defendant throughout.

DEVADOSS, J. :—I agree.

1923 Madras. 245.

KRISHNAN AND VENKATASUBBA RAO, JJ.

Veerappan Servai and another ... Defendants—Appellants.

v.

Mennappan and others ... (Plaintiffs & Defendants.)—Respondents.

C. M. S. A. No. 428 of 1921, dated 14th September 1922, against the order of the Addl. S. J. of Tanjore, in A. S. No. 105 of 1920.

Civil P. C., O. VII, R. 10—Finding on the point—Amending the plaint giving fuller particulars.

After having been found by the Court that gross negligence has been established there is no necessity whatever for amending the plaint by giving fuller particulars. The order directing amendment of the plaint is inconsistent with previous judgment and it should be set aside.

C. V. Anantha Krishna Ayyar—for the Appellants.

T. R. Ramachandra Ayyar and *S. Ramaswamy Ayyar*—for the Respondents.

JUDGMENT :—The question raised in this appeal before the Subordinate Judge was whether the decree in O. S. No. 235 of 1914 as well as those in the appeal and second appeal was binding upon the minor plaintiff in this case. If it were so binding it is not denied that the question based on his legitimacy or illegitimacy will be *res judicata* between him and the defendants.

The Subordinate Judge however has accepted the plaintiff's case that in the conduct of O. S. No. 235 of 1914 his guardian who was his mother was guilty of gross negligence and therefore he held that the decrees in that case and its appeals were not binding upon the minor plaintiff.

The first point taken by Mr. Anantakrishna Ayyar before us for the Appellants (defendants 2 and 3) is that there is really no evidence to support this finding of negligence. We are unable to agree with that contention. Even though there might be no oral evidence in support of it, the circumstances in which the previous litigation was carried on by the mother as appearing from the prior judgments are a sufficient foundation for the Subordinate Judge's view, that the lady was guilty of gross negligence in the conduct of the case. Circumstantial evidence is as good as any other kind of evidence in such matters and perhaps better evidence than oral evidence.

The finding on the question of negligence is a finding of fact, and, as we are not prepared to hold that there is no evidence to support it as contended for

by the Appellants ; we must accept that finding. The result of it then is that the previous decrees will not be binding on the minor and the first issue raised in the case was rightly found in his favour and the case has to be tried on other issues.

The Subordinate Judge, however, after finding that gross negligence was established, says in the last paragraph of his judgment that particulars as regards negligence were not stated with sufficient fullness and clearness as they should have been and he has therefore directed the plaint to be amended by giving full particulars. This is like putting the cart before the horse. After having found that gross negligence has been established there is no necessity whatever for amending the plaint by giving fuller particulars. As a matter of fact we find on examining the plaint ourselves that particulars are fairly satisfactorily stated. If the defendants considered that further particulars of the fraud and negligence, should have been given, it was their duty to have applied to the Court for such amplification. They did not do so, but went on to trial on the plaint as it was. We therefore think that the order of the Subordinate Judge directing amendment of the plaint is inconsistent with his previous judgment and it should be set aside.

There is no necessity to amend the plaint at this stage. His order however that the case should go back to the Court of first instance to be tried on other issues which have not yet been tried will stand. As regards his order as to costs about which the plaintiff's next friend has filed a memorandum of objections on his behalf in this Court, we are of opinion that that order cannot be supported.

Apparently the next friend is made to bear the costs of the trial in the first Court as well as in the appellate Court up to the date of the Subordinate Judge's order because the Subordinate Judge was of opinion that full particulars were not given by him, but as we are differing from him on that point, it is unnecessary to say more than that the proper order as to costs in the first Court should abide and follow the result of the suit but that the appellants should get their costs in the lower appellate Court.

We accordingly substitute that order for the Subordinate Judge's order as to costs. With the modification that no amendment of the plaint need be insisted upon, we dismiss the appeal and direct the appellants to pay the costs of the respondent in this Court. There will be no costs on the memorandum of objections.

Appeal dismissed.

1923 Madras. 246.

OLDFIELD, J.

Lakshmana Pillai (alias) *Shanmugam Pillai and others* ... Petitioners.

v.

Appalwar Alwar Ayyangar and another ... Respondents.

Civ. Rev. Pet. No. 353 of 1922, dated 13th September, 1922.

Civil P. C., O. 23, R. 1—Withdrawl of suit.

On general principles there does not seem to be any reason why withdrawal of a withdrawal should not be recognised, if there is no question of undue prejudice to any other party to the proceedings.

The plaintiffs' withdrawal was in the following terms : "The suit is withdrawn, it may be dismissed without costs."

Held, taking the withdrawal petition as conditional on the passing of an order regarding costs to the effect specified in it, unless and until the Court signified its intention to pass such an order, the petition could not operate as a termination of the suit. That being so, and the suit still being pending on the date of the petition withdrawing the withdrawal, there was no obstacle to the Court, in the exercise of its discretion, dealing with the latter petition and dismissing the former and continuing the trial.

(P. 247, Col. 2.)

T. R. Ramachandra Ayyar and S. Srinivasa Ayyar—for the Petitioners.

T. Narasimha Ayyangar—for the Respondents.

JUDGMENT.—Plaintiffs, here respondents, on 21—4—1921 presented a petition withdrawing their suit. No order was passed on it at once. But on the 29th July 1921 the 2nd plaintiff applied to withdraw from that withdrawal. The lower Court in the order I am asked to revise, has dismissed the first of these applications as withdrawn and presumably intends to proceed with the trial. The argument rejected by the lower Court

was generally that authority does not recognise withdrawal from the withdrawal of a suit. On general principles there does not seem to be any reason why withdrawal of a withdrawal should not be recognised, if always there is no question of undue prejudice to any other party to the proceedings. Argument here has been based rather on what was implied in the argument before the lower Court that the original withdrawal must be regarded as terminating automatically the proceedings in the suit and involving the suit's immediate dismissal, and that therefore at the time, when the 2nd withdrawal petition was filed, there was no proceeding pending on which it could operate and there was no previous withdrawal petition undisposed of, of which it could effect a withdrawal.

Order 23, Rule 1 (1) of the present Code provides that after the institution of a suit the plaintiff may, as against all or any of the defendants, withdraw his suit or abandon part of his claim and in Rule 1 (3) there is provision for the plaintiff's liability for such costs as the Court may award. The existence of the second provision suggests that the withdrawal cannot be complete until the Court has made its award as to costs. It is not necessary for reasons which will appear, to express a final opinion, on the question whether generally the plaintiff may withdraw his withdrawal at any time before the decree, including the award of costs, is passed, in case as may well happen, he prefers continuing the litigation to complying with the Court's order as to costs. Authority in the appellants' favour consists in the judgment in *Raja Shumsher Bahadoor* v. *Mirza Mahomed Ali* (1) but considerable doubt has been thrown on that decision by *Rambhuros Lall* v. *Gopee Beebee* (2). On the other hand there is in favour of the respondents the judgment of Sundara Ayyar, J. in *Mukkammal* v. *Kalimuthu Pillai* (3) and *Rajkumari Debi* v. *Nritvakali Debi* (4). Generally therefore I should hold that the lower Court's decision is correct.

In the present case, however, the question arose in a very limited way. For the plaintiffs' withdrawal was in the following terms: "The suit is withdrawn, it may be dismissed without costs." Mr. Ramachandra Ayyar on behalf of the appellants has no doubt asked me to read this, as expressing by the first sentence an unconditional withdrawal, the second sentence containing merely a suggestion as to costs, which might or might not receive effect. But the petition is not in my opinion capable of that construction. I can understand the plaintiffs as meaning only that the suit is withdrawn on condition that it is dismissed without costs. This is material. For at the date of the petition, 21—4—1921 the suit had been pending since 19—3—1920 and majority of the defendants had notice and had appeared by vakils and some of them had filed written statements. In fact but for the death of a defendant and the necessity for joining his legal representatives, the issues would have already been framed. It is therefore clear that an order, such as the plaintiffs proposed, dismissing the suit without an order as to costs, that is, without making the plaintiffs liable for the costs of the defendants, would have been most unfair, and, in fact, although Mr. Ramachandra Ayyar's clients, the present appellants, now say that they do not want costs, the 10th defendant's vakil pressed for them and it is possible that other defendants also would have done so. Taking the withdrawal petition as conditional on the passing of an order regarding costs to the effect specified in it I must hold that, unless and until the Court signified its intention to pass such an order, the petition could not operate as a termination of the suit. That being so, and the suit still being pending on the date of the petition withdrawing the withdrawal, there was no obstacle to the lower Court, in the exercise of its discretion, dealing with the latter petition and dismissing the former and continuing the trial. No ground for revision has been made out. The revision petition therefore, must be dismissed with costs.

Petition dismissed.

1. (1867) Agra H. C. R. 153.
2. (1874) 6 N. W. P. 66.
3. (1912) M. W. N. 997=15 I. C. 852.
4. (1910) 12 C. L. J. 434=7 I. C. 892.

1923 Madras. 248.

SCHWABE, C. J. AND WALLACE, J.

Mahomed Markayar (Magdoom) ... Defendant—Appellant.

v.

Bansi Lal, (minor) and another ... Plaintiffs—Respondents.

O. S. A. No. 88 of 1921 dated 31st August 1922, from the judgment of Coutts-Trotter, J.

Hindu Law—Joint family — Alienation — Separation —Purchase by a separate member.

Where after the joint family property is disposed of by valid or voluntary alienation, the family separates and a purchase is made of the property by one of such separated members, with his own funds, it is his self-acquired property.

The doctrine laid down in *Visalatchi Ammal* v. *Annaswamy Sastri* (1) is applicable to the case of a mortgage or to a wrongful dispossession of joint family property, but will not apply to a case where the joint family diposed of the property by valid and voluntary alienation.

A. Krishnaswamy Iyer—for the Appellant.

V. Radhakrishnayya and *P. V. Ramachandra Raju*—for the Respondents.

SCHWABE, C. J.:—I agree with the judgment of Wallace, J. which I have had the opportunity of reading and have nothing to add.

WALLACE, J.:—The contest in this appeal concerns certain houses, Nos. 100, 101, Thambu Chetty Street, Madras, purchased by one Kulluram Lal now deceased, on 31-12-1909. The plaintiff is the minor son of Kulluram's brother, Rajaram Lal, also deceased. The first defendant is the widow of Kalluram and the second defendant an alienee from her. The chief point at issue is whether the property is joint family property, the whole of which the plaintiff alone would be entitled to, on the death of his father and uncle, or the absolute and self-acquired property of Kalluram to which his widow succeeded in absolute right. The trying Judge has found in favour of the plaintiff and the second defendant appeals.

The property originally belonged to Kalluram and Rajaram as joint family property having been bought by their father in 1872. On 4-10-1895 both brothers sold the property to one Arni Perumal Mudaly. Shortly after that each brother in turn separately went insolvent. Early in 1895 each got a personal discharge, but, so far as appears in this case, each did not get a final discharge until his death in 1918. On the same date as the sale to Perumal Mudaly the latter mortgaged the property with possession to one Rangiah Chetty. Perumal Mudaly on 17-2-1897 created a further charge on the property in favour of his mortgagee, and later on borrowed various sums from him. For all that was owing up to 13-8-1900. Perumal Mudaly sold the property to Rangiah Chetty for Rs. 11,900. On 16-6-1904 Rangiah Chetty sold it to Rajagopal Chetty and Subbiah Chetty for Rs. 9,500. On the same date these two entered into an agreement with the maternal uncle of Kalluram and Rajaram to sell the property, for the price paid by them, at any time within 3 years from that date. On 31-12-1909, Kalluram purchased the property from these two for Rs. 10,000 having borrowed Rs. 9,000 of this on an equitable mortgage Ex. ii (c) over the property itself, which was subsequently replaced by another, Ex. ii, dated 19-1-1910, Kalluram mortgaged the property in 1910 and 1913, and he died in 1918. Thus the property which had originally been the joint family property, and was sold by both brothers in 1894 came in 1909 into Kalluram's possession by purchase.

3. The plaintiff was born in the interval, in 1907. His case is twofold, based on the common foundation that the brothers never divided. He claims first that the property never passed out of the possession of the family, and that the series of transactions noted above between 1894 and 1909 never deprived the family of it; and secondly that, even if the family had lost it, Kalluram's purchase in 1909 was a purchase for and on behalf of the joint family. The defence case is that Kalluram and Rajaram were divided in status at least from the date of their separate insolvencies, that there was no reunion before 1909, that the series of transactions was a genuine series which for the time carried the property wholly out of the possession of the brothers and

1. 5 M. H. C. R. 156.

therefore it ceased to be joint family property, and that the repurchase by Kalluram was for himself alone with his own private funds and not with any joint family funds.

4. The real point for decision is whether before the birth of plaintiff and at the time of Kalluram's purchase the brothers were or were not divided. It will be convenient to discuss first what was the real nature of the series of dealings with the property from 1894 to 1909. It is true that the plaintiff did not in the plaint put forth the contention that they were *benami* or colourable, but that is not important. They were produced as part of the defence case, and the plaintiff's business then was only to explain them away as far as he could. They were, however, before the plaintiff when he called his evidence in Court and I may note here that except for a vague answer elicited from P. W. 2, which is not evidence the plaintiff has not adduced any evidence about these documents. He relies entirely on inferences and suggestions and speculations drawn from the texts of the documents. The initial assumption involved in his case is that the sale of 1894 to Perumal Mudaly was, since the brothers were on the verge of bankruptcy, *benami* for the joint family. Having this as a foundation the plaintiff's pleader ingeniously built upon it the rest of his case, that the sale of Perumal Mudaly to Rangiah Chetty, the mortgagee, was not really a sale but a mortgage, that Rangiah Chetty and Subbiah Chetty had only the mortgagee right, that the brothers thus continued throughout to retain the equity of redemption, so that when Kalluram Lal ostensibly purchased from the Chettis in 1909, he was taking his stand on the joint family right to the equity of redemption and that in that view it matters not whether the money paid ostensibly for the purchase but really to discharge the mortgage was Kalluram's own private money or not, since his redemption of the mortgage would be, as laid down in *Visalatchi Ammall* v. *Annaswamy Sastri* (1), for and on behalf of the joint family and thus the property would in the end be, as it was in the beginning, joint family property.

5. Undoubtedly there are some matters unexplained in the case which would fit in with this theory. An impending insolvency is a likely motive for a fraudulent sale and for the concealment of the real ownership until all danger from creditors has been removed. The fact that the sale by Rangiah Chetty was for Rs. 2,400 less than he had bought the property for might indicate that the figures were merely nominal and not real. The sale to Rajagopal Chetty and Subbiah Chetty was accompanied by a contemporaneous agreement to sell to the maternal uncle of the brothers, for whom Kalluram himself was eventually substituted. But I feel that this line of attack on these document is too speculative, and that the attack has been developed since the date of the hearing of the suit, in a manner which the defence cannot be expected to meet here. The case which the defendant was called on to meet by evidence in the Court was that raised in Issue 1, that is, the general question whether Kalluram and Rajaram were not divided in their lifetime before the birth of the plaintiff. The trying judge in his judgment so states the point for trial at page 18, line 25 of the printed papers. From a further remark at page 19, line 11, it would appear that it was only at the time of argument it was advanced that the whole series of transactions from October 1894 to December 1909 was colourable. This appears to be correct, as I find that the only hint in evidence of the present attack is the question to P. W. 2 noted above as to the nominal nature of the sale to Perumal. But as he only came into the service of the brothers in 1901, he could not give any direct evidence, and I note that, though the same man has attested the sale deed to Rangiah Chetty, he was not asked a word about that. The learned Judge in his conclusion at page 20, line 18 assumes the document to be genuine transaction but supposes they were "to get the property out of the hands of Rajaram's creditors and possibly out of the hands of Kalluram's creditors." But I feel sure that the attack of the plaintiff on these documents, developed at the time of argument and not in the evidence, has put the defendants at a disadvantage of which they have reason to complain. Had the defendants

(1) 5 M. H. C. R. 150.

had warning at the time of trial in the lower Court as to the particular points of the present attack they might have been able to prove, for example, that the sale to Perumal Mudaly was merely the common dodge of the bankrupt for converting the immoveable property into cash, that the sale price to Rangiah Chetty was fixed at Rs. 11,900 because that was the sum total of the debts owing to Rangiah by Perumal Mudaly, and Rangiah could not hope to get all his money out of him otherwise, that no cash proceeded from Rangiah for that purchase. They might also have been able to show that the property had depreciated in value between Rangiah Chetty's purchase and the sale to Rajagopal Chetty and Subbiah Chetty and that the agreement of sale to the maternal uncle was the result of a genuine endeavour by the brothers to get a sort of right of pre-emption over the property, to be exercised whenever financial circumstances permitted. It is a weak point in the plaintiff's case that no suggestion is made why these Chetties, one of them being a professor in the Christian College should oblige these bankrupt brothers, and why it should be necessary to substitute Rangiah Chetty as the nominal purchaser in the place of a *benamidar*, Perumal Mudaly, who *ex hypothese* was willing to oblige.

6. I think the only sound conclusion is that Rangiah Chetty at least insisted on a sale and that the property passed to him, but that each brother was keeping an eye on the property, and, when it came to Rajagopal Chetty and Subbiah Chetty, one of them found a chance of recovering it. It may be further noted that though the agreement to reconvey was taken from Rajagopal and Subbiah Chetty, no similar agreement was obtained from Rangiah Chetty. I think the strong probabilities are that the sale to Rangiah Chetty was a genuine sale. On this point of the case I conclude that, whatever grounds there may be for holding that the transfer to Perumal Mudaly was not a genuine one, there is no valid ground for holding that the sale to Rangiah Chetty was not what it purports to be and that the ownership of the brothers in the property passed by it. I will point out as worthy of notice that no creditor of either brother appears to have come forward at any time to claim that these alienations were nominal. This would indicate the public estimate of these transactions.

7. I conclude therefore that the property passed wholly out of the hands of the joint family, if not in 1894 when it was sold to Perumal Mudaly, then at least in 1900 when it was sold to Rangiah Chetty and that the latter sale was a valid sale. The doctrine laid down in *Visalatchi Ammal* v. *Annasawmy Sastri* (1) is applicable to the case of a mortgage or to a wrongful dispossession of joint family property, but will not apply to a case where the joint family disposed of the property by valid and voluntary alienation. See *Bajaba* v. *Trimbak Vishvanath* (2) and *Chokku Roaji Mahar* v. *Tatya Nama Mahar* (3).

8. On the main question whether the brothers were divided at the time of Kalluram's purchase, I will first take up the evidence as to the source of the purchase money. Such evidence as there is is all one way. Rs. 9,000 was borrowed on security of the property given by Kalluram alone, and Rs. 1,000 in each apparently came from some other source. The plaintiff's suggestion that the cash might have come out of the monies borrowed by the brothers for joint trade on the hundies, Ex. B series is a pure surmise. On the other hand in the mortgage deed by Kalluram, Ex. iii dated 6—4—'10, there is a statement by him that this Rs. 1,000 was his own money. This document is attested by Rajaram with the significant addition to his signature of the words, 'after having read the whole document.' This note was obviously intended to fasten on Rajaram a knowledge of what Kalluram had said in the document. This is a document executed after the birth of the plaintiff, and the effect of such a statement on the plaintiff's rights in the property, as well as his own could not have been absent from Rajaram's mind. This admission against his own interests by Rajaram while of course not an estoppel against the plaintiff is in the absence of other evidence reasonable proof that the Rs. 1,000 came from Kallu-

2. (1910) 34 Bom. 106=11 Bom. L. R. 1122=4 I. C. 255.

3. (1920) 22 Bom. L. R. 1297=59 I. C. 569.

ram alone. The conclusion is strengthened to my mind by the fact that the pronote and equitable mortgage for Rs. 9,000 Ex. II was executed by Kalluram alone. The plaintiff argues, it was still at the time necessary for Rajaram to hide his interest in the property in order to conceal it from his creditors. But I fail to find any satisfactory evidence that he was then in any worse financial situation than Kalluram, while at the same time the two brothers were publishing to the business world, and therefore to their creditors, their jointness in trade by jointly executing hundies, Ex. B series for trade purposes. The lender of Rs. 9,000 would in his own interest, not have refrained from getting Rajaram's signature to bind the whole joint family. The more the joint trade of the brothers suggested jointness in status, the more likely is it that their lender would have insisted on Rajaram signing the equitable mortgages if the property was really joint family property. There is thus a strong probability that it was Kalluram's own money alone which went for the purchase in 1909.

9. That is some indication that the brothers were then divided, and that inference is further strengthened in three ways first, the probability that the brothers were divided at the time of the insolvency, secondly, the conduct of Rajaram himself, and thirdly the conduct of his widow after his death. As to the first point, the two brothers went into insolvency in 1895 separately as if divided, with separate creditors and separate list of assets. We have looked into their schedule but they do not throw any light on the question of division. We are not told that any creditors or Official Assignee attempted to amalgamate the two insolvents and the two estates. It is not necessary in this case to decide whether the presumption of separate insolvency petitions would in law be a sufficient declaration of an intention to separate and would constitute a partition. The fact remains that in 1894 the brothers held themselves out to the world to be divided, and I see no good reason for supposing that this attitude did not represent the truth. The series of dealings with the property subsequent to the insolvency does not conflict with a divided status, even if I suppose that they were all *benami*. The existence of a joint trade must be admitted and has weighed much with the lower Court, but that again is not inconsistent with division, while there is some oral evidence, which there is no reason to reject, including that of the brother's clerk P. W. 4, examined for the plaintiff, that the brothers each had also a separate trade. The fact, that when Kalluram bought the property in 1909, the sale-deed was taken in his name alone, though 'the names of both brothers appeared on the original sale in 1894, by which the property left the family, is a point in favour of the status of the brothers, being then a divided status.

10. In this connection also the conduct of Rajaram (point 2 noted above) becomes important. We see him at a time when his minor son was alive attesting with full knowledge of its contents, Ex. III, dated 6—4—1910 by which Kalluram mortgaged the property and in which Kalluram states "that none except myself has any kind of claim" in the property, and again attesting Ex. IV dated 28—5—1910 a subsequent mortgage by Kalluram in which Kalluram states that he is the absolute owner of the property. Then after the death of Kalluram, when, if the family had remained joint, he became the manager of it and when clearly it was imperative in his own interest as well as that of his son to put dealings regarding the property, which held out Kalluram as the sole owner, in their true light, he did nothing at all, but let things remain as they were. Even in a will written by him, but not produced by the plaintiff, he is said by D. W. 8 a High Court Vakil, who attested the will, to have made no claim to any immoveable property. This is a document in which at any rate he need not have been afraid to set out the real state of affairs, since he could have kept the knowledge of it from his creditors. Further he is stated by several witnesses to have been present when Kalluram's widow after her husband's death took rental agreements, Exs. VII and IX series in her own name from the tenants occupying the property and he again did nothing. Against this the plaintiff has nothing to set worth mentioning except the fact that in Rajaram's diary there are entries that in 1918 he paid sums of money from time to time to Kalluram's widow for the repair of the house, and

once paid her Rs. 5 for stamp agreements for his house. Again I would note that this is the point which the defence has not been given any opportunity of rebutting. It is not impossible, for instance, that the widow, being then in seclusion got him on to look after rental agreements and repair and financed him for that purpose, and that the diary entries are merely notes for his own information of what he had paid out. The plaintiff's suggestion that these rental agreements were nominal for Rajaram because the latter was still in financial difficulties is not supported by any satisfactory evidence. I regard this apathy by the father of a minor son in the face of the dealings with the property as her own absolute property by the sonless widow of his brother as a very strong proof that a division had in fact taken place, before his son's birth and that the property, when purchased by Kalluram, became his sole absolute property.

11. As to the conduct of the widow of Rajaram Lal after his death, it is significant that, though he died in November 1918, she did not send any notice to the tenants on the property, who were attorning to Kulluram's widow, to attorn to the plaintiff, although she published notices warning intending purchasers not to buy from Kalluram's widow. It is remarkable that she, examined as P. W. 1, nowhere says that she was told by her husband that he and the minor plaintiff had an interest in this property. Surely at least when he was dying, Rajaram would have made her cognisant of the true state of affairs, so that she may look after her infant's interest. It is clear that Rajaram left no record oral or verbal to his immediate relations that his minor son had any interest whatever in this property.

12. The trying Judge had decided the case in the plaintiff's favour on the footing that the family never was divided and that either the purchase by Kalluram was for the joint family or the series of transactions from 1894 to 1909 were *benami*, and the property never passed from the family. The existence of a joint trade weighed most with him in deciding that there had been no division. I would lay more stress on the likelihood that the sale to Rangiah Chetty was a genuine sale and that the separate insolvencies indicated a real division of status, and on the fact that the consideration for the purchase came from Kalluram alone, and on the conduct of Rajaram and his widow after the death of Kalluram which are only consistent with the theory that they knew plaintiff had no rights in the property bought by Kalluram. I consider that there is no evidence to show that throughout all the long series of transactions Rajaram was in such bad financial circumstances that we must presume that he was afraid to put forward in any quarter his claim or his son's claim to a share in this property.

13. For the above reasons I would differ from the trying Judge and hold on the first issue that at the time of Kalluram's purchase in 1909 the property had ceased to be joint family property, that the brothers had divided even before the plaintiff's birth and that the plaintiff has had no right to any share in the suit property. My conclusion would be that the plaintiff's suit must fail *in toto*, as the property is self-acquired property of the first defendant's husband to which plaintiff can have no manner of right. I would therefore reverse the decree of the lower Court and dismiss the plaintiff's suit with costs to the 2nd defendant here and below.

Appeal allowed.

1923 Madras. 252.

COUTTS-TROTTER AND RAMESAM, JJ.

Malli & Co. (Messrs.) ... Appellants (Plaintiffs.)

v.

V. A. A. R. Firm ... Respondents (Defendants.)

O. S. A. No. 11 of 1921 dated 9th March 1922, from the judgment of Phillips, J. dated 8th November 1920.

Contract Act S. 113—Warranty.

The effect of S. 113 is to lay down that, when there is no express warranty in the sale of goods, there is an implied warranty of merchantability, that is to say, the goods shall be immediately saleable under the description by which they are known in the market. 8 M. L. W. 192, *Foll.*) Where 9/10th of goods were either damaged or seconds there was held to be a breach of warranty. Whether goods are what the law calls "merchantable" is a question of mixed fact and law. (1910 L. R. 2 K. B. 831 foll.)

One might apply the principle of *de minimis* to damage which, though it cannot be met by reconditioning, could be met by a small allowance but you cannot recondition goods with shortage of weaving and short composition.

It cannot be said that goods are "merchantable" if they only want some trifling thing to be done to make them immediately saleable, and they are to be considered as merchantable, although not immediately saleable, and although a further expenditure of money is required by the purchaser to make them saleable.

(P. 253, Col. 1 ; P. 254, Col. 1.)

S. *Doraiswamy Aiyar*—for the Appellants.

A. Suryanarayaniah—for the Respondents.

COUTTS-TROTTER, J :—This is an appeal from a judgment of Mr. Justice Phillips, sitting on the Original Side and the claim was one by the plaintiffs for damages for breach of warranty in regard to 15 out of a consignment of 25 bales of sarries which were sold to them on the 28th August 1918. The learned Judge has followed the decision of this Court in *Peer Mahamad Rowther* v. *Dalooram Jayanarayan* (1), that the effect of S. 113 of the Indian Contract Act is to lay down the same law in this country as in England, namely, that when there is no express warranty in the sale of goods, there is an implied warranty of merchantability, that is to say, the goods shall be immediately saleable under the description by which they are known in the market.

We have had put before us figures about these bales and the figures are rather startling. Out of 1037 pieces in the first bale 782 pieces were "damaged" and 105 pieces were what are known in the trade as "seconds," which I understand means of unequal length. That comes to this that 9/10ths of the whole pieces in the bale are defective ; and in money, taking Messrs. Walker & Co.'s allowance of 8 annas for "damaged" and 4 annas for "seconds", Rs. 417-4-0 has to be allowed out of a total of about Rs. 8,000 for the bale, that is, something like 1/16. In the second bale out of 1027 pieces, 707 pieces were damaged and 83 pieces were seconds, that is about 4/5ths of the whole contents. In the third bale out of 907 pieces, 462 pieces were damaged and 143 pieces were seconds, that is about 2/3rds of the contents of the whole.

The only question before us and ultimately the only question before the learned Judge was whether on the facts of this case these goods were what the law calls "merchantable." That is a question of mixed fact and law. The attention of the learned Judge does not appear to have been called to two cases in the Court of Appeal in England. The first is the case of *Bristal Tramways etc., Carriage Co.* v. *Fiat Motors Ltd.* (2) and the other is the case of *Jackson* v. *Rotax Motor and Cycle Company* (3). I shall go to the latter case because I think it enunciates the propositions which are laid down in both perhaps in a form more easily applicable to this case. What happened in that case was this : A large consignment of motor horns was sent from France to London. When they arrived the horns were found to be dented and scratched, some badly polished and some badly finished and 364 horns out of a total of 609 were said to be defective. The main causes of complaint were that the bell parts of the horn were dented and scratched, that the tubes were discoloured and were badly finished and polished and that 12 of the horns were not of the pattern ordered, and the sellers were ready to substitute good horns for the wrong horns sent by mistake. The Official Referee appears to have misled himself first by thinking that what he really had to apply his mind to was whether these things were something different to those covered by the contract, (of course it was not in the least necessary for him to put the case as high as that) and then he came to the conclusion that "most if not all of the horns thus dented or otherwise injured could have been at very slight cost made merchantable. As regards the tubes, some arrived in a condition which required polishing or other work to make them merchantable, and in a few there may have been some careless work. But reviewing the evidence as a whole I cannot find that the goods as an entire consignment were unmerchantable so as to justify rejection" and he accordingly gave the buyers an allowance and held that the goods were merchantable. Dealing with the law Cozens-Hardy, M. R. said this : I shall have to read first the part which deals with the facts. "The case made out before the Official Referee was that a

1. (1918) 35 M. L. J. 180=24 M. L. T. 227=(1918) M. W. N. 658=8 L. W. 192=47 I. C. 555.

2. (1910) 2 K. B. 831.

3. (1910) 2 K. B. 937.

very considerable portion of the horns delivered in London were dented and damaged in various ways, and that damaged state was partly due to the bad packing by the plaintiff in Paris and partly to injury sustained in the transit. The Official Referee has found not merely that the horns were damaged in transit, but that owing to defective packing many of the horns as delivered were not in a merchantable state in the sense that they could without more have been disposed of reasonably and properly by the buyers as dealers in horns to any customer who wanted then and there a horn for a motor car, but in order to make them merchantable they required to be polished and otherwise dealt with at a cost which he said would have been trifling." Then the Divisional Court appears to have taken much the same view and the learned Master of Rolls says this: "The Divisional Court put what, so far I am aware, is an entirely new meaning on the word "merchantable" namely that goods are "merchantable" if they only want some trifling thing done to make them immediately saleable, that they are to be considered as merchantable, although not immediately saleable, and although a further expenditure of money is required by the purchaser to make them saleable. I am not aware of any authority for that view. It seems to me to be inconsistent with the language of the Sale of Goods Act to which our attention has been called." And then he says that although a large proportion of the goods were merchantable this was not a case in which he could apply the doctrine of *de minimis*. Farwell, L. J., applies the same principle and he says this: "It may well be that in the case if a single horn out of hundreds was not good the rule *de minimis* would apply and it would be open to the jury, or to the Official Referee, to find that notwithstanding the fact that one or two items were unmerchantable the consignment as a whole, treating the contract as for a consignment, was merchantable but the Official Referee has not taken that view, and, as I understand his finding, I think it is untenable." This was a case where you could recondition the goods but you cannot recondition goods with shortage of weaving and short composition. I think one might apply the principle of *de minimis* to damage which, though it cannot be met by reconditioning, could be met by a small allowance. But I cannot understand the view that a bale of a thousand pieces of piece goods of which 9/10ths are damaged, however slightly is merchantable and that a seller can say to his buyer, you must take these goods and I will make you an allowance in respect of 9/10ths of them because they are damaged, or "seconds." A mere statement of the figures is enough to show according to the true principles of law laid down by the Court of Appeal in the two cases which I have cited, that these goods were radically unmerchantable and that no seller could have forced them on an unwilling buyer.

As Mr. Doraiswami Aiyar is willing to accept Messrs. Walker and Co.'s figures as between them and their vendors at 8 annas a piece for "damaged" and 4 annas a piece for "seconds," the result will be that there will be a decree for the plaintiffs for Rs. 1,059-8-0 with costs here and below with interest thereon at 6 per cent. from the date of the lower Court's decree.

RAMESAM, *J*:—I agree.

Appeal allowed.

1923 Madras 254.

WALLACE, J.

Ahmad Thambi Maraicair (A. K G.) ... Petitioner—Respondent.

v.

V. S. Basava Maracayar ... Respondent-Petitioner.

Petition No. 395 of 1922 dated 10th October, 1922, under S. 115 of Act V of 1908 and S. 107 of the Government of India Act, from order of Court of Subordinate Judge of Negapatam dated 5th May, 1922 in O. P. No. 71 of 1921.

Madras District Municipalities Act (5 *of* 1920). S. 28—*Election Rule* 4.

Where a person whose name had been duly proposed and seconded, himself presided at the meeting and conducted the ballot, opened the ballot box, counted the votes and acted as Returning Officer. *Held* this is "taking part in a ballot." The phrase is not restricted to the mere act of voting.

The word Chairman in Sect. 28, includes, "Chairman Delegate" in cases where there is no Vice-Chairman.

Under the Madras Rules no breach of the rules whether mandatory or directory, shall invalidate an election unless the result of the election has been materially affected by such breach.

When dealing with an election enquiry of this kind, the Judge sits as a Court subordinate to High Court and therefore S. 115 applies.

(P. 255, Col. 1, 2.)

C.P.C., S. 115—Scope,—Material irregularity.

What is a "material irregularity" is a matter in itself undefinable and must be decided on the facts in each case. So far as it may be negatively defined, it is not a mere mistake of fact or law unless that mistake has occasioned a wrong assumption or refusal of jurisdiction, since a Court which has jurisdiction to decide a case on a point of fact or law, has jurisdiction to give a wrong as well as a right decision on either point.

But when there is jurisdiction and that jurisdiction has not been excercised or has been illegally or irregularly excercised, S. 115 will apply (case law discussed.)

(P. 257, Col. 1.)

S. Swaminathan and *V. L. Ethiraj*—for the Petitioner.

V. N. Venkatavaradachariar for—the Respondent.

JUDGMENT:—Three main points have been argued on this petition, (1) whether the statutory rules for the election of the chairman were broken: (2) whether having found that they were broken, the lower Court was not bound to find further that that breach had materially affected the result of the election, before it could set aside the election: (3) whether if the Court has neglected so to find, this Court can, and, if it can, will, interfere in revision, and in what manner it should so interfere.

(2). As to point (1) whether the election rules have been broken, the lower Court's finding appears to me to be a finding of fact, which in revision this Court will not ordinarily disturb. It is pleaded for petitioner that the lower Court's finding is vitiated by a fundamental misreading of the rules which are statutory rules, *i.e.*, that it is based on an error of law. Rule IV lays down that:

"No candidate whose name has been proposed and seconded shall take part in a ballot."

It is admitted that petitioner, whose name had been duly proposed and seconded, himself presided at the meeting and conducted the ballot, opened the ballot box, counted the votes and acted as Returning Officer. I am in full agreement with the lower Court that this is "taking part in a ballot" and that that phrase is not restricted, as petitioner argues to the mere act of voting. The rule has clearly been framed to carry out the salutary principle that no man shall be a Judge in his own cause, and that it should not be in the power of one vitally interested in the result to decide on such questions intimately affecting the result, *e.g.*, the validity of a particular vote, as the officer presiding at the ballot has to decide. The English law on this subject is quite plain, *see R. v. Owens* (1); *R. v. White* (2), and other cases cited on page 115 of Vol III of Rogers on Elections, 18th Edition, *viz.*, that a candidate is precluded from acting as chairman at an election and is incapable of acting as a returning officer, and that if he so acts and is elected, his election is voidable on petition *ad hoc*. R. 4, I have no doubt, was designed to carry out the English Law principle.

3. I have no doubt then that in this case R. 4 was broken, and that the lower Court, did not misinterpret the rules or the law relating to elections when it held so. It has been urged before me that this R. 4 seems to be in direct contravention of S. 28 of the Madras Municipalities Act, Act V of 1920, which implies that at every meeting of the Council at which the Chairman is present, he shall preside. The difficulty is not met in my opinion by counter-petitioner's suggestion of interpreting "absence" as including "incapacity." These two words are in fact used in S. 18 separately and as not implying each other, and if the incapacity of the Chairman to preside had been contemplated in S. 28 similar language to that used in S. 18 would have been employed. S. 30 (4) has been obviously misread by the lower Court and has no application to the present point. The difficulty however is resolved by holding that the word Chairman in S. 28, includes, "Chairman Delegate" in cases where there is no Vice-Chairman, and in fact it is clear that one must hold so, otherwise the "Chairman Delegate" could not preside at meetings at all, a *reductio ad absurdum*. The proper procedure then in cases like the present, is that the Chairman, being incapacitated from fulfilling

1. (1859) 2 E. and E. 86.
2. (1867) 2 Q. B. 557.

his duty of presiding at the election meeting should under S. 18 appoint a Chairman Delegate, who under S. 28, would preside at the meeting. Whether the salutary principle that a man should not be a Judge in his own cause is preserved by a procedure which allows him to appoint his own Judge in his cause may well be doubted, but that is, so far as I can see, the result of the present procedure as laid down in the Act and the statutory rules.

4. Be that as it may, the difficulty does not alter the fact that petitioner committed a breach of the election rules in presiding at the meeting and taking part in the ballot for the election at which he was a candidate. It does not however at all follow that the lower Court's order setting aside the election was correct. Here I come to point (2) argued before me. Under the statutory rules for the decision of election disputes published in the *Fort St. George Gazette*, dated 30th November, 1920, page 607, non-compliance with the provisions of the Act or rules made thereunder can invalidate an election only if "the result of the election has been materially affected thereby". To that question the lower Court, has in my opinion, nowhere given its attention. Counter-petitioner argues that since the lower Court holds that the rule broken was a mandatory provision, it must be deemed to have held that the result of the election was materially affected, and relies on the ruling in *Shyam Chand Basak* v. *Chairman, Dacca Municipality* (1). What the election rules in Calcutta are, has not been stated before me. If they follow R. 13 of the English Ballot Act of 1872 as quoted at p. 532 of that ruling, they are wider in principle than the rules in Madras for under R. 13 an election conducted "not in accordance with the principles laid down in the body of the Act" may be declared "invalid." Under the Madras Rules no breach of the rules, whether mandatory or directory shall invalidate an election unless the result of the election has been materially affected by such breach. It is not an axiom then in this Presidency that the breach of a mandatory rule will so affect an election. It is a question of fact to be decided and found by the Judge who hears the election petition.

5. It was the more necessary for the lower Court to have decided this question in this case, as it was never even alleged much less attempted to be proved by counter-petitioner that the result of the election would have been different had the rules not been broken, and there is no suggestion that while the ballot was going on, the petitioner had to give and did give a decision on any point which could have effected the result of the ballot, and the majority of votes, in his favour was overwhelming. Counter-petitioner argues that the *onus* of showing that the breach did not affect the election lay on petitioner who had violated the rule. Granting so, it is still clear that the lower Court never put that issue before petitioner or called on him to prove it, while obviously it was unnecessary for petitioner to go out of his way to set out any rebuttal to a case never stated by counter-petitioner in his objection-petition to the lower Court.

6. The lower Court has thus neglected to put to itself and to the parties the question it had to decide before, under the rules, it had any legal power to set aside the election. I therefore come to the third point argued *viz.*, whether this Court can and if it can, will interfere in revision. That in a matter of this kind this Court has power to interfere under S. 115 of the Code of Civil Procedure has been lately decided by a Bench of this Court, in a ruling as yet unreported, in C. R. P. Nos. 341 and 342 of 1922. (4) I need not recapitulate the *ratio decidendi* of the decisions of their Lordships Krishnan and Venkatasubba Rao, JJ., on this point with which I respectfully agree. They hold that when dealing with an election enquiry of this kind, the Judge is sitting as a Court subordinate to this Court and therefore S. 115 applies.

7. Is the present case one then in which this Court should interfere in revision? The phrase in S. 115 which can be called in aid by petitioner is "if such subordinate Court appears to have acted in the exercise of its jurisdiction illegally or with material irregularity." A good deal of discussion has centered round this

1. (1920) 47 Cal. 524=24 C. W. N. 189=30 C. L. J. 270=53 I. C. 741.

4. [Since reported as *Ramaswami* v. *Velappa* (1922) 16 L. W. 848.-Ed.]

point and many cases have been cited to me for the purpose of showing in what sort or class of cases High Courts in India and in England have acted in revision. I need not deal with these cases in detail since they all lead to the same conclusion that what is a " material irregularity " is a matter in itself undefinable and must be decided on the facts in each case. So far as it may be negatively defined, it is not a mere mistake of fact or law [see *Amritrav Krishna Deshpande* v. *Balkrishna Ganesh Amrapurkar* (5), *Kuppuswami Aiyangar* v. *Narayana Aiyangar* (6), *Jhotu Lal Ghose* v. *Ganouri Sahu* (7) and *Venkataramanjulu Naidu* v. *Ramaswami Naidu* (8)] unless that mistake has occasioned a wrong assumption or refusal of jurisdiction [*Atchayya* v. *Sri Seetharamachandra Rao* (9) and *Hindley* v. *Joynarain Marwari* (10)] since a Court which has jurisdiction to decide a case on a point of fact or law has jurisdiction to give a wrong as well as a right decision on either point. Thus where there is jurisdiction and that jurisdiction has been exercised merely wrongly so as to eventuate in a wrong decision on fact or law, S. 115 cannot be called in aid. [See Privy Council ruling in *Amir Hassan Khan* v. *Sheo Baksha Singh* (11) and the ruling in *Shew Prosad Bungshidhur* v. *Ram Chunder Haribux* (12)]. But when there is jurisdiction and that jurisdiction has not been exercised or has been illegally or irregularly exercised, S. 115 will apply, [see Privy Council ruling in *Balakrishna Udayar* v. *Vasudeva Ayyar* (13)].

8. I take the general principle to be this, that when a Court has taken up a point of fact or law for decision and has decided that point wrongly, it has acted with full jurisdiction and regularly and legally and no revision lies unless that decision itself affects the Court's own jurisdiction, but that when having jurisdiction, the Court has failed or refused to take up the point for decision, it has exercised its jurisdiction irregularly, and the more the failure or refusal affects the exercise of its jurisdiction, the greater the irregularity will be.

9. Applying that principle to the present case, and recalling my conclusion that the lower Court has omitted to decide whether the result of the election was materially affected by the breach of the rules *i.e.*, to decide the one point in this case which gave it jurisdiction to set aside the election, I cannot come to any other conclusion than that the Subordinate Judge exercised his jurisdiction with material irregularity. Clearly he exercised it irregularly since he had no legal basis on which to set aside the election, and overlooked the one factor which alone gave him jurisdiction to set it aside; and clearly the irregularity was material because it may well be that if he had decided that question his decision might have been in petitioner's favour and then he would not have set aside the election.

10. I therefore under S. 115 (c) set aside the lower Court's order and direct it to rehear and decide afresh the petition before it according to law. In doing so, the Subordinate Judge will consider, if he decides, that the election should be annulled whether having regard to the amendments introduced by Madras Act I of 1922 into Madras Act V of 1920, a fresh election is necessary. It is a point I have not heard at length in this Court.

11. Costs of this petition and up to date in the lower Court will abide the result.

Petition allowed : Case remanded.

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5. (1887) 11 Bom. 488.
6. (1915) 19 M. L. T. 24=3 L. W. 36=32 I. C. 3.
7. (1918) 3 Pat. L. J 376=46 I. C. 176.
8. (1915) 2 L. W. 709=18 M. L. T. 164=29 M. L J. 353=(1915) M W. N. 728=30 I. C. 353
9. (1916) 39 Mad. 195=13 M. L. T. 60=24 M. L J. 112=18 I. C. 555.
10. (1920) 46 Cal 962=24 C. W. N. 288=54 I. C. 439.
11. (1885) 11 Cal. 6=11 I. A. 237.
12. (1914) 41 Cal. 323=23. I. C. 977.
13. (1917) 40 Mad. 793=44 I A. 261=15 A. L. J. 645=2 Pat. L. W. 101=33 M L J. 69=26 C. L. J. 148=19 Bom. L. R 715=(1917) M. W. N. 628=6 L. W. 501=22 C. W. N 50=11 Bur. L. T. 48=40 I. C. 650 (P. C.).

1923 Madras. 257.

KRISHNAN AND RAMESAM, JJ.

Muhammad Rowther (T.S.N.) ... Defendant—Appellant.

vs.

M.M. Abdul Rahman Rowther...Plaintiff—Respondent.

Appeal No. 85 of 1922, dated 1st November 1922, against the decree of the Court of the 2nd A. S. J. of Madura in O. S. No. 56 of 1921.

(a) *Civil P. C., S.* 11—*Might and ought.*

The first case was for possession against the defendant as owner on the strength of plaintiff's title by purchase, the second case was again for possession on the strength of plaintiff's title as owner by inheritance. In both cases plaintiff was litigating under the same title namely, his ownership. *Held* he should have combined the two claims in the first suit.

The joining together of the two claims, the one under the purchase and the other as heir, would have led to no confusion or embarrassment.

[P. 259, Cols. 1, 2.]

(b) *Civil P. C., O.* 2, *R.* 2—*Res judicata.*

A plaintiff is not bound under O. 2, R. 2 to join in one suit all the causes of action he has got against the defendant; but that principle is not the one applicable to the question which refers to a plaintiff's duty to bring forward all the grounds of his attack in support of the title that he is litigating.

A plaintiff is not bound to combine different causes of action in the same suit.

[P. 260, Col. 2.]

KRISHNAN, J.—This is an appeal by the defendant against the decree of the 2nd Additional Subordinate Judge of Madura in O. S. No. 56 of 1921 on his file. The only point argued before us by the appellant is that the present suit is barred by *res judicata* under S. 11 read with Explanation 4 of the Civil Procedure Code. The Subordinate Judge has held that it is not so barred and hence the appeal by the defendant.

The plea of *res judicata* is based on the former suit O. S. No. 1 of 1916 brought by the present plaintiff along with the widow and daughter of his deceased brother one Mahomed Muthu Ravuthar against the heirs of one Varisai Ravuthar, defendants 1 to 5 and against the present defendant as the 6th defendant and against the heirs of the third deceased brother Naina Mahomed Ravuthar. His case there was that the properties in suit, the title-deeds of which stood in the name of Muthu Mahomed Ravuthar were purchased by all the three brothers with their joint earnings *benami* in the name of Muthu Mahomed and they really belonged to all of them in equal one-third shares. One of the items sued for was a house in Madura town. Muthu Mahomed had executed a sale-deed regarding it to one Varisai Ravuthar and after the latter's death it had been sold by his heirs defendants 1 to 5 to the 6th defendant and he was in possession. It was alleged by the plaintiff that the sale-deed to Varisai Ravuthar was a nominal transaction not intended to convey title and that the 6th defendant had no title either, as he was a purchaser with notice of the defect of title. The present plaintiff therefore claimed a one-third share for himself and plaintiffs 2 and 3 claimed another one-third share as heirs of Muthu Mahomed allowing the other one-third to the heirs of Naina Mahomed.

The Subordinate Judge who tried the suit found that the property was not the joint acquisition of the brothers but belonged to Muthu Mahomed alone and on that finding he dismissed the plaintiff's claim. He also found that the sale to Varisai Ravuthar was a nominal one and that the 6th defendant obtained no title as he was a purchaser with notice of the infirmity of title to his vendor. He thus gave a decree to plaintiffs 2 and 3 as the heirs of Muthu Mahomed but only for a one-third share as they had not asked for more although they were entitled to a five-eighth share under the Mahomedan Law of inheritance on his finding. Plaintiff did not appeal but the 6th defendant filed an appeal in the High Court. Plaintiffs 2 and 3 filed a memo. of objections claiming their five-eighth share in the property under the Mahomedan law on the footing that the whole property belonged to Muthu as found by the Sub-Judge. The High Court dismissed the 6th defendant's appeal but gave a decree for five-eighth share to plaintiffs 2 and 3. They have executed the decree and got possession of that share.

It is for the balance, three-eighth share, of the house in Madura that the plaintiff brings the present suit against the 6th defendant. He now claims as the sole residuary heir to Muthu Mahomed being his sole surviving brother. Defendant contends that the plaintiff "might and ought to have" claimed this relief in the alternative in the previous suit and not having done so he is barred by S. 11 read with explanation IV from claiming it again.

The previous suit was so far as the present defendant is concerned a suit for his ejectment from the suit house on the ground that he had no valid title to it or in other words that he was a trespasser; and it was based upon plaintiff's title as owner by joint purchase with two others. The prayer for partition was only against the heirs of his brother: It did not concern

the present defendant. It is conceded that in that suit plaintiff might have put forward his claim to ownership by inheritance as heir to Muthu Mahomed as an alternative claim. In fact though the case of the plaintiffs two and three was also one based on Muthu Mahomed being entitled to only a third share as joint purchaser, they were given a decree for their five-eighth share in the whole property on the footing that it belonged solely to Muthu Mahomed. Plaintiff could have got relief on the same footing in that suit if he had put forward his claim as Muthu Mahomed's residuary heir.

The question then is whether he "ought" to have put his present claim forward in that suit. The ruling in *Woomatara Debia* v. *Unnoppoorna Dassee* (1) is in point, where their Lordships of the Privy Council held that a suit to recover property on the ground that it was part of plaintiff's taluk was barred by a previous suit for the same land on the ground that it was *tanfir* land or land which was obtained by adverse possession as the two claims should have been combined in the first suit. In the case before us the first case was for possession against the defendant as owner on the strength of plaintiff's title by purchase, the present case is again for possession on the strength of plaintiff's title as owner by inheritance. In both cases plaintiff is litigating under the same title namely, his ownership. He should therefore according to this ruling have combined the two claims in the first suit.

In that case their Lordships followed an earlier ruling of theirs in *Srimat Rajah Mootoo Vijaya Raganadha Bodha Gooroo Swami* v. *Kamala Nachior* (2) where in the first suit the party rested his title upon the property being the separate property of the Zamindar whereas in the second suit he claimed title under a Will. That plea was held to be barred.

The case in *Woomatara Debia* v. *Unnopoorna Dasee* (1) is referred to in *Ramaswami Iyer* v. *Vythinatha Iyer* (3). The learned Judge while distinguishing it from the case before him which was one of redemption of a mortgage different from the one sought to be redeemed in the first case though on the same property observes that the suits in *Woomatara Debia* v. *Unnopoorna Dasee* (1) were "both suits based upon plaintiff's title as owner" and that "the case is an authority only for the position that if one is dispossessed of land and brings a suit to recover possession on the strength of his title, he must establish his title in that very suit by urging and proving all that would go to establish his title and cannot reserve one or more of such grounds for a future suit; and this is what is laid down in explanation 2 of S. 13, C. P. C., 1882 which is the same as explanation 4 to S. 11 of the present code. Even taking this restricted view of the scope of the decision without deciding whether it is correct to so restrict it, it appears clear that the present case falls within it and is covered by the explanation.

The Privy Council again held in *Kameswa Pershad* v. *Rajkumari Ruttan* (4) that a suit to enforce a charge on property barred a second suit for the same amount on a personal covenant to pay under the same agreement. Their Lordships say that "the question whether the second claim ought to have been put forward in the first case depends on the particular facts of each case. When matters are so dissimilar that their union might lead to confusion, the construction of the word "ought" would become important. In this case matters were the same. It was only an alternative way of seeking to impose a liability upon Rau Bahadur, and it appears to their Lordships that the matter ought to have been made a ground of attack in the former suit." This case shows that if a person has two grounds on which he could base his claim or title to a thing he must bring forward both in the first suit itself and he will be barred from bringing a second suit, unless indeed the union leads to confusion. In the case before us the joining together of the two claims the one under the purchase and the other as heir would have led to no confusion or embarrassment. If plaintiff failed to prove the joint purchase he alleged, the property must have necessarily been taken to be Muthu Mahomed's as the deed was in his name

1. 11 B. L. R. 158=18 W. R. 163.
2. 11 M. I. A. 50.
3. (1903) 26 Mad. 760 (774 and 775)=13 M. L. J. 448.
4. (1893) 20 Cal. 79=19 I. A. 234=6 Sar. 241.

and as the defendant claimed title through him for his alternative claim he would then have to prove only that he is a residuary to get relief on that ground. In either case the invalidity of the 6th defendant's title must be proved so that the addition of the alternative case will have led to no confusion at all and no embarrassment to plaintiff in leading his evidence.

The case in 20 Cal. was followed by their Lordships again in *Moosa Goolam Ariff* v. *Ebrahim Goolam Ariff* (5). Thus it would seem clear on the authority of the Privy Council ruling that the plaintiff should have put forward all his grounds of attack to recover the suit house from the defendant and not having put forward his claim based on his right of inheritance in the former suit he is now barred from doing so. The fact that plaintiff claimed in the first suit a one-third share by partition whereas now he claims a specific three-eighth share which alone is left with the defendant, the balance having been recovered from him by Muthu Mahomed's widow and daughter, can make no difference to the application of the rule of *res judicata*: for according to both his claims the defendant had no right to any portion of the property he being a trespasser. A plaintiff cannot by claiming larger or a smaller share in the same property than in his first suit get rid of the effect of *res judicata* against him. In both cases the relief against the defendant is to recover possession from him of the whole or part of the same property.

Besides the abovementioned authorities the appellant cited *Masilamania Pillai* v. *Thiruvengada Pillai* (6) *Rangaswami Patrudu* v. *Appalaswami* (7) & *Guddappa* v. *Tikkappa* (8). The respondent on the other hand has quoted a number of cases where it was held that the second suit was not barred but I think it is not necessary to discuss them at all. It is not possible to reconcile all the cases; but it may be conceded that a plaintiff is not bound under O. 2, Rule 2 to join in one suit all the causes of action he has got against the defendant; but that principle is not the one applicable to the question before us which refers to a plaintiff's duty to bring forward all the grounds of his attack in support of the title that he is litigating. Reference must however be made to two of the cases relied on by the learned Vakil for the respondent: 26 Mad. 760 a decision of this Court and *Payana Reena Saminathan* v. *Pana Lana Palaniappa* (9) a decision of the Privy Council in an appeal from Ceylon. In the former case it was ruled that the dismissal of a suit to redeem one mortgage did not bar a subsequent suit to redeem another mortgage on the same property. I agree with this decision as the two suits are different from one another being based on two different contracts. The title or jural relationship in the two litigations are different as the terms of the two mortgages which regulate that relationship are different. But I do not wish to be understood as agreeing to all the observations in that judgment. That case is really an illustration of the rule that a plaintiff is not bound to combine different causes of action in the same suit and does not apply here.

In the Privy Council case cited in 41 I. A. the first suit was on certain promissory notes, which failed as the notes were found to have been materially altered. The second suit was for money due under a certain award or settlement for which the notes had been given. The question considered in that case was not one of *res judicata* but whether the second suit was barred by reason of S. 34 of the Ceylon Procedure Code corresponding to O. 2, R. 2 of our Code. Their Lordships held that the claim on the notes and the claim on the original consideration under the award or settlement were quite independent claims and constituted "two inconsistent and mutually exclusive causes of action" and therefore the second suit did not offend against the section quoted. No question of the kind before us was raised and we cannot therefore treat it as an authority on that question.

For the above reasons I hold that the present suit is barred by S. 11, explanation

5. (1912) 40 Cal. 1=39 I. A. 237=16 C.W.N. 937=23 M. L. J. 215=16 C. L. J. 642=14 Bom. L. R. 1211=12 M. L. T. 449=5 Bur. L. T. 211=(1912) M. W. N. 1097=10 A. L. J. 485=6 L. B. R. 119=16 I. C. 70 (P. C.).
6. (1908) 31 Mad. 385.
7. (1916) 1 M. W. N. 286=34 I. C. 456.
8. (1911) 25 Bom. 189=2 Bom. L. R. 872.
9. (1915) 41 I. A. 142=18 C. W. N. 617=26 I. C. 228 (P. C.)

4, C. P. C. and must be dismissed. I allow the appeal and dismiss the suit with defendant's costs throughout.

Ramesam, J. :—The facts are fully stated by my learned brother.

The decision depends on a construction of the words "litigating under the same title" taken with explanation IV in S. 11 of C. P. C. As a large number of decisions, including those of the Judicial Committee are available as guides, it is futile to attempt to work out the details in the application of the section by mere consideration of the words of the section. On an analysis of the decisions cited before us, the following propositions may be gathered from them;—(without attempting to generalise).

(1) Where the creditor (hypothecatee) of a Hindu widow claimed to recover the debt from a reversioner who got into possession of the estate through a surrender by the widow a claim based on the ground of an express covenant at the time of surrender to pay the debt is barred by a prior suit to recover the identical debt where it was based on the ground that it was beneficial to and binding on the reversioner—*Kameswar Pershad's* case (4) 20 Cal. 79 (P. C.).

(2) Where the first suit was to redeem one mortgage it does not bar a suit to redeem a mortgage of a different date, though the property sought to be redeemed and the principal amount of the mortgage are identical (26 Mad. 760) *Veerana Pillai* v. *Muthkumara Asary* (10) and *Thirakaitat Madathil Raman* v. *Thiruthiyil Krishen Nair* (11)

(3) Where the first suit was based merely on the relationship of landlord and tenant between plaintiff and defendant (and not on plaintiff's title as owner or otherwise) a second suit based on title is not barred. *Mangalathammal* v. *Veerappa Goundan* (12).

In the first case the claimant litigates under the same title but not in the second and third cases.

(4) Where the plaintiff sought to recover a property as owner, a second suit to recover the same property also as owner is barred, even though the details for the ownership are different from those in the first.

(It is scarcely necessary to add that in cases 1 and 4 the facts which are the basis of the second suit must have existed at the time of the first suit to attract the bar of *res judicata*). The fourth proposition is supported by 11 B. L. R. 158 (P. C.), 40 Cal. 1 (P. C.) 25 Bom. 189; 31 Mad. 395 and (1916)1 M. W. N. 286.

In my opinion the decisions in *Subramanian Chetty* v *Authinarayanan* (13), S. A. No. 1606 of 1914 and S. A. No. 1391 of 1917 (unreported) are inconsistent with 11 B. L. R. 158 (P. C.). I also agree with Seshagiri Iyer, J.'s dissent in (1916) 1 M. W. N. 286 from the remarks at page 779 of 26 Mad. 760.

In the application of the fourth proposition it must be remembered that the claim in the second suit must be either substantially identical with or part of the claim in the first suit.

Coming to the present case, can there be any difference for the purpose of *res judicata* merely because (1) the share claimed by the plaintiff in the present case is three-eighth and that in the former case was one-third and (2) there was a claim for partition in the first suit and none now? I think not. In the first place, the share to which plaintiff was entitled in the former suit (on the footing that all the three brothers originally acquired the property) was not one-third but one-third plus three-eighth of one-third or eleven twenty-fourths, the plaintiff being entitled to the extra one-eighth by reason of succession from the second brother. Though the results of this succession were overlooked, in so far as the two-thirds, claimed by all the three plaintiffs in the former suit were concerned, it was a claim for ejectment against the present defendant (whether the two thirds consisted belonging to 1st plaintiff and one third to 2nd and 3rd plaintiffs or eleven twenty-fourths to 1st plaintiff and five twenty-fourths to 2nd and 3rd plaintiffs). The fact that a partition was asked for because the heirs of the 1st brother did not join as co-plaintiffs was a mere accident and does not change the character of the suit.

10. (1904) 27 Mad. 102.
11. (1900) 23 Mad. 153.
12. [1919] M. W. N. 287.=52 I. C. 823.
13. 7 M. L. J. 288.

The share now claimed (*viz.*, three-eighths) by the plaintiff was certainly less than the eleven twenty-fourths to which he was entitled at the time of the former suit (even on the allegation of acquisition by all the three brothers) though by an oversight as to the results of the death of the second brother, his title was described as that to a third ; and it certainly overlaps substantially the claim actually made. If the shares are identical though there is no claim for partition in the second suit, it cannot be said that the second suit is not barred and the non-identity of the shares is a mere accident and can make no difference for the application of the principle.

In *Balabhaddar Nath* v. *Ram Lal* (1) *Shivaram* v. *Narayan and others* (2) and *Konorrav* v. *Gurrav* (3) the plaintiff's right as co-owner (using the term generally) was admitted in the first and only the fact of a partition resulting in plaintiff's right to a specific plot was in dispute. In the interval between the two suits, he continued to be co-owner and the second suit for partition was not barred. In *Nilo Ramachandra* v. *Govinda Ballal and others* (4) (a suit for *vattan* property) some of the defendants in the first suit admitted plaintiff's right though not the one who was the contesting defendant in the 2nd suit. In *Thandavan* v. *Valli Amma* (5) *and Dhanapala Chetty* v. *Anantha Chetty* (6) the first suit was for a declaration and there was neither identity of suit nor identity of issue as the validity of the Will in one case and the construction of the Will in the second were not in question in the first suit. *In Allunni* v. *Kunjushe* (7) the *karnavan* had not exercised his right to resume as *karnavan* at the time of the first suit. In S. A. No. 1391 of 1917 if the plaintiff's right to his own undivided share was admitted in the first suit, that decision would have been distinguishable like 26 All. 501 and the case in 5 Bombay. As it is, I am not able to agree with it. It cannot be said either in S. A. No. 1391 of 1917 or in the present suit that if the second claim was made alternatively in the first suit, the first suit would have been bad for mis-joinder of parties and of causes of action either under the present Code or the old Code. In the result I agree with my learned brother that the plaintiff's suit should be dismissed with costs throughout.

Appeal allowed.

1. 26 All. 501.
2. 5 Bom. 27.
3. 5 Bom. 589.
4. 10 Bom. 24.
5. 15 Mad. 336.
6. 24 I. L. J. 418.
7. 7 Mad. 264.

1923 Madras. 262.

SPENCER AND DEVADOSS, JJ.

Vadamalai Pillai and others ... Appellants.

v.

Subramania Chettiar and others ... Respondents.

Appeal No. 246 of 1920, dated 15th September 1922, against the decree of the Court of the A. S. J. of Cuddalore in O. S. No. 27 of 1919.

(*a*) *Hindu Law—Alienation by father—Antecedent debt.*

A personal covenant given by a father at the time of entering into a mortgage could not be described as "disconnected in fact as well as in time." Even if the personal covenant be contained in an earlier mortgage, as that earlier mortgage is an alienation and not a debt, there is no antecedency on the principle of *Chet Ram* v. *Ram Singh* (1922 P. C. 247). Thus whether the personal covenant be contemporaneous or previous, if it is part of a mortgage, it is not antecedent in the legal sense.

Whether there is an antecedent obligation dissociated in time and in fact from the sale or mortgage in any particular case is a question of fact.

[P. 264, Cols. 1, 2.]

(*b*) *Pro-note—Collateral security.*

A security promissory note does not lose its character of being a negotiable instrument by the fact that title-deeds were deposited as collateral security.

[P. 265, Col. 1.]

(*c*) *Hindu Law—Alienation by father—Self-acquired property.*

If a father transfers property and it is clear that he intends to part with all the interest he possesses in any capacity in the property, a recital in the deed as to its being his self-acquired property is not sufficient to invalidate an otherwise proper transaction.

[P. 265, Col. 1.]

(*d*) *Reg. Act, S.* 17—*Equitable mortgage.*

A writing which only gives the plaintiff a right to obtain a mortgage deed need not be duly registered.

In cases of equitable mortgages, the act of deposit of title-deeds creates a mortgage and not any letter accompanying, preceding or contemporaneous with the deposit which did not of itself purport to create a mortgage right.

[P. 265, Col. 2.]

(*e*) *Hindu Law—Joint family—Self-acquisitions—Nucleus.*

If there is a large family nucleus and if the property in the possession of a member of the joint family can be ordinarily traceable to the income of the family nucleus, such property would be considered joint family property till it is affirmatively shown that that property was acquired without the help of and without detriment to the family nucleus. The question of *onus* is not of much importance when all the evidence is before the Court. When it is found that the family nucleus is of such a character that it could not have yeilded any appreciable income and when there is no proportion between the family nucleus and the fortune acquired in the course of a few years, the matter does not rest with mere presumptions alone. The Court has to see whether the acquisitions were made by a member unaided by the family nucleus (case law discussed.)

[P. 266, Col. 2.]

A. Krishnaswami Iyer and *A. C. Sampath Aiyangar*—for the Appellants.

V. Visvanatha Sastri and *T. L. Venkatarama Iyer*—for the Respondents.

SPENCER, J.—This suit was brought on the strength of an equitable mortgage made by 1st defendant in favour of the plaintiff. Defendants 2 to 6 are the sons of 1st defendant. Defendants 7 and 8 are puisne mortgagees. Defendants 1, 2 and 5 are now dead and defendants 3, 4 and 6 prefer this appeal.

The evidence on record shows that the plaintiff was lending money to the 1st defendant in a series of transactions commencing from the 24th of August, 1907. Every time that accounts were settled between the parties a promissory-note was executed. On the 13th of October, 1910, the 1st defendant deposited title-deeds of landed property to secure a debt of Rs. 10,900 carrying interest at 12 per cent., due on the 12th of October, 1913. On the 1st of October, 1912, there was a consolidation of intermediate loans and on the 4th October, 1913 there was a fresh consolidation for which a promissory-note Ex. C for Rs. 13,900 was executed. This was followed on the 7th of October, 1913, by a letter Ex. E giving particulars of the title-deeds deposited for the debt of Rs. 13,900. Exs. C (1) and C (2) are promissory-notes for the interest that subsequently accrued. They are dated 17th February, 1915, and 20th September, 1915 respectively. Finally Ex. E (2) a letter dated the 20th September, 1915, was written by the 1st defendant to the plaintiff stating that he consented to the title-deeds and other documents already deposited being held as security for interest amounting to Rs. 812 and odd lent upon a promissory-note of the same date, *viz.*, Ex. C (2). The deposit of title-deeds having been made in the Presidency Town of Madras was quite regular and valid according to S. 59 of the Transfer of Property Act.

In appeal the following contentions have been raised: first, that the loan is not true, that the transactions between the plaintiff and the 1st defendant were brought about in order to shield the property from his unsecured creditors and that being pressed by them he filed a petition to be declared an insolvent on the 23rd of March, 1916: Secondly, the son's interest is not affected by this equitable mortgage as the father did not contract it for an antecedent debt in the sense that these words have been used in recent Privy Council decisions. Thirdly, as the father purported to be dealing with his own property, he did not make the mortgage in his capacity of manager of the joint family and, therefore, it cannot bind the sons' shares: fourthly, if the mortgage is partially effective over the father's interests, the plaintiff can only proceed against the sons' shares after exhausting his remedies against the father's share. Fifthly, Exs. E and E (2) which are letters referring to the deposit of title-deeds are invalid for the purpose of creating a mortgage as they have not been registered. In the lower Court an attempt was made to prove that the debts were incurred for illegal and immoral purposes. Mr. A. Krishnaswami Aiyar for the appellants frankly stated that he could show that the 1st defendant was leading an immoral life, but he admitted that he could not connect any particular debt with immorality. Therefore, the defence which formed the subject of the 4th issue in the lower Court has not been pressed in appeal. [His Lordship then dealt with evidence and confirmed the finding of the Trial Court as to existence of the debt]

The respondent's answer to the second objection is threefold. First, he contends that the mortgage properties were in fact the self-acquisitions of the 1st defendant and, therefore, no question arises as to the existence of an antecedent debt. Secondly, he relies on the personal covenant given by the 1st defendant at the time when the mortgages were created,

if it be held that the properties mortgaged were really ancestral properties. And thirdly he has referred to the documentary evidence to show that in each case promissory-notes evidencing the father's liability existed before the equitable mortgage on the family property was created. In the present case all the evidence is before us and upon that evidence it appears probable that the properties mortgaged were in reality the self-acquisitions of the 1st defendant. Although, when the 6th issue was before the lower Court, the Subordinate Judge observed that no attempt was made by the plaintiff to prove that the properties in the plaint schedule were the self-acquisitions of the 1st defendant as alleged in the plaint and as recited in Ex. E. Ex. E clearly states that the title-deeds, a list of which is contained in the letter, related to self-acquired immoveable properties, and there is no particular reason why the 1st defendant should have made this statement if, in fact, it was not true. There is evidence that he was earning from Rs. 300 to 400 a month when he was Dubash to Haji Jamal Moideen & Co., and Messrs. Wilson & Co., and that he was living on the rice which he got from his village lands, (*vide* statement of D. W. 1). On the other hand, it has not been proved that a sufficient nucleus of ancestral property existed out of the income of which he might have acquired the lands which he subsequently mortgaged. The only family property which he appears to have possessed was Survey No. 61 valued at Rs. 200 and a house site No. 44 upon which there was a debt of Rs. 500. Ex. E contains a reference to item No. 7 a property worth Rs. 800 which was divided between the 1st defendant and his brothers, and Ex. D (6) is a deed of exchange relating to a house site worth Rs. 200. It has not been shown that any other ancestral properties existed, and thus by a process of exclusion it may be inferred that there was no source of income for the purchase of property of the value of the property concerned in this suit. On the 6th issue, I, therefore, find that the plaint properties were the self-acquisitions of the 1st defendant.

On the second part of this issue I am of opinion that, even if they were not self-acquisitions, the mortgage is binding on the shares of defendants 2 to 6. The respondent's pleader relies on the personal covenant of the 1st defendant contained in the mortgages and he has argued that, if there is such a personal covenant, it will form a basis for a mortgage being effected by the manager of a Hindu family so as to bind the interests of the other members. In *Sahu Ram Chandra* v. *Bhup Singh* (1), their Lordships of the Privy Council laid down that to effectively bind the father's issue, there must be

> **"An obligation not only antecedently incurred, but incurred wholly apart from the ownership of the joint estate or the security afforded or supposed to be available by such joint estate;"**

and in the subsequent case *Chet Ram* v. *Ram Singh* (2) their Lordships say that the debt must be "disconnected with the mortgage in fact as well as in time." I do not consider that a personal covenant given by a father at the time of entering into a mortgage could be described as "disconnected in fact as well as in time." Even if the personal covenant be contained in an earlier mortgage, as that earlier mortgage is an alienation and not a debt, there is no antecedency on the principle of *Chet Ram* v. *Ram Singh* (2). Thus whether the personal covenant be contemporaneous or previous, if it is part of a mortgage, it is not antecedent in the legal sense, and thus *Ram Dei* v. *Suraj Buksh* (3), a decision of the Oudh Judicial Commissioner's Court given before the Privy Council had decided *Chet Ram* v. *Ram Singh* (2) does not appear to be good law.

Whether there is an antecedent obligation dissociated in time and in fact from the sale or mortgage in any particular case is a question of fact. In the present case, the accounts produced by the plaintiff show that money was first advanced and afterwards security was taken. The learned Subordinate Judge in paragraph 18 of his judgment has referred to the fact that promissory-notes, which might have been enforced against the 1st defendant

1. (1917) 39 All. 437=44 I. A. 126=21 C. W. N. 698=1 Pat. L. W. 557=15 A. L. J. 437=19 Bom. L. R. 498=26 C. L. J. 1=33 M. L. J. 14=(1917) M W. N. 439=22 M. L J. 22=6 L. W. 213=39 I. C. 280 (P. C.).

2. (1922) P. C. 247=49 I. A. 228=44 All. 368 =16 M. L. W. 89=(1922) M. W. N. 455=3 Pat. L. T. 363=43 M. L. J. 98=31 M. L. T. (P. C.) 50=24 Bom. L. R. 1231 (P. C.).

3. (1921) 23 O. C. 204=7 O. L. J. 509=60 I C. 177.

who executed them, were in existence before the title deeds were deposited under Exs. E and E (2). Ex. C which consolidated previous debts up to 1913 was dated the 4th of October, 1913. Ex. E, the letter referring to the deposit of title-deeds was dated three days later. In *Ramachandra Row* v. *Sesha Aiyangar* (4), it was held that a promissory note did not lose its character of being a negotiable instrument by the fact that title-deeds were deposited as a collateral security. In my opinion, the debts were, in the present case, sufficiently dissociated in time and in fact from the mortgages to constitute antecedent debts. It follows that the suit mortgage is valid against the interests of defendants 2 to 6, if they had any interest in the mortgage properties.

It is unnecessary to discuss the fourth point as I have found that the son's interests are liable upon the footing of the suit transactions being mortgages.

On the third point the appellants' learned Vakil quotes the case of *Balwant Singh* v. *R. Clancy* (5). In that case the mortgage made by Sheoraj Singh was held to have been made not as manager of the family or as representing Maharaj Singh who was a minor and, therefore, the mortgage deed was void against Maharaj Singh and his interest in the estate. In the present case the first defendant did not purport to be mortgaging only his own share in the lands described in Ex. E and, therefore, it must be taken that he mortgaged such interest as he was capable of mortgaging thereby. If a father transfers property and it is clear that he intends to part with all the interest he possesses in any capacity in the property, a recital in the deed as to its being self-acquired property is not sufficient to invalidate an otherwise proper transaction. Vide *Sabapathy Chetty* v. *Ponnuswamy Chetty* (6).

The last point relates to the registration of Exs. E and E (2). In *Chunilal* v. *Vithaldas* (7) it was held that a document creating a charge by deposit of title-deeds required registration and could not take effect if unregistered. So far as this case decides that a writing which only gave the plaintiff a right to obtain a mortgage deed should be duly registered, I am not inclined to follow it, as no reference has been made to the terms of S. 17 (2) (v) of the Registration Act which exempts from registration a document which does not of itself create a right over immoveable property but merely creates a right to obtain another document which will create or extinguish such right or interest. It is clear from a recent decision of the Privy Council in *Rajangam Aiyar* v. *Rajangam Aiyar* (8) that such a document would not require registration and would not be bad for want of registration. In *Muthiah Chetty* v. *Kothandaramaswami Naidu* (9) it was pointed out that, in cases of equitable mortgages, the act of deposit of title-deeds created a mortgage and not any letter accompanying, preceding or contemporaneous with the deposit which did not of itself purport to create a mortgage right. *Bhoirab Chandra* v. *Ananth Nath* (10) is another case in point. There it was held, quoting the words of Couch, C.J., in *Jungee Lall* v. *Sham Lall Misser* (11) that if there is a memorandum accompanying an equitable mortgage, and, if without such a memorandum there would have been a complete equitable mortgage by the deposit of the deeds, the memorandum in such a case is only evidence of the fact of the deposit which might be proved by any other evidence. In Exs. E and E (2) there are no words purporting to pass an interest in immoveable property and, therefore, I hold that they do not require registration.

The appeal thus fails on all points and is dismissed with costs of 1st respondent.

Time for redemption is extended by six months from this date.

Interest to be at the contract rate till the date fixed for payment, and 6 per cent. thereafter.

DEVADOSS, J.—[After stating facts, the judgment proceeded to deal with evidence

4. (1898) 3 M. L. J. 225.
5. (1914) 34 All. 296=39 I. A. 109=(1912) M. W. N. 462=11 M. L. T. 344=9 A. L. J. 509=15 C. L. J. 475=16 C. W. N. 577=23 M. L. J. 18=14 Bom. L. R. 422=14 I. C. 629 (P. C.).
6. 11 N. L. R. 45=28 I. C. 362.
7. 1922 Bom. 440=24 Bom. L. R. 502=68 I.C. 1005.
8. 1922 P. C. 266=31 M. L. T. (P. C.) 136=16 M. L. W. 615=69 I. C. 123.
9. (1916) 31 M L. J. 347=(1916) 2 M. W. N. 221=4 L. W. 472=35 I. C. 864.
10. (1920) 24 C. W. N. 599=31 C. L. J. 375=57 I. C. 686.
11. 20 W. R. 120.

relating to the genuineness of the loan and held it to be so and continued].

The next point urged for the appellants is that Ex. E, which was written about the time of the deposit of title-deeds, speaks of the properties as the self-acquired properties of the 1st defendant, and that as the plaintiff took from the 1st defendant what he considers to be self-acquired properties and as the 1st defendant did not purport to mortgage the properties as the father of defendants 2 to 6 or the managing member of the joint Hindu family the 1st defendant's share alone is liable for the mortgage debt and not the shares of his sons. It is true that Ex. E says:

"I leave with you herewith the title-deeds and other documents of some of my self-acquired immoveable properties situate in the village...".

Granting that the contention of the learned Vakil is correct, in view of my finding on issue 6 it would be unnecessary to consider whether the 1st defendant mortgaged the properties as the managing member of a joint Hindu family or an individual member hypothecating his own share of the property. The Subordinate Judge, for reasons which are not quite clear, says, in regard to issue 6, *viz.*,

"Are the plaint properties the self-acquisitions of 1st defendant; even if not is the equitable mortgage not binding on the shares of defendants 2 to 6?"—"No attempt was made by the plaintiff to prove that the properties of the plaint schedule are the self-acquisitions of the 1st defendant as alleged in the plaint and as recited in Ex. E, and hence the first portion of the issue is found in the negative and against plaintiff.

I cannot accept the finding of the Subordinate Judge in the light of the evidence that has been adduced. The 1st defendant got, by partition with his brothers in 1897 a piece of land worth Rs. 200 and a house worth Rs. 200 with a debt of Rs. 500 to be discharged. It is admitted that the 1st defendant came to Madras and was employed in 1886 as a clerk to the Dubash of Carl Simon Soehne, that for about 7 or 8 years from 1896 he was Dubash to Messrs. Wilson & Co., that his income was from Rs. 300 to 400 a month and that he was earning about Rs. 100 a month till the date of his insolvency in 1916. It is contended by the appellants that the *onus* is upon the plaintiff to make out that the properties mortgaged to him are the self-acquisitions of the 1st defendant and that he has not discharged the *onus* and that it cannot be said in the circumstances that the properties mortgaged are the self-acquisitions of the 1st defendant. The family properties which are said to be worth Rs. 200 in 1897 are said to be worth Rs. 800 in 1901. Whatever might have been the value of that plot of land, it could not have yielded any appreciable income from which it could be said that the plaint properties as well as other properties of the 1st defendant have grown up. The principle in all these cases is that if there is a large family nucleus and if the property in the possession of a member of the joint family can be ordinarily traceable to the income of the family nucleus, such property would be considered joint family property till it is affirmatively shown that that property was acquired without the help of and without detriment to the family nucleus. The question of *onus* is not of much importance when all the evidence is before the Court. When it is found that the family nucleus is of such a character that it could not have yielded any appreciable income and when there is no proportion between the family nucleus and the fortune acquired in the course of a few years, the matter does not rest with mere presumptions alone. The Court has to see whether the acquisitions were made by a member unaided by the family nucleus. Mr. Mayne quotes with approval the observations of Grant, J., in *Gooroochurn* v. *Goluckmoney* (12):

"Where the property descended is incapable of being considered as the germ whose improvement has constituted the wealth subsequently possessed, this wealth must evidently be deemed acquired *e.g.* An ancestral cottage never converted, or capable of conversion to an available amount into money, in which the maker of the wealth had the trifling benefit of residing with the rest of the family when he commenced turning his industry to profit—so of other things of a trifling nature." (Mayne's Hindu Law, 8th Edition, page 363).

In a recent case reported in *Narayana Rao* v. *Venkatakrishna Rao* (13) the learned Chief Justice and Seshagiri Aiyar, J., quote with approval the observations of Chamier, J., in *Ramakrishnan Das* v.

12. Fulton 165 at p. 181.
13. (1914) 27 M. L. J. 677=26 I. C. 33.

Tunda Mal (14) and lay down the law thus:

"Under the Hindu Law mere living together of the members of a family will not make them joint owners of properties acquired by each individual member. There must have been a nucleus of ancestral property which was utilised for the purpose of making the subsequent acquisitions or the members must have thrown their joint earnings into hotchpot with the intention of giving up their individual rights in them."

Chamier, J., examines all the previous rulings on the subject in *Ram Kishan Das* v. *Tunda Mal* (14) and says that:

"There is no presumption that property found in the possession of any one member is joint family property unless it is shown that the family as such possessed at least some property."

In another place the learned Judge says:

"That it is only when there is ancestral property by means of which other property may have been acquired, then it is for the party alleging self-acquisition to prove that it was acquired without any aid from the family estate. We entirely agree with these propositions."

The appellants rely on *Kundan Lal* v. *Shankar Lal* (15), *Luximan Row Sudasew* v. *Mullar Row Bajee* (16), *Tottempudi Venkataratnam* v. *Tottempudi Seshamma* (17) and *Gokal Chand* v. *Hukam Chand-Nath Mal* (18), for the position that the mere fact that there is a family nucleus is sufficient to make out that all the acquisitions of a member belonging to the family are joint family property and that the *onus* is heavily on any one who asserts that it is his self-acquisition to show that no part of the family nucleus went to help the member in the acquisition of such property. In the Lahore case the salary and acquisitions of a Civil servant were considered joint family property as he was educated in England for several years at considerable expense to the family, and as the costly education he received enabled him to get into the Civil Service. Their Lordships of the Privy Council observe at p. 49:

"If he desired to give evidence to show that his specialised education in England was obtained by 'the presents of a friend,' the charitable benefactions or the educational foundations of strangers, or by his own self-taught efforts, this should have been done by him at the trial."

In *Kundan Lal* v. *Shankar Lal* (15) it was held that property in the possession of a joint Hindu family should be presumed to be joint family property until the contrary is shown, even though it might have been acquired in the name of a particular member of the family. Richards, C. J., observes at page 568:

"The normal and natural condition of the family being one of complete unity of interest, I cannot hold that any presumption arises from the mere fact that the property has been acquired in the name or names of one or more members of the joint family. If this view be correct, the plaintiff ought to have proved that the property was acquired with the separate property of Mohan Lal or at least that after its acquisition he held it as separate property excluding the other members."

The decision in *Kundan Lal* v. *Shankar Lal* (15) is no authority for saying that whenever property is acquired by a member of a joint Hindu family, it must necessarily be presumed to be joint. Where it is proved that there is no family nucleus which might in the ordinary course of things have helped him substantially in acquiring it, there is no warrant in any of these cases for the position that, where the family nucleus is so small that it could not by any stretch of imagination have been the means of acquiring any portion of the property standing in the name of a member, such property should be held to be joint family property. In *Tottempudi Venkataratnam* v. *Tottempudi Seshamma* (17) the facts were, one Subbiah died in 1897 leaving two sons and 4 daughters and he bequeathed by his will certain legacies. In the will he stated that the properties were his self-acquisitions and that he had a right to dispose of them. A suit was brought for a declaration that the will was invalid as Subbiah could not dispose of joint family property to the prejudice of his sons. The Subordinate Judge held that the property was joint family property and could not be disposed of by will. On appeal the District Judge reversed the Subordinate Judge's decree on the ground that the property was the self-acquisition of Subbiah. The High Court reversed the decree of the District Judge and restored that of the

14. (1911) 33 All. 677=8 A. L. J. 723=10 I. C. 543.
15. (1913) 35 All. 564=11 A. L. J. 910=21 I. C. 13.
16. 2 Knapp 60.
17. (1904) 27 Mad. 228.
18. (1921) 2 Lah. 40=48 I. A. 162=23 Bom. L. R. 671=19 A. L. J. 249=40 M. L. J. 327=2 Pat. L. T. 201=33 C. L. J. 355=29 M. L.T. 258=(1921) M. W. N 175=25 C. W. N. 534=14 L. W. 485=42 P. W. R. 1921=3 U. P. L. R. (P. C.) 12=60 I. C. 379 (P. C.)

Subordinate Judge. Sir Arnold White, C. J., and Moore, J., in the course of their judgment observed as follows :

"Eliminating, then, the matters upon which the District Judge based his conclusion, what is left to rebut the presumption that the property was family property except the fact that from small beginnings the property became something considerable, worth about Rs. 20,000? This is not enough. As the Subordinate Judge points out the growth of the property was the work of over half a century and was partly at least the product of the skill and labour of Subbiah's father, and, admittedly, there was a considerable nucleus of joint property to start with."

Here there is a clear finding that Subbiah's father acquired considerable property and the family nucleus was large. That case can have no application to the facts of the present case where it is admitted that the family nucleus at the time of partition was worth only about Rs. 400 burdened with a debt of Rs. 500. Cases can be conceived where the family nucleus is mortgaged and money raised on the security of it with which a trade is started and acquisitions made out of the savings of the trade profits; or where the family nucleus is given as security for an appointment such as that of Dubash or Cash keeper and but for such security the member could not have secured the appointment, in such cases it may reasonably be held that the family property was the means or the foundation of the fortune, that was acquired afterwards. Can it be said that Srinivasa Pillai the 1st defendant ever raised any money on the security of the family property? Is there any evidence that such property was offered as security for getting employment in Madras? In the partition-deed of 1900, Ex. D (6), there is a recital that Srinivasa Pillai had gone to Madras for employment. It is in evidence that he was employed as clerk to a Dubash in 1886 and that he rose to the position of a Dubash in another firm in 1896 and he continued to be so for 7 or 8 years. Srinivasa Pillai who was evidently a man of business, was able to acquire in the course of 10 or 15 years property worth Rs. 30,000 to 40,000. When it is remembered that he borrowed large sums of money from the plaintiff ostensibly for the purpose of buying property, one cannot but come to the conclusion that the property standing in the name of the 1st defendant was his own self-acquisition and was not the outcome of any family nucleus. In one of his letters Srinivasa Pillai tells the plaintiffs that he was arranging for the purchase of a land and that he was going to get the document registered in Chidambaram. That evidently shows that he borrowed money for buying property. It is not unusual thing for people who are in receipt of a good income to buy property in their own native village by borrowing money in the hope of discharging the debt from their earnings. There is no reason why the plaintiff's evidence as to what 1st defendant told him at the time when he borrowed money, that he wanted money for buying properties in his village, should not be accepted. I hold in the circumstances that it has been clearly proved that the properties are the self-acquisitions of the 1st defendant.

The next point urged by the appellants is that Ex. E is a document which requires registration and therefore, no mortgage decree could be given in plaintiff's favour. If Ex. E is itself the only evidence of the transaction, or if by itself created any rights, then no doubt, the appellants' contention would be good. But we find here that the documents of title were deposited as security from the very beginning of the dealings between the plaintiff and the 1st defendant. The plaintiff maintains what is known as security register book. In it, it appears that some documents were deposited with him so far back as 1897 and as properties were acquired very probably other documents were deposited and finally in 1913 accounts were settled and a list of the documents in deposit was prepared. I consider Ex. E not as a mortgage transaction itself but as a list showing the items of properties mortgaged and the number of documents left with the plaintiff. The words in Ex. E are important :

"As you have paid me the sum of Rs. 13,900 on my simple promissory note of the 4th instant, I leave with you herewith the title-deeds and other documents of some of my self-acquired immoveable properties situated in the village of Uttamsolamangalam, Chidambaram Taluq, South Arcot District as per particulars below to be held by you in deposit as collateral security for the said loan until its repayment to you."

When there is clear evidence that documents were deposited from time to time and monies were advanced from time to time, it cannot be said that the deposit of title-deeds was made by this document. This document gives particulars of title-

deeds left with the plaintiff. Though the present tense is used, it cannot be said that the documents were left only after the date of this document or on the date of this document. The appellant's rely upon *Chunilal* v. *Vithaldas* (7). With great respect it is very difficult to follow the reasoning of the learned Judges of the Bombay High Court. S. 17, Sub-S. (2) Cl. (5) of the Registration Act is quite clear :—

"Any document not itself creating, declaring, assigning, limiting or extinguishing any right, title or interest of the value of one hundred rupees and upwards to or in immoveable property but merely creating a right to obtain another document which will, when executed, create, declare, assign, limit or extinguish any such right, title or interest need not be registered."

In the face of that the learned Judges hold that though a document creates only a right to get another document, still it requires registration. The recent decision of the Privy Council in the Tinnevelly case [P.C. Appeal No. 113 of 1921 *Rajangam Ayyar* v. *Rajangam Ayyar* (8),] is clearly against the decision in *Chuni Lal* v. *Vital Das* (7). The deposit of title deeds could be proved even though a letter accompanying it cannot be proved unless it be that the letter itself is the only evidence of the transaction. This was held in *Muthiah Chetty* v. *Kothandaramaswami Naidu* (9) Seshagiri Ayyar, J., observes at page 476 :—

"There is clear authority which I am prepared to follow that if the letter made a bare reference to the *factum* of deposit and to the creation thereby of the equitable mortgage, no question of stamps or registration would arise."

I hold that Ex. E does not require registration and that the mortgage by deposit of title-deeds is proved by the evidence of the plaintiff and the account books which he has produced which clearly show that the documents of title were given as security.

In the light of my finding on issue 6, *viz.*, the properties were the self-acquisition of the 1st defendant, it is not necessary to consider the contentions urged by the appellants that the debt is not binding upon the other members of the family, defendants 2 to 6 and that there being no antecedent debts for which the father could alienate the family property, the mortgage itself being the only transaction, the alienation could not bind them. The question whether a mortgage in which there is a personal covenant to pay, can be considered to be antecedent debt is an interesting question and has not arisen for consideration by the Privy Council. In the three cases decided by the Privy Council *Sahu Ram Chandra* v. *Bhup Singh* (1), *Chet Ram* v. *Ram Singh* (2) *Jogi Das* v. *Ganga Ram* (19) there was no personal remedy against the father outstanding as the mortgage properties alone were security for the debts. That a mortgage debt without a personal liability of the father cannot sustain a subsequent alienation is quite clear from the three cases ; but it is not quite clear whether a subsequent alienation in order to prevent the personal remedy in a mortgage deed being enforced against a father would bind the sons and it is a matter which requires consideration. In the case of a simple mortgage or even in the case of usufructuary mortgage where there is a personal covenant to pay, it is open to the mortgagee to give up his security and ask for a personal decree and a personal decree could sustain a subsequent alienation by the father. Again where there is a personal covenant and the mortgagee obtains a mortgage decree and the mortgage property is not able to satisfy the decree-amount the father would be personally proceeded against, in which case also the unsatisfied portion of the mortgage decree by the sale of the mortgaged property would sustain a subsequent alienation. Where the personal covenant to pay is outstanding in a mortgage document, I cannot see why that covenant cannot sustain a subsequent alienation as an antecedent debt, even though no decree has been passed to enforce it. It is unnecessary to pursue this inquiry further as any conclusion that can be arrived at might be considered *obiter* in the light of the finding on issue VI.

In the result, the appeal is dismissed with costs of the plaintiff. Time for redemption extended to six months from this date. Interest at contract rate to date of payment fixed, thereafter at six per cent.

Appeal dismissed.

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(19) (1917) 21 C. W. N. 957=(1917) M. W. N. 739=42 I. C. 791 (P. C.).

1923 Madras 270.

OLDFIELD, J.

Sudali Muthu Pillay ... Petitioner.

v.

V. Sudali Muthu Pillay and others ... Respondents.

Civ. Rev. No. 873 of 1921, dated 5th October 1922, against order of Sub-J. of Tuticorin in A. S. No. 46 of 1921, dated 23rd day of November 1921.

(*a*) *Civil P. C.* 115—*Order as to Court fee.*

The petitioner was directed to pay *ad valorem* fees on the amount at stake in his miscellaneous appeal, against an order in restitution proceedings under S. 144, instead of the fixed fee of eight annas, which he had actually paid. *Held* the order was revisable as it was a decision of a case.

[P. 271, Col. 1.]

(*b*) *Court Fees Act, S. II, Art.* 2,—*C.P.C., S.* 144.

Applications in restitution are to be regarded as applications in execution and on appeals from such orders Court fee is leviable under schedule 2, Art. 11.

[P. 271, Col. 2.]

K. Rajah Iyer and *P. V. Krishnaswamy Iyer*—for the Petitioner.

C. S. Venkatachariar—for the Respondents.

JUDGMENT :—In this petition I am asked here to revise the order of the Subordinate Judge of Tuticorin directing the petitioner, appellant before him, to pay *ad valorem* fees on the amount at stake in his miscellaneous appeal instead of the fixed fee of eight annas, which he had actually paid.

The first question raised before me is whether this is a case, in which this Court can interefere in revision with reference to the terms of S. 115 Civil Procedure Code. In order to bring the matter within the section I have first to find whether there is a case which has been decided by a Court. The respondent contends that there is no such case, because the lower Court's order does not decide anything at all, being merely a conditional order which declares that the petitioner's appeal will be dismissed, if payment is not made within a month. The petitioner, it is urged should have waited until a month had expired, allowed his appeal to be dismissed and then brought a second appeal against the dismissal in the ordinary course. Authority is against this contention. There are, firstly, cases resembling the present case generally, in which this Court has interfered in revision with merely conditional order, containing a declaration that some result will follow in case a specified condition is not complied with. In *Sitaramayya* v. *Ramappaya* (1), *Arunachallam Chettiar* v. *Arunachallam Chettiar* (2) and *Shanmuka Nadan* v. *Arunachallam Chetty* (3) this Court interfered by way of revision with orders directing the correcting of misjoinder of parties or cause of action, failure to comply with which would have been followed by the dismissal of the suit at some later date. And there is further a decision of this Court, in *Doddu Sannekappa* v. *Sankrayya* (4), which is directly in point. It is urged that the cases relating to misjoinder afford no guidance here, since in them if the proceedings had been allowed to go on on a mistaken basis substantial expense and trouble would have been wrongly imposed on the party, whereas, here the only result of a refusal to deal with the order before me in revision will be that the petitioner will have to submit to the dismissal of his suit in consequence of his refusal to pay and to file an appeal against that dismissal without being put to any expense in consequence of the continuation of the proceedings. But that distinction takes no account of a more important consideration common to these cases and to this : the possibility that in appeal this Court may confirm the lower Court's order and yet may not exercise its discretion to give the petitioner an opportunity to comply with it. The petitioner is entitled to avoid the risk of any such refusal, on the part of this Court to exercise its discretion in his favour convenience and authority justify a decision that there is before me a case which has been decided.

I turn next to another question, whether the requirement of S. 115 that the Subordinate Court has failed to exercise a jurisdiction vested in it or has acted in the exercise of its jurisdiction illegally is fulfilled. Something has been said of the wording of S. 12 of the Court Fees Act, under which the decision of the Court, in

1. (1917) 5 L. W. 207=39 I. C. 160.

2. 1922 Mad. 436=43 M. L. J. 218=16 M. L. W. 175=(1922) M. W. N. 453.

3. 1922 Mad. 332=45 Mad. 194=42 M. L. J. 97—30 M. L. T. 172.

4. (1911) 86 I. C. 831.

which the plaint is filed, is final as between the parties to the suit. But that has been explained in *Lakshmi Amma* v. *Janamajayan Nambiar* (5) as not debarring the appellate Court from dealing with the question as to the category, in which the suit is to be placed for the purpose of determining the Court-fee. Generally it is impossible to hold that the order directing the dismissal of an appeal in case the payment is not made is not a refusal to exercise jurisdiction in that appeal, and the fact that such refusal is conditional has already been dealt with in connection with the question whether there is a case which has been decided. Taking this view I hold that it is open to me to proceed with the present case under S. 115, Civil Procedure Code.

To turn to the merits, the question is whether this appeal, relating to a claim under S. 144, Civil Procedure Code, to restitution, should be valued *ad valorem* under Sch. (1) Art. (b) of the Court Fees Act or should be valued simply as an appeal. This appeal is not from a decree or order having the force of a decree under Sch. (2) Art. 11. The latter provision is applicable, if at all, in virtue of Notification 4344 S. R. dated 6th October 1893 published in the Gazette of the Government of India 1893, Part 1, page 575, directing that the fee chargeable on appeals from orders under S. 214 (c) of the Code of 1882 then in force shall be limited to the amounts chargeable under the Article last referred to. Difficulty arises from the reference in the notification to the previous Code and the difference between the wording in that Code and in the Code now in force, the provision relating to restitution, S. 144 of the present Code, differing in certain respects from the former S. 583. It is common ground that before this change in the law, applications for restitution were in every sense applications in execution covered by S. 244. But the respondents contend that applications for restitution are now made, not in execution, but in virtue of a substantive right, conferred by the section. If the respondents' contention is well founded, it will no doubt be impossible to apply the Government of India Notification or Sch. 2, Art. 11 of the Court Fees Act to such an appeal as that before me.

5. (1896) 4 M. L. J. 183.

As regards the wording of the present Code I have been referred first to the definition of the decree in S. 2 (2) in which section orders under S. 47 and orders under S. 144 are mentioned separately, the inference supported being that under the present Code they are regarded as differing in nature. There is then the difference between the wording of the former S. 583 and the present S. 144, especially the omission from the latter of any reference to the rules prescribed for regulating proceedings in execution and a very comprehensive description in it of the orders which can be made in restitution proceedings including those for payment of damages as compensation which (it is said) are essentially different from those which an executing Court can ordinarily pass. This argument is however supported by reference to only one decision *Jivaram* v. *Nand Ram* (6). On the other hand we have in favour of the view that proceedings in restitution under the present Code are to be regarded as proceedings in execution, *Somasundaram* v. *Chokalingam* (7), *Unnamali Ammal* v. *Muthan* (8), *Mullasari Gopala Menon* v. *Kristki Kovilanta Manikraman* (9) and *Kurgodi Gonda* v. *Nengan Gonda* (10). It is true that in four of those cases the question was raised with reference to limitation and in the remaining case with reference to the application of the doctrine of *res judicata*. But it has not been shown how that is material or why if applications of this kind are to be regarded as made in execution in these connections, they should not be so regarded as made in execution for the present purpose. There is also one case, in which the point now under consideration was raised directly, *Madan Mohan Dey* v. *Nogendra Nath Dey* (11). The conclusion there was that applications in restitution are to be regarded as applications in execution and that on appeals from such orders Court fee is leviable under schedule 2, Art. 11.

6. 1922 All. 223=44 All. 407=20 A. L. J. 226=66 I. C. 144.
7. (1917) 40 Mad. 780=5 L. W. 267=38 I. C. 806.
8. (1917) M. W. N. 643=6 L. W. 359=33 M. L. J. 413=22 M. L. T. 333=42 I. C. 530.
9. (1912) 10 M.L.T. 568=22 M. L. J. 146=13 I. C. 179.
10. (1917) 41 Bom. 625.
11. (1908) 12 C. W. N. 554.

Following the tenor of the decisions of this High Court and the explicit decision of the Calcutta High Court, I allow the Civil Revision Petition, set aside the lower Court's order and direct it to admit the appeal and proceed to dispose of it in accordance with law. The respondent will pay the petitioner's costs in this Court.

Petition allowed.

1923 Madras. 272.

SCHWABE, C. J. AND WALLACE, J.

Parameswara Pattar ... (Plaintiff) Appellant.

v.

Viyathan Mahedevi alias *the Valia Thamburatti* ... (Defendant) Respondent.

Appeal No. 78 of 1922, dated 30th October 1922, against the order, dated 30—1—1922, in the excercise of the Ordinary Original Civil Jurisdiction of the High Court.

(a) ***Civil P. C., S. 20—Fraud.***

Discovery of the fraud is no part of the cause of action. The cause of action is the fraud.

[P. 272 Col. 2.]

(b) *Decree—Setting aside—Fraud.*

Quaere.—**Whether 41 M. 743 applies to the case, namely, of two defendants in a suit by surety conspiring outside the Court but going into the Court and both giving false evidence there with the intention that the defendant party of those two should have a decree made against him which it was known he could not satisfy, with a view to make the surety pay an amount which was not really due by anybody.**

(c) ***Civil P. C., S. 20—Applicability to High Court.***

The application of S. 20 to High Court in the excercise of its original jurisdiction is expressly excluded by S. 20, C. P. C.

(d) ***Letters Patent—(Madras) Amended—Cl. 12 —Scope.***

The provisions of the amended Letters Patent cannot be read as conferring jurisdiction upon High Court in a case where one or more of the several defendants reside within its jurisdiction. The real question to be considered is the balance of convenience.

Krishna Ayer—for the Appellant.

Narasimha Ayengar and Ramakrishna Ayer—for the Respondent.

SCHWABE, C. J :—This case comes by way of interlocutory appeal from an order of Kumaraswami Sastri, J., in which he set aside leave to sue which had been granted in the suit.

The plaintiff in the suit is a surety for the due performance of his duties and due accounting by the agent of the Kizhakke Kovilagam. Some years ago proceedings were taken in Malabar against the agent by the then head of the Kovilagam, it being alleged that he had not properly accounted for monies that he had received, and the present plaintiff was brought into that suit as a surety. A decree having been obtained, and the then agent, who was the 1st defendant in those proceedings, having been found to be indebted to the Kovilagam and being a person of no means, the present plaintiff as surety had to pay. In this suit the surety wishes to set aside the decree of the earlier suit. He makes as parties the present representatives of the agent and the present Ranee who is the representative of the then principal and is now the head of the Kovilagam. The defendants other than the Ranee reside in Madras. They are not British subjects but are subjects of the State of Cochin. In order to bring this suit within the ordinary original jurisdiction of this Court an application was made and granted for leave to sue this lady who lives in Malabar. That application was necessary under S. 12 of the amended Letters Patent which provided that the Court should have jurisdiction "if the cause of action shall have arisen, either wholly, or, in case the leave of the Court shall have been first obtained, in part, within the local limits of the Ordinary Original Jurisdiction of the High Court." It was then alleged that the cause of action arose in part in Madras. In order to ascertain whether that is correct or not, the learned Judge having held that no part did arise within the jurisdiction, I must look at the plaint. There in paragraph 12 it is stated that the cause of action arose partly at Madras in September 1917 when the plaintiff came to know of the existence of the securities and of the fact of concealment of certain documents. If that paragraph stood alone, I should have no hesitation in saying that that does not show the arising of any part of the cause of action in Madras; for, in my judgment the discovery of the fraud is no part of the cause of action. The cause of action is the fraud. But we are referred also to paragraph 8. In paragraph 8 is stated that "neither the 5th defendant's prede-

cessor (the 5th defendant being the Ranee) or her agent the said Appu Pattar nor his legal representative brought to light in the previous litigation, though repeatedly called upon to produce by the Court and by the sureties, the collection papers including certain accounts and ledgers and thus effectively keeping it beyond the reach of the sureties and no one in being in a position then to expose the frauds committed by them, the Courts had to pass a decree." It is said that what happened was this. That decree having been obtained in Malabar by false evidence and concealment of these very documents, he appealed to this Court. The guardian of certain minor respondents and the 5th defendant's predecessor conspired together to prevent the Court from ascertaining, as was a fact, that these documents said to be material were in the possession of one or another of those parties. The guardian put in an application to this Court supported by an affidavit alleging that he was unable to advise his minors whether they should go on with the case or not as those documents had been concealed and without those documents he could not judge their position properly. The 5th defendant's predecessor answered that by affidavit saying: "Those documents might be of considerable use to me; possibly to you. I have not got them You, as the representative of the then 1st defendant the agent, have got them." It is alleged that that was all done by both parties in conspiracy and that really the agent and his representatives after his death and his then principal had said to each other in effect, "we will confuse everybody about those documents you say I have got them, I say you have got them; nobody knows where they are: Then judgment will go against you the agent and you the agent have no money: I the principal would get it unjustly from your surety" I must confess that, if it had been the intention of the pleader to have made out that case, it could and should have been done in very much clearer language than is employed in paragraph 8. But I think the words of paragraph 8 referring to the previous litigation and frauds committed by them on the Courts are wide enough to cover such a charge and I think, therefore that it is right to say that there is in this suit an allegation that fraud was committed before the High Court here and, in my judgment, such fraud does form part of that cause of action. I am not surprised that the learned Judge did not appreciate that, because I am fairly sure that he was not told of that view and no one would read it out of paragraph 8 without the clear explanation of the true inward meaning of paragraph 8 which has been made to us in this Court. That being so, in my judgment this Court has jurisdiction to grant the leave.

It is then said that it really does not give a cause of action at all and, if the fact alleged to have taken place in Madras does not give a cause of action it follows that no part of the cause of action arose in Madras, because it must be an admissible cause of action. That contention is put on the ground that it has been decided by the Full Bench of this Court in *Kadirvelu Nainar* v. *Kuppusamy Naicker* (1) that no action lies to set aside a decree obtained by a fraud committed before the Court in the sense of production of false perjured evidence or the suppression before the Court of the truth. Whether that applies to the case now suggested, namely, two defendants conspiring outside the Court but going into the Court and both giving false evidence there with the intention that the defendant party of those two, should have a decree made against him which it was known he could not satisfy with a view to make the surety pay an amount which was not really due by anybody, is a very difficult question and is one which I do not desire to express an opinion about *obiter*.

Turning to the question of whether this Court, assuming it has power, ought to grant the leave under s. 12 of the Amended Letters Patent, I have come to the conclusion that there is no real ground for interfering with the discretion exercised by the learned Judge. I agree that he was really not exercising the discretion, because he held that no part of the cause of action arose within jurisdiction; so I do not think it right to say we should be interfering with his discretion because I think it is more correct to say that this discretion has not been exercised. We

1. (1918) 41 Mad. 743=34 M. L. J. 590=8 L. W. 103=(1918) M. W. N. 514=45 I. C. 774 (F. B.).

have to exercise ours. On the whole I think we shall refuse.

The real question to be considered is the balance of convenience. Nearly the whole of this alleged cause of action arose in Malabar. There would be no ground at all in my judgment for bringing it here if it did not happen that two of the defendants reside here who, it is alleged, had in their power here a very material document. I do not think that some difficulty which is anticipated in getting this document produced in Malabar is a sufficient ground for saying that this suit, should be brought in Madras and not in Malabar. That being our view, it is unnecessary to express an opinion as to whether *Kadirvelu Nainar* v. *Kuppusamy Naicker* (1) applies or not.

A second point is taken and it is this. It is urged that, as some of the defendants are within jurisdiction, this Court has a right to bring before it in this suit defendants not within jurisdiction. That is a right which, under s. 20 of the Civil Procedure Code, is possessed by Courts in the mofussil. The application of s. 20 to this Court in the exercise of its original jurisdiction is expressly excluded by s. 120, C. P. C. and, if we have the power, it must be found within the four corners of s. 12 of the Amended Letters Patent. The words are, " or if the defendant at the time of the commencement of the suit shall dwell or carry on business within such limits." The principal defendant does not dwell here. The section does not say, " if the defendant, or if there are more than one defendant any of them, shall dwell or carry on business within such limits " and, in my view, I cannot read the provisions of the Amended Letters Patent as conferring jurisdiction upon this Court in a case where one or more of the several defendants reside within jurisdiction. The point is free from authority except the case in *Hadjee Ismail* v. *Hadjee Mahomed*, *Hadjee Joosub* v. *Hadjee Mahomed* (2) which I read as affirming the view I am now expressing, although it has been read by a learned author Mr. Broughton as giving the High Courts power to grant leave to sue in such cases. However in the view I have expressed in this case, namely, that on the balance of convenience this case should be brought in Malabar and not here, that point too does not directly arise for decision.

On these grounds this appeal must be dismissed with costs, and we must order the plaintiff to pay the Court fee which he should have paid if he had not been permitted to sue as a pauper.

Wallace, J.—The plaint on a perusal of which we are expected to express our minds in this case is culpably vague, not clearly setting out the cause of action in Madras, *i.e.*, the specific fraud alleged to have taken place in Madras nor the date when it arose. But as the plaintiff's real case has been put before us it resolves itself into three main points. First, fraud by way of collusion between the predecessor of defendants 1 to 4 and the predecessor of the 5th defendant in that they colluded to defraud and so got a decree against the plaintiff 2nd damages for conspiracy between the abovementioned persons who are all now dead, and these damages are now sought to be recovered from the Kovilagam which the 5th defendant now represents and third, for the accounting of and recovery from the 5th defendant of certain securities or concealed properties. The whole of the reliefs Nos. 2 and 3 is, therefore, sought against the 5th defendant or her estate; and, as regards relief No. 1 most of the collusion alleged was prior to the suit in the original Court and in connection with the proceedings in that Court. Whether the plaintiff has any cause of action at all on the ground of fraud in the High Court is open to grave doubt under the ruling in *Kadirvelu Naickar* v. *Kuppusami Naicker* (1). But it is a matter which in the view I take, may be left for the trying Court to decide and I would not say, anything which would hamper it in trying that point. But assuming that a small portion of the relief which plaintiff seeks is based on any cause of action arising in this Court, I do not think we should exercise our discretion under clause 12 of the Letters Patent considering that that portion of the plaintiff's relief which arises in this Court was not clearly set out by plaintiff until it was put forward in argument in this Court and that by far the major portion of the relief which he wishes has to be recovered from the 5th defendant who resides in Malabar or from her estate which is situated in Malabar.

2. 13 B. L. R. 91=21 W. R. 203.

As to the question whether we should give leave to bring the whole action in this Court merely because most of the defendants reside here while the 5th defendant does not, the bearing and interpretation of clause 12 of the Letters Patent on this point is a matter of some difficulty and I consider that it would be better not to say more on a point which is not necessary for the decision of the case, since I hold that, even if the Court has the power, we should not in this case exercise it or give leave to the plaintiff to sue. On the merits I agree that our discretion should not be used in the plaintiff's favour.

Appeal dismissed.

1923 Madras. 275.

WALLACE, J.

Puniya Syamalo ... Accused.

v.

Emperor ... Respondents.

Cr. Revn. Nos. 427 & 40 of 1922, dated 1st November 1922, referred for the orders of the High Court, under S. 438 of the Code of Criminal Procedure, by the Sess. J. of Ganjam at Berhampore in his letter, dated 24th April 1922.

Madras Local Boards Act, S. 221—Revision.

A Magistrate, in acting under S. 221 of the Local Boards Act, is acting as a Criminal Court, and his orders thereunder are therefore subject to the revisional jurisdiction of the High Court.

In imposing a fine in addition to the recovery of the fees due, the Magistrate clearly acts beyond the jurisdiction conferred on him by S. 221, Local Boards Act.

Vaz (for Public Prosecutor)—for the Crown.

ORDER :—This is a case referred by the Sessions Judge of Ganjam. The Town Sub-Magistrate of Berhampore, purporting to act under section 221 of Act XIV of 1920 (Madras Local Boards Act) not only directed a toll gate lessee to pay up fees due from him to the Ganjam District Board, but fined him Rs. 25 as well. The Sessions Judge is of opinion that the levy of fine is illegal and I quite agree with him.

The point of some difficulty raised is whether this Court, sitting in the exercise of its powers of criminal revision, has authority to deal with such a case, in other words, whether, the Magistrate is, when he takes action under S. 221 of Act XIV of 1920, an inferior Criminal Court within the meaning of S. 435 of the Code of Criminal Procedure.

The word "Magistrate" is not defined in Act XIV of 1920, consequently I must fall back on the definition in the Madras General Clauses Act, *viz.*, "any person exercising all or any of the powers of a Magistrate under the Code of Criminal Procedure." The word "warrant" is also not defined in Act XIV of 1920, but I think it can have no other meaning than a warrant for the collection of a fine as if in a criminal case, such as the Magistrate would ordinarily issue under section 386 of the Code of Criminal Procedure for the collection of a fine in a Criminal case. Otherwise the Local Boards Act provides no machinery by which the "warrant" issued under s. 221 is to be carried out.

S. 221 therefore has to be read as if the Magistrate had fined the defaulter for the amount due to the Local Board, and issued a warrant under s. 386 of the Code of Criminal Procedure for its collection, and the collection of the fine is not by any method of execution of a civil order or decree, but by the method for the collection of a fine in a criminal case.

In this view, I think it must be inferred that the Magistrate, in acting under S. 221 of the Local Boards Act, is acting as a criminal Court, and that his orders thereunder are therefore subject to the revisional jurisdiction of this Court.

In imposing a fine in addition to the recovery of the fees due, the Magistrate was clearly beyond the jurisdiction conferred on him by S. 221, Local Boards Act. If the power in this Court to set aside such an order made without jurisdiction is not conferred by S. 435 of the Code of Criminal Procedure, this Court can interfere under S. 107 of the Government of India Act.

I therefore set aside the order of the Magistrate, so far as it relates to the imposition of the fine and the sentence of imprisonment in default of payment, and direct that the fine, if paid, be refunded.

Order set aside.

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* **1923 Madras. 276 (1)**

WALLACE, J.

Narra Appayya ... Petitioner.

v.

Darsi Venkatappayya ... Respondent.

Cr. Revn. Case No. 325 of 1922 and Cr. Revn. Petn. No. 282 of 1922, dated 31st October 1922, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Dy. Magt. of Guntur, dated 29—6—21.

Criminal P. C. Ss. 439 and 485—Dismissal for default—Restoration.

The High Court cannot and will not entertain a petition on a matter already disposed of, when the order disposing of it, is still in force and has not been set aside. A revision petition dismissed for default cannot be restored.

T. Ramachandra Rao—for the Petitioner.

C. Sambasiva Rao—for the Respondent.

ORDER :—It is admitted that Criminal Revision Case No. 787 of 1921 presented by the same parties and for the same relief, was dismissed by this Court for default of payment of printing charges. The preliminary point for decision therefore in this case is whether the High Court cannot or will entertain a petition on a matter already disposed of, when the order disposing of it is still in force and has not been set aside. Petitioner relies only on the general powers of superintendence given to this Court over subordinate Courts under section 107 of the Government of India Act.

2. The ruling of a Bench of this Court in *Ranga Rao, In re* (1) is in point, that being a case in which it was sought to restore to file a revision petition dismissed for default. The Bench held that it had no such power. This ruling is also clear authority for the proposition that in a criminal revision case "no distinction can be made between an order passed without hearing the petitioner and one in which he is heard." Hence the order of dismissal of Criminal Revision Case No. 787 of 1921 is a final disposal. A Bench of this Court has recently in its judgment in Criminal Appeal No. 695 of 1922 laid down that when a criminal appeal has once been disposed of finally, the Court has no power to entertain fresh appeal on the same matter while the original disposal stands. It is true that one of the learned Judges in that case Devadoss, J. doubts the correctness of the ruling in 23 M. L. J. 371, on the ground that the High Court is not entitled to dismiss a Criminal Revision Petition for "default of appearance." But that does not cover the present case, or affect the finality on this date of the order dismissing Criminal Revision Case No. 787 of 1921.

3. It is a universal principle of law in the absence of direct statutory provision, that when a matter has been finally disposed of by a Court, the Court is *functus officio* and cannot entertain a fresh prayer for the same relief, unless and until the previous order of final disposal has been set aside. Thus the present petition cannot lie as a petition to rehear the matter finally disposed of in Criminal Revision Case No. 787 of 1921, while the ruling in 23 M. L. J. 371 precludes me from treating it as a petition to set aside or review the order of dismissal of that Criminal Revision Case for default ; nor is the petition framed for that relief.

4. I must therefore refuse to entertain this petition and dismiss it.

Petition Dismissed.

** **1923 Madras. 276 (2)**

SCHWABE, C. J. AND WALLACE, J.

Rengasami Nayudu and another. ... Appellants (Defendants.)

v.

V. Krishnasami Iyer (dead) and others. ... Respondents.

S. A. No. 1425 of 1920, dated 16th November 1922, against the decree of the District Court of South Arcot in A. S. No. 52 of 1919.

Community—Right to sue.

Although notionally held by the deity and although it has been said that the deity represented by the idol can own the property, in fact the right to possess the property must be in some human being or beings. If there is a trustee or a manager, that trustee or manager is the human being who can sue for possession. But if there is none the answer must depend on

1. (1912) 23 M. L. J. 571=12 M. L. T. 350=(1912) M.W.N. 982=13 Cr.L.J. 710=16 I.C. 518.

the circumstances of each bequest or trust. Such a body as inhabitants of a village or worshippers at a particular shrine is ordinarily represented by a manager, or a trustee or a committee or some elected or nominated representatives of that kind. But, if no such representative has been nominated, the right of possession would vest in the general body, and the general body can sue. If there is a trustee or other properly constituted representative, then individual worshippers cannot sue for possession.

K. Bashyam Aiyangar and *P. J. Kuppanna Rao*—for the Appellants.

B. Sitarama Rao and *N. S. Srinivasa Iyer*—for the Respondents.

SCHWABE, C. J.—This is an appeal from a decision of the Acting District Judge, South Arcot by certain persons entitled in reversion to the property of the husband of one Tailammal. That lady left some property to a religious charity. It has been found as a fact and is not now disputed that this lady owned that property herself and was entitled to leave it by will. The defendants therefore admittedly have no right to the possession of the property at all. They are sued by the plaintiffs in alternative capacities, either on behalf of themselves and all other worshippers or frequenters of the charitable institution in question or as managers of the charity. The learned District Judge has found as a fact that they are managers of the charity. There was ample evidence which entitled him to come to that conclusion as they had in fact been acting since the death of the brother of one and father of the other plaintiff, who admittedly was a properly constituted trustee or manager of this property and the learned Judge was quite entitled to infer from the fact of their having acted undisputedly for some years that they had been properly appointed or that their self-appointment as managers or trustees had been ratified and adopted by those persons, namely, the frequenters of the charity.

This being a question of fact, it is not open for this Court on Second Appeal to interfere with the finding even if it does not, as we do in this case, agree with that finding. That is sufficient to dispose of this case, because it is not disputed that managers of charity are the persons who are entitled to sue for possession of the charity properties from anybody in possession. But, as the point has been argued, it is perhaps desirable to say something about the plaintiffs in the other capacity, namely, that as representing themselves and all other worshippers.

As I understand the law of property bequeathed to idols or temples, although notionally held by the deity and although it has been said that the deity represented by the idol can own the property, in fact the right to possess the property must be in some human being or beings. If there is a trustee or a manager, that trustee or manager is the human being who can sue for possession. But if there is none, then the question is, in whom the right is vested? I think the answer must depend on the circumstances of each bequest or trust. In this one I should say it was vested in the worshippers, meaning thereby not casual worshippers but the regular worshippers at this particular shrine; and so it was held in *Venkatasubban Patter* v. *Ayyathurai* (1), that in the case of a village temple owned in common by the villagers management of the temple and its properties vests in the inhabitants of the village as a corporation. Now, such a body as inhabitants of a village or worshippers at a particular shrine is ordinarily represented by a manager, or a trustee or a committee or some elected or nominated representative of that kind. But, if no such representative has been nominated, the right of possession would, in my judgment, vest in the general body, and the general body can sue; but as a matter of convenience, rules have been provided that general bodies can be represented in Court, for, without such rules, the number of plaintiffs or defendants would make the suit impossible to handle. So one finds in O. 1, R. 8, a provision that, with the permission of the Court, when there are numerous persons having the same interest in one suit, one or more of such persons may sue on behalf of or for the benefit of all persons so interested. Ordinarily the application for such permission would be made at an earlier stage of the suit, but in this case, the plaintiffs without objection received from the Court at the hearing, its sanction to represent the numerous persons, namely, the general body of worshippers. In my judgment

1. (1919) 37 M. L. J. 554=26 M L. T. 364=54 I. C. 202.

that is in order and, if the general body are entitled to possession, these are proper representatives admitted by the Court under O. 1, R. 8 and are entitled to an order of possession.

A case was quoted as being to the contrary. In *Muhammad Sahib* v. *Karim Bibi Ammal* (2) the headnote was to the effect that the worshippers of a mosque cannot, whether in their individual or collective capacity maintain a suit for the possession of the properties belonging to the mosque. That headnote, is, in my judgment, much too wide. If the case means that where there is a representative such as a trustee, then individual members of the mosque or the charity cannot sue, I agree with it ; but, if it means that persons in representative capacity cannot get an order of possession when the persons they represent are entitled to possession, I do not agree with it. The authorities quoted in the judgment in that case are not authorities in support of any such proposition ; but they are authorities for the proposition that if there is a trustee or other properly constituted representative, then individual worshippers cannot sue for possession.

The appeal fails and must be dismissed with costs.

Wallace, J.—I agree and have nothing to add.

Appeal dismissed.

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* **1923 Madras. 278.**

SCHWABE, C. J., AND WALLACE, J.

Thurutheelakath Thottinakkara Puthuiapurayil Kunhi Kuttiali Karnavan and Manager of the Tavazhi Tarwad and Main Tarwad and others. — Appellants (Defendants 1, 6 and L. Rs. of 3rd and 8th Defendants).

v.

Tharayil Peetikayil Kunhammad and another. — Respondents (Plaintiff and L. Rs. of 2nd Defendant).

S. A. No. 1631 of 1920, dated 14th November 1922 against the decree of the Court of the Temporary Sub-Judge of Tellicherry in A. S. No. 728 of 1914.

Limitation Act Arts. 85, 61—*Mutual account' meaning of*—

In order that accounts might be mutual, there must be transactions on each side, creating independent obligations on the other, and not merely transactions which create obligations on the one side, those on the other being merely complete or partial discharges of such obligations. Where there is a case of shifting balance, sometimes in favour of one side, sometimes in favour of the other, it is a test of mutuality, but its absence is not conclusive proof against mutuality. If there is a balance in favour of either party, it follows that there must be mutual liabilities of both parties to each other ; if the balance is always in favour of one party in the very nature of the transactions, then the case is one where there are not separate mutual dealings. In order to prove a mutual and open account current, it is sufficient to prove mutual dealings between the parties consisting of sales made, or services performed, by each party, to or, for the other, creating mutual. duties or reciprocal demands. Where there was an obligation, on the one hand, to pay salary and an obligation on the other hand, to account for and pay over to the principal the amounts that may yearly be found due on balance to the principal. *Held* this is mutual account.

C. Madhavan Nair—for the Appellants.

S. Saminathan, K. P. M. Menon, K. P. Abdulla Kutti and B. Pocker—for Respondents.

SCHWABE, C. J.—In this case the plaintiff was the manager of a mosque. He held his position under a karar, dated the 21st October 1910 which was a yearly appointment authorising him to collect the various dues due to the mosque, to pay the outgoings of the mosque and to take his remuneration according to stipulations in a previous karar which stipulations were also incorporated in this document. Turning to the previous karar, Ex. 32 in the case, dated the 9th of November, 1903, one finds there a more detailed account of the payments to be made by the manager, of his duties and liabilities and a detailed account of what is to be given as remuneration for the work he did which included a right to take 720 seers of paddy and Rs. 12 per annum. One of the terms was that accounts were to be rendered and the balance struck on a certain date each year after the end of the year's management. It was arranged between the parties that when the mosque was short of funds the manager advanced monies of

2. (1914) 27 M. L. J. 270=16 M. L. T. 165=25 I. C. 559.

his own, and that yearly a balance was taken on one side which showed the expenditure by him, the advances by him and the salary due to him, and on the other side all that he had received on account of the mosqe. His employment came to an end in February, 1912 and before the expiration of three years, he brought a suit for an account and payment to him of the amounts he claimed as due, mainly made up of advances made by him to or for the benefit of the mosque. It has been found that the balance due to him was Rs. 923. He is met with the defence that this amount is not recoverable, because it is barred under the Limitation Act, 1908, Art. 61. That article applies to money paid for and on account of another which becomes barred after three years from the date when the money is paid. The plaintiff replies to that that Art. 61 has no application but Art. 85, which is "for the balance due on a mutual, open and current account, where there have been reciprocal demands between the parties," the period for bringing a suit in respect of which is three years from the close of the year in which the last item admitted or proved is entered in the account. It is argued for the trustees that this article has no application, because there is not in this case a mutual, open and current account, and we are referred to English cases and particularly to *Padwick* v. *Hurst* (1), in which it was held that for an account properly to be called a mutual account, there must be mutual dealings in the sense that both parties come under liability to each other. That principle has been applied in many cases in India in reference to the interpretation to be put upon Art. 85. But in applying the principle one has to look at it rather carefully and it was most carefully examined by Mookerjee, J. in his judgment in *Rampershad* v. *Harbans Singh* (2). In that case dealing with the earlier leading authority of *Hirada Basappa* v. *Gadigi Muddappa* (3) a judgment of Holloway, J. he points out and approves of the statement by that learned Judge that "in order that accounts might be mutual there must be transactions on each side, creating independent obligations on the other, and not merely transactions which create obligations on the one side, those on the other being merely complete or partial discharges of such obligations." He then enters on a discussion of the various cases on those lines and points out that "where you have a case of shifting balance, sometimes in favour of one side, sometimes in favour of the other, it is a test of mutuality, but its absence is not conclusive proof against mutuality." The meaning of that, as I understand it, is that, if you may get a balance in favour of either party, it follows that there, must be mutual liabilities of both parties to each other; if the balance is always in favour of one party in the very nature of the transactions, there you have got a case where you have not separate mutual dealings. Later in his judgment, having quoted that and applied the English case referred to above, he says this: "In order to prove a mutual and open account current, it is sufficient to prove mutual dealings between the parties consisting of sales made, or services performed, by each party, to or, for the other, creating mutual duties or reciprocal demands." I think that is a fair statement of the principle to be applied and one has to look at each particular case and see if it is really a case of a debtor and creditor only or a case of mutual obligations which will in the ordinary way result in enforceable liabilities on either side. Looking at the facts of this case, it seems to me that it is clearly a case where you have a mutual open and current account with reciprocal demands. That the account was open and current, there can be no doubt, whether it is mutual or not, and whether the demands were reciprocal or not. In this case it is enough to say that there is an obligation, on the one hand, to pay salary and an obligation on the other hand, to account for and pay over to the principal the amounts that may yearly be found due on balance to the principal. I think also it would be enough if the course of dealing is, as in this case, the lending of money by the agent to the principal, which is not an ordinary part of an agent's duty, such loans by the agent to the principal being brought into account, and you would have, apart from the question of salary, reciprocal dealings between the

1. 18 Beav. 575.
2. (1906) 6 C. L. J. 158.
3. (1891) 6 M. H. C. R. 142.

parties in the sense required to fulfil the conditions stated by Mookerjee, J. A clear instance of the application of an article of the Limitation Act of 1877 similar in terms to Art. 85 of this Act, is to be found in *Lakshmayya* v. *Jagannatham* (4).

It follows that, in my judgment, the judgment of the Subordinate Judge is right. I should think it right to add that I consider it a great pity that such a point should have been taken by the trustees of a mosque, assuming the facts to be as they have been stated to us, namely, that this agent assisted the mosque from his own pocket and to a great extent without being under any obligation to do so. This appeal must be dismissed with costs of the plaintiff, 1st respondent.

WALLACE, J.—I agree and have nothing to add.

Appeal dismissed.

1923 Madras. 280.

SCHWABE, C. J. AND WALLACE, J.

Kottal Kanhalikutty Haji Karnavan and others. ... Appellant.

v.

Malikkaravida Lottal Kunhamayan. ... Respondents.

S. A. No. 1653 of 1920, dated 15th November 1922, against the decree of the Court of the Sub. J. of Tellicherry in A. S. No. 19 of 1919.

Malabar Law—Maintenance—Decree for—

A decree for arrears of maintenance personally against the Karnavan in the following terms: "that the 1st defendant personally and as Karnavan of his tarward do pay....." does not seem to be right in ordinary cases.

Malabar Law—Tarwad—Maintenance.

The members of the tarwad are entitled to receive maintenance out of the tarwad house, when there is no room for them in that house, and, if the karnavan makes an insufficient allowance, the anandravans are entitled to apply to the Court to determine what allowance is sufficient, having regard to the circumstances of the family. The general principle is this: *Prima facie* the junior members living out of the tarwad house should be treated equally but the circumstances of each particular one can be taken into consideration and it is for the karnavan to judge how much each particular one should get. He may take into consideration things like the health of a particular child or the education of a particularly intelligent child or a child with small intelligence; he can take into account the earning capacity of a junior member; apparently it has been laid down that he can also take into account the fact that a particular person has himself made a rich marriage; and there are many other things which the karnavan in exercising his discretion as, so to speak, the father of this family, can take into consideration. It is enough to say that, on any such application to the Court, very great weight indeed should be given to the decision of the karnavan, and his decision in such a matter would not be lightly interfered with.

C. Madhavan Nair—for Appellant.

K. P. M. Menon, C. V. Ananthakrishna Iyer, T. S. Visvanatha Iyer, P. R. Narayana Iyer and V. P. Karunakara Nambiar for Respondents.

SCHWABE, C. J. In this case the District Munsif and the lower appellate Court have awarded to the plaintiffs maintenance, the lower appellate Court at rather a higher rate than the District Munsif. The plaintiffs are the junior members of a tarwad. The 1st is the Karnavan of the tarwad: The 2nd defendant is the next to him for that position. The decree has been made for arrears of maintenance, at the rate which has been found by the Subordinate Judge to be the proper rate, personally against the Karnavan in the following terms: "that the 1st defendant personally and as Karnavan of his tarwad do pay....." This form of decree does not seem to me to be right. I see no reason for a personal decree against the Karnavan which would involve the right of the junior members of this tarwad to arrest him if he did not pay forthwith, although it may be, he may have none of the property in his hands available for immediate payment. We have had several decrees, which have come before this Court, looked up and I have found none in which that form of decree has been used. In No. 1036 of 1918 on Second Appeal from the South Malabar District, the form of decree approved by this Court was "that this Court doth order and decree that the 1st defendant, as karnavan and manager of his tarwad and from the income of the tarwad properties and also from the properties of the tarwad, do pay the plaintiff Rs. 216 for his maintenance due for the past three years." In No. 48 of 1916 on appeal from

4. (1887) 10 M. 199.

the same district, the decree approved by this Court was "that the plaintiffs do recover from their and the defendants' tarwad Rs. 1,136 being the amount of maintenance due for the plaint period, that is 6 years." On the whole, I think the former of those two forms, namely, that approved in Second Appeal No. 1036 of 1918 is the better form, and the decree of the lower Appellate Court in this case must be amended by being made to conform with that form.

It is then argued that the amount of maintenance allowed in this case is wrong, because the lower Appellate Court has not applied the right principle in arriving at the proper figure and has allowed too much, and it is argued on the other side that too little has been allowed. Now, the law seems to be this as stated by Turner, C. J. and Kindersley, J. in an apparently unreported case of the Madras High Court, the judgment in which is set out clearly, in Moore's Malabar Law and Custom, at page 132. "The members of the tarwad are entitled to receive maintenance out of the tarwad house, when there is no room for them in that house, and, if the karnavan makes an insufficient allowance, the anandravans are entitled to apply to the Court to determine what allowance is sufficient, having regard to the circumstances of the family." The circumstances which may be taken into consideration on such discussion before the Court are dealt with in the case of *Thayan Kunji Ama* v. *Shangunni Valia Kymal* (1). The general principle is this: *prima facie* the junior members living out of the tarwad house should be treated equally but the circumstances of each particular one can be taken into consideration and it is for the karnavan to judge how much each particular one should get. He may take into consideration no doubt things like the health of a particular child or the education of a particularly intelligent child or a child with small intelligence; he can take into account the earning capacity of a junior member; apparently it has been laid down that he can also take into account the fact that a particular person has himself made a rich marriage; and there are many other things which the karnavan in exercising his discretion as, so to speak, the father of this family, can take into consideration. To some extent all these are things which can be controlled by the Court; if a junior member is aggrieved, he can come to the Court and apply for maintenance and ask the Court to say what allowance is sufficient. I think it is enough to say that, on any such application to the Court, very great weight indeed should be given to the decision of the karnavan, and his decision in such a matter would not be lightly interfered with. In this case it is proved that certain members of the tarwad and, in particular the 2nd defendant, have had provisions made for them by way of maintenance not by the present karnavan, but by his predecessors, he having been karnavan only for a short period; and both the District Munsif and the Subordinate Judge have, to a great extent, in arriving at what they considered to be a proper maintenance for these plaintiffs, eliminated the individual arrangements which had been made by those previous karnavans in regard to the 2nd defendant and other members of the tarwad. But they have both, in arriving at what they think the right amount, taken the generality of those members so provided for and said that that on an average works out at so much; and I think, quite properly the Subordinate Judge took that into consideration as a guide provided by past karnavans as to what was the sort of maintenance this tarwad was capable of paying to its minor members. I do not find that he did anything more than look at it as a guide. It is also true that, in making that calculation for that purpose, he eliminated from consideration the amount which was going to the 2nd defendant. He does not seem to have had before him anything about the 2nd defendant to show why he got a considerably larger amount than other members. I do not see any reason for saying that the figure arrived at is wrong, and certainly I find no reason for saying that it is wrong in law. What was the reasonable maintenance is a question of fact and on the facts before the Courts, the figure was arrived at. I cannot find any reason to say that there was any error in law in arriving at that figure. I think it right to say something further. In this case a discussion took place in both the Courts below as to whether some property which

1. (1881) 5 Mad. 71.

the karnavan had got for his own maintenance before he became karnavan was to be taken into consideration, or whether the amount that he was getting and wanted as karnavan should be taken into consideration. In my judgment, he is, in respect of property which he is using for his own maintenance, in the same position as other members of this tarwad who have got similar property made available for their maintenance. In arriving at the amount of maintenance that should be paid, the income is, of course, to be considered and as against the income the proper expenditure to be met by the karnavan for managing this tarwad is to be taken into consideration. But the property that the karnavan is in enjoyment of himself under some arrangement by a previous karnavan is merely useful as a guide in the same way as the properties in the possession of other members of the tarwad are useful as a guide in arriving at a reasonable amount. But all those grants, the grant to the present karnavan, the grant to the 2nd defendant and the grant to the other members of property for their maintenance are subject to revision by the karnavan in a proper case. It has been laid down, and I think rightly laid down, that that revision can only take place if he proposes to substitute for the maintenance provided in this way, some other proper maintenance. How this decree is to be made, how the maintenance of those minor members for the future is to be paid is a matter for the karnavan to decide, and he can, if he thinks right, look into the position of every member of the tarwad; and he would be perfectly justified in saying that one member was getting too much and another member was getting too little and he could alter and re-adjust the incidence of the burden of the expenditure of his tarwad. I need hardly add that he must, in exercising any such powers, act honestly and in the general interest of the tarwad and not of course in his own personal interest as opposed to the general interest.

I think that disposes of everything in this case and this appeal must be allowed to the extent of varying the order in the way suggested by me.

My brother points out to me that it may be too general a statement to say that a personal decree against the karnavan can never be given. I can conceive cases where it would be right that there should be a personal decree. All I meant to convey is that the ordinary decree in the first instance in the absence of special circumstances, should be a decree in the form suggested by me.

As regards costs, on the whole, I think that respondents 1 to 9 must have their costs against the tarwad. The memorandum of objections of respondents 1 to 8 is dismissed with costs of the appellant and the memorandum of objections of the 10th respondent is dismissed with costs.

WALLACE, J :—I agree and have nothing to add.

Decree modified.

** **1923 Madras. 282.**

(Full Bench)

SCHWABE, C. J., COUTTS-TROTTER AND KUMARASWAMI SASTRI, JJ.

Kalianasundaram Pillai ... Appellant.

v.

Karuppa Muppanar and others ... Respondents.

Appeal Nos. 1 and 2 of 1921, dated 13th November 1922, under Cl. 15 of the Letters Patent against judgment in S. A. Nos. 112 and 113 of 1919, preferred to the High Court against the decrees of the Dt. Court of Tanjore in A. S. Nos. 50 and 51 of 1918 respectively.

Registration Act, Ss. 47 and 17—Effect of registration.

The effect of the sections, is that, if a title is complete except for registration, no subsequent alienation or dealing with the property by the vendor or donor, as the case may be, can defeat the title which, on registration, becomes an absolute title dating from the date of the execution of the document. The subsequent birth of a child, or the adoption of a child, or the death of the vendor or donor has no effect in defeating a title obtained under an instrument executed before the happening of these events but registered thereafter.

T. M. Krishnaswami Iyer and S. Rangachari—for the Appellant.

T. Rangachariar and S. Muthiah Muddaliar—for the Respondents.

SCHWABE, C. J. :—The facts of this case are that one Vythilingam Pillai made a deed of gift of certain property on the 9th of September 1891, and it has been found as a fact—and that finding is accepted by the appellant—that that deed of gift was

handed over to the donees on the day of execution. Next day the donor adopted a son, the present appellant. After the adoption, the deed of gift was registered on the 15th of September 1891.

It is now contended that, as the adoption took place before the registration and on adoption the adoptee, according to Hindu Law, is in the same position as a child born to the adopter, his rights to this property had intervened and the gift is, therefore, void. Under the Indian Registration Act, 1908, (corresponding to Act III of 1877) S. 47:

"A registered document operates from the time from which it would have commenced to operate if no registration thereof had been required or made, and not from the time of its registration."

Under Sect. 49:

"No document required by Sect. 17 to be registered shall affect any immoveable property unless it has been registered."

The effect of those sections, in my judgment, is that, if a title is complete except for registration, no subsequent alienation or dealing with the property by the vendor or donor, as the case may be, can defeat the title which, on registration, becomes an absolute title dating from the date of the execution of the document. In this case, upon handing over the deed of gift to the donees, on the authorities, this deed became irrevocable, and upon the subsequent registration, the title dated back to the date of its execution. It is enough to say that there is a long line of authorities not altogether uniform but ending with *Venkati Rama Reddi* v. *Pillati Rama Reddi* (1), a decision of the Full Bench of this Court which has now established that the subsequent birth of a child, the adoption of a child, or the death of the vendor or donor has no effect in defeating a title obtained under an instrument executed before the happening of these events but registered thereafter. By that decision we are bound, and I think it is right to add that I entirely agree with it and, in my judgment, these appeals must be dismissed with costs.

COUTTS-TROTTER, J.—I am of the same opinion and only desire to add a word, because I had occasion in *Venkati Rama Reddi* v. *Pillati Rama Reddi* (1) to consider the present state of the case-law on this subject. My brother Seshagiri Aiyar and myself came to the conclusion that certain of the cases reported in the Madras series were contrary to the general trend of authority and incorrectly decided, and I pointed out in the reference that two well-known writers of text-books had expressed the opinion that some Madras cases—I may take *Ramamirtha Ayyan* v. *Gopala Ayyan* (2), as a type—were wrongly decided. Accordingly in order to set doubts at rest, we sent the case up to a Full Bench asking this question:

"Whether a deed of gift registered by the donee after the death of the donor without the consent of the legal representative of the donor is valid?"

The Full Bench in that case took the same view as the one which myself and my brother Seshagiri Aiyar had indicated, and decided that the registration was perfectly valid, even although the donor or his representatives did not consent to its registration; that the donee could effect registration, and that when that was done the title would date back to the date of the execution of the document. That seems to me to follow the plain words of the statute, and I do not think that, after an authoritative ruling given by this Court so lately as 1917, we should depart from it. If the appellant wishes to show that that decision is wrong, I think he must seek to do so in the Privy Council.

KUMARASWAMI SASTRI, J.—I agree with the Chief Justice and have little to add. I think we are bound by the finding that the document was handed over to the trustees and by the decision of the Full Bench in *Venkati Rama Reddi* v. *Pillati Rama Reddi* (1) with which I agree.

Appeals dismissed.

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1. (1917) 40 Mad. 204=31 M. L. J. 690=20 M. L. T. 450=(1917) M. W. N. 112=4 L. W. 465 =38 I. C. 707 (F. B.).

2. (1896) 19 Mad. 433=6 M. L. J. 207.

** **1923 Madras. 284.**

SCHWABE, C. J. AND WALLACE, J.

Abdul Shaker Sahib ... Appellant—(Defendant).

v.

Abdul Rahiman Sahib and another ... Respondents—(Plaintiffs).

O. S. A. No. 126 of 1921, dated 1st November 1922, from the decree of Justice Coutts-Trotter passed in the exercise of the Ordinary Original Civil Jurisdiction of this Court in C. S. No. 80 of 1920.

(a) *Specific performance—Parties—Refusing parties being defendants.*

Where it was intended by the decree that the payment of the Rs. 4,000 by the date named should be a conditon, failing to comply with which, would deprive the successful plaintiff of all his rights under the decree. *Held*, this decree is in the nature of a preliminary decree, the original Court keeping control over the action and having full power to make any just and necessary orders therein, including in appropriate cases the extension of the time. Otherwise this decree is wrong and should, if necessary, be set right by eliminating the condition which ought not not to have been imposed upon the successful plaintiff except at a much later date and upon definite refusal by him to complete. Even in that case such condition could only be imposed at the request of the defendant. Though certain persons entitled to the benefit of the contract refused to join the plaintiffs in the suit and have been joined by them as defendants, the decree for specific performance can be granted [P. 285, Col. 2.]

(b) *Limitation—Equitable relief.*

It is a well established principle that persons who desire the assistance of the Court in obtaining equitable relief must come quickly. In each case it is a question to be decided on the facts whether the delay on the part of the plaintiff is such that the Court ought not to exercise its powers. [P. 287, Col. 1.]

K. Rajah Iyer—for the Appellant.

V. Visvanatha Sastri and T. L. Venkatarama Iyer—for the Respondents.

SCHWABE, C. J.—The respondents, plaintiffs, obtained a decree for specific performance of a contract for the sale of certain lands and superstructures thereon to them by the first defendant. Coutts-Trotter, J., gave judgment in the following words:—" I must therefore find for the plaintiffs and give them decree for specific performance on payment of Rs. 4,000. Time for payment—two months. " In pursuance of this judgment a decree was passed providing (1) that, upon payment by the plaintiffs on or before the 19th day of December 1921 of a sum of Rupees Four Thousand only, the first defendant do execute and register a proper deed of conveyance of the properties in the schedule, (2) that upon payment the first defendant do put the plaintiffs in possession of the properties together with all documents and title-deeds. Before the expiry of the two months that is before December 19th, the first defendant had given notice of appeal. Before the expiry of the two months but after the notice of appeal, the plaintiffs had issued an application before the Judge in charge of the Original side for extension of the time for paying the money and this application was heard in January 1922, that is, after the expiration of the two months and was ordered to stand over until the hearing of this appeal. The appeal coming on, a preliminary point is taken, namely, that the two months having now elapsed neither the Original Court nor this Court has any power to extend the time and that therefore the plaintiffs have lost irrevocably all their rights under the decree except the costs, and that it is therefore useless to occupy the time of this Court in considering the merits of the case. I do not think that this is strictly a preliminary point, because the question of the costs of the suit would still remain. If the decree was right, the plaintiffs would be entitled to costs from the first defendant and if wrong the plaintiff would be liable for costs. But the point has been fully argued on both sides and raises important points on which we shall express our opinion.

The decree as drawn up, I am told, is the ordinary form of decree in use here in cases of specific performance. It may be that it is a convenient form in certaincases, though I have been unable to discover its history and how it came to be adopted. No form for a decree for specific performance is provided by statute or rule here, and it has been left to the Courts to devise a suitable and appropriate form. Specific performance is an equitable remedy which has been known and used by the Courts of Chancery in England for centuries and appropriate forms of judgment have been approved by learned Equity Judges in England and have now become almost stereo-typed : and those at present in use will be found set out in Seton on Judgments underthe title Specific Performance.

On a persual of them the first thing to be observed is that not one of those forms contained in the first instance a limit of time for payment of the purchase-money and not one attempts to make payment of the purchase-money by a certain date a condition of the continuance of the rights under the judgment. After the original judgment for specific performance it is the definite practice in England that all consequential relief by reason of any party failing to comply with the terms of the judgment must be sought by application to the Court by which the judgment was passed. Such applications are made by motion in the action showing that in England, after the original judgment the action is by no means ended but remains under the control of the same Court. If the default is made by the purchaser in paying the purchase-money there are several remedies open to the vendor. (1) He may on motion in the action obtain an order fixing a definite time and place for payment and delivery over of the conveyance and title-deed and can, after the expiration of that time, levy execution for the amount, if not paid. (2) He may apply by motion in the action for an order rescinding, not the judgment but the contract, and in order to succeed in such a motion he has to satisfy the Court that there has been a positive refusal to complete, which it may be observed in the present case, the respondent has certainly not proved. A similar right is given by S. 35 of the Specific Relief Act of 1877. (3). He can enforce his unpaid vendor's lien for the purchase-money and costs. (4) He can by motion in the action obtain an order for sale by the Court of the property when he will be at liberty to bid. The proceeds of the sale are paid into Court and the vendor gets his contract price, interest and costs and the purchaser the balance if any. Where the vendor is in default, the remedies are even more varied.

It would seem to be absurd to hold that the mere fact that a date of completion is fixed in the original decree put an end to the action and that the control of the original court expires on the expiration of that date—and thus substitute in effect for all the known remedies stated above the simple expedient of treating the action and the decree as dead for all purposes and leaving the vendor in undisturbed possession of property which is not his and may as in the present case, be of a greater value than the contract purchase-money, which, perhaps by some accident, purchaser has failed to produce on the date fixed. In this particular case it is worth observing that there is no evidence that the first defendant was ready to execute a conveyance or hand over the title-deeds in exchange for the money and in fact so far from intending to complete, he was appealing on the ground that the decree was wrong.

In my judgment it was intended by this decree that the payment of the Rs. 4,000 by the date named should be a condition, failing to comply with which, would deprive the successful plaintiff of all his rights under the decree. In my judgment this decree is in the nature of a preliminary decree, the original Court keeping control over the action and having full power to make any just and necessary orders therein, including in appropriate cases the extension of the time. If I am wrong in this and the proper interpretation of this decree is as contended for by the appellant, then, in my judgment, this decree is wrong, and I should, if necessary, order that it be set right by eliminating the condition which ought not to have been imposed upon the successful plaintiff except at a much later date and upon definite refusal by him to complete. Even in that case such condition could only be imposed at the request of the defendant who as I have pointed out has other various remedies. As long as this form of decree is understood to be of a preliminary nature and the Court still retains full power over the action, I do not see any particular harm in the continuance of its use. Some words such as "further consideration reserved" shall be added. But, personally, I should be prepared to say that the appropriate forms are those set out in Seton.

It is however contended that this form having been used, we are precluded by authority from holding that the time fixed is not a condition and, as I understand also from holding that either the original Court or this Court has power to extend the time. I do not so interpret this decree but as I have said, if that is the correct interpretation of it, in my judgment, it

must be varied. Therefore, the question whether we are bound by authorities which so interpret it, is not of great importance. The cases relied on are *Ramaswami Kone* v. *Sundara Kone* (1), *Moideen Kuppai* v. *Ponnuswami Pillai* (2), and *Gopala Ayyar* v. *Sannasi* (3). In *Ramaswami Kone* v. *Sundara Kone* (1) the decision of the District Munsif was that on plaintiffs paying into Court the balance of consideration within a month the defendant should execute a sale-deed. The money was not paid into Court within the month, and after the expiration of the month, the defendant appealed. On appeal the Subordinate Judge confirmed the District Munsiff's order. The plaintiff then applied to execute this decree and the District Munsiff held that the original one month granted by his decree having expired and the plaintiff not having complied with its terms, the plaintiff could not have execution. The plaintiff then applied to the Subordinate Judge to modify the appellate decree by introducing into it a fresh time limit. This having been refused, the plaintiff appealed against the District Munsiff's order dismissing his application for execution. That appeal was dismissed by the Subordinate Judge. The case came on appeal before a Bench of this Court which held that on the proper construction of the first appellate decree of the Subordinate Judge, the time was not extended and that therefore execution could not be granted. The Court, however, did lay down that the Subordinate Judge could extend the time for performing conditions precedent granted by the original decree on appeal from that decree. It is however to be observed that no application was at any time made to the District Munsiff to extend the time allowed by the decree, and this case does not therefore touch the point in question here.

In *Moideen Kuppai* v. *Ponnuswami Pillai* (2) this Court on Second Appeal, directed that on payment of Rs. 50 within three months by the plaintiff to the defendant a moiety of the suit property should be delivered to the plaintiffs. Subsequently, the plaintiffs applied to the lower Court to extend the time. That was refused by the lower Court, and on appeal, by this Court on the ground that the lower Court had no power to extend the time fixed by the Appellate Court. The plaintiffs then petitioned this Court to extend the time and this Court held that it had no power to modify its own order except on a proper application for review which that application was not. The Court held that the time fixed by its order in that case was an essential term and that the non-compliance with it could result in plaintiff's losing their rights unless they could put the matter right by review. But, in that case, the question was not under consideration whether the original court, if it directed that specific performance should be performed within a certain time, could extend that time.

In *Gopala Ayyar* v. *Sannasi* (3), the Court of first instance gave a decree for specific performance giving the plaintiff one month's time to pay the price, which decree was, on appeal to the Subordinate Judge, confirmed by him. More than one month after the date of the appellate decree the plaintiff applied to the Subordinate Judge to extend the time fixed by the original decree. The application was granted but on a revision petition it was held by Srinivasa Aiyangar, J., that the Appellate Court had no jurisdiction to extend the time fixed by the Original Court. This may be right; but the learned Judge said that it had been decided by this Court in *Ramaswami Kone* v. *Sundara Kone* (1) that the Court which passed the decree had no power to extend the time, much less any appellate Court. As I have pointed out *Ramaswami Kone* v. *Sundara Kone*, (1) did not say so, and with that part of the judgment of *Srinivasa Aiyangar*, J., I do not agree.

I therefore do not feel in this matter in any way hampered by authority and this preliminary point fails.

Turning to the merits, the main question is a pure question of fact. The learned trial Judge has, I think, correctly stated, that different judges or different juries might take different views of the facts. But there was ample evidence to support his finding that the contention alleged was made and I see no reason for differing from it.

1. (1907) 31 Mad. 28=17 M. L. J. 495=3 M. L. T. 26.
2. (1914) 1 L. W. 882=16 M. L. T. 430=26 I. C. 63.
3. (1915) 3 L. W. 29=19 M. L. T. 137=32 I. C. 401.

Further the contract alleged is to reconvey the property when the Rs. 4,000 is tendered within one year. There is no evidence of an actual tender but there is evidence that the first plaintiff attended upon the first defendant with P. W. 6 who had the money with him and on the first plaintiff asking the first defendant to take it, the first defendant said he would not. This, in my judgment, was a waiver of and dispensed with any actual tender, see *Polglass* v. *Oliver*, (4) and many subsequent cases.

A further point was taken that, as certain persons entitled to the benefit of the contract refused to join the plaintiffs in the suit and have been joined by them as defendants, the decree for specific performance could not be granted. I do not agree with this contention and I have nothing to add to the judgment of Coutts-Trotter, J. on the point.

Lastly it was contended and this is a more difficult point that as two years had elapsed from the date of the original offer of the money, the plaintiffs were too late in bringing this suit. It is a well established principle that persons who desire the assistance of the Court in obtaining equitable relief must come quickly. In each case it is a question to be decided on the facts whether the delay on the part of the plaintiff is such that the Court ought not to exercise its powers. In this case on the facts I think that the delay should be excused, for on the evidence, the plaintiffs were put off for some time by the first defendant himself. The case has however been brought very late but in my judgment not late enough to compel us to refuse relief at not being shown that the defendant has been prejudiced.

The appeal will therefore be dismissed with costs. The time for the completion will be extended by this decree for a period of two months. It must be understood that the original Court still has jurisdiction in this matter and has full powers to deal with any point that may arise including, if necessary, an application for further time.

WALLACE, J.:—I agree. On the first point of law taken, I wish to say this: No special form for drafting a decree for specific performance is supplied by the Civil Procedure Code, as is supplied by it in the case of a decree in a pre-emption suit by Order 20, Rule 14, which directs that, if the purchase money is not paid as stipulated in the decree, the suit shall be dismissed with costs. Hence the analogy of decree, etc., in pre-emption suits and reported rulings thereon is not of assistance in this case. The form of decree drawn up in the trying Court is the general form adopted in this Presidency for such decrees. But that it is in the nature of a preliminary and not a final decree is, I think placed beyond doubt by S. 35 of the Specific Relief Act. As I read that section, it lays down that when a decree for specific performance of a contract of sale has been passed and the purchaser makes default in payment of the sum which the Court has ordered him to pay, the vendor may either file a fresh suit for rescission of the contract or may, in the specific performance suit itself, apply to the Court to rescind the contract. It is perfectly clear that the contract is not determinable or determined by the mere failure to comply with the terms of the decree. It is not determined until the Court orders that it is determined. By the decree for specific performance the Court sets out what it finds the real contract between the parties was, and declares that such a contract exists and gives what it considers a reasonable time within which the contract shall be carried out. Regarding the decree from this point of view, as a contract, it is clear in this case, as in most others of the same kind, that time is not of the essence of the contract, and that, until the contract is rescinded by formal order or decree, such time for performance, not being an essential part of the contract, may be varied by the Court which has declared what the essential terms of the contract are. It is clear as the learned Chief Justice has shown, that it must be within the power of the Court to vary the time within which the contract shall be performed, as difficulties might arise through no fault whatever of the parties preventing performance within the time specified in the decree; *e.g.*, when a third party has within that period set up a *bona fide* claim of title to the property, it may even be necessary to direct specific performance to stand over for a reasonable but indefinite period, until that claim has been adjudicated.

4. 149 E. R. 7.

I take it then that where specific performance of sale has not been effected within the period laid down by the decree, it is open (*a*) to the purchaser to apply to the Court for an extension of time for payment of the purchase money, and (*b*) to the vendor to apply either for a final and peremptory order for specific performance or for an order rescinding the contract either immediately or to follow automatically on the expiry of the period peremptorily granted. The original action is thus open until a final decree or order of such a nature and scope is passed, and the original Court has until then ample power to extend the time for specific performance. The case reported in *Moideen Kuppai* v. *Ponnuswami Pillai* (2) is not a case in point. It was apparently not a case of a decree for specific performance since no reference was made to S. 35 of the Specific Relief Act. In the 3 L. W. case also no reference is made to that section, and in any case the application to extend the time was made after the time granted by the decree had expired. In *Ramaswami Kone* v. *Sundara Kone* (1) case there was no application for extension of time at all, and the decision turned on the propriety of interpreting the appellate decree in terms of the original decree. In the present case an application to extend the time was put in by plaintiffs to the Court which passed the decree and no final order has yet been passed on that. I am therefore quite clear that the original Court has in this case full power to extend on proper application made to it, the time fixed by its decree for specific performance, and equally so has the Appellate Court in an appeal which is of the nature of an appeal from a preliminary decree. The argument that plaintiffs should not be allowed to get a fresh extension of time because defendant has appealed against the decree does not impress me. His appeal was tantamount to declaration that he would not receive the money and carry out his part of the contract, and thus made it useless for plaintiffs to attempt to carry out their part of it. On the other points of the case I have nothing to add to the judgment of the learned Chief Justice.

Appeal dismissed.

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* **1923 Madras. 288.**

KRISHNAN AND RAMESAM, JJ.

Lakshmindra Thirtha Swamiar of Sirur Mutt minor by guardian P. Rajagopala Charya ... Appellant—(Defendant).

v.

Vibhudapriya Thirthaswamiar of Admar Mutt ... Respondent—(Plaintiff).

Appeal No. 306 of 1921, dated 8th November 1922, against the decree of the Court of the Sub. J. of South Kanara in O. S. No. 44 of 1919.

Hindu Law —Religious endowment — Mutt—Power of—Mattathipathi.

A Shebait or Matathipathi cannot alienate mutt properties unless constrained to do so by unavoidable necessity and the same rule must apply to the creation of debts binding on mutt properties, for the enforcement of such debts may result in the alienation of such properties through Court sale. The borrowing may be for a purpose which is not in itself justifiable at all; again the purpose may be a legitimate one but nevertheless the Matathipathi having enough funds of the mutt in his hands at the time, there might be no necessity to borrow at all to meet the expenses; in other words the question may be one of the legitimacy of the purpose for the debt or of the financial necessity to borrow. The Matathipathi has a large dominion over his surplus income and he is not bound to account for it and his discretion to use it as he likes is unfettered. Where there was no established or local custom to feed every Brahmin, the debt incurred for finding every Brahmin is not a debt binding on the successor.

A. Krishnaswami Iyer, K. Sundra Rao and K. Balasubramanya Mudaliar—for Appellant.

T. Rangachariar, B. Sitarama Rao and K. Y. Adiga—for Respondant.

KRISHNAN, J.—This is an appeal by the defendant against the decree of the Subordinate Judge of South Kanara in O. S. No. 44 of 1919 on his file. The suit was brought by the Swami of Admar Mutt in Udipi against the present Swami of the Sirur Mutt to recover from the assets of that Mutt the amount claimed to be due under a "Sampratipatti" or settlement of accounts signed by the late Swami and marked as Ex. A. The defendant denied the genuineness of Ex. A and the existence of the debt and the admissibility of the

document in evidence and he further pleaded that even if the debt was true it was not binding on the Mutt or its properties as it was not contracted for any necessity or benefit of the Mutt, the Mutt having ample income to meet all its legitimate expenses.

On these pleadings two issues were framed, namely, whether the patti sued on was true and valid and receivable in evidence and whether the debt was binding on the defendant's Mutt. The Subordinate Judge found both these issues in plaintiff's favour and gave him a decree as sued for. The appellant before us has not attacked the finding on the 1st issue; his learned vakil however contended that the finding on the 2nd issue should have been in the negative and in his client's favour and the suit should have been dismissed.

We have thus to consider in this appeal whether the debt sued on was borrowed by the late Swami of the Sirur Mutt for a purpose binding on the Mutt properties in his successor's hands. Now it is clear law that a Shebait or Matathipathi cannot alienate Mutt properties unless constrained to do so by unavoidable necessity and the same rule must apply to the creation of debts binding on Mutt properties, for the enforcement of such debts may result in the alienation of such properties through Court sale. The rule regarding alienation is laid down very clearly by the Privy Council in the recent case of *Palaniappa Chetty* v. *Sreemath Devasikhamani Pandara Sannathi* (1). Their Lordships refer to their previous decisions in *Prosunno Kumari Debya* v. *Golabchand Baboo* (2); *Koonwar Doorganath Roy* v. *Ram Chandersen* (3); and *Hanooman Persaud Pandy* v. *Mussamutt Babooee Munraj Koonwaree* (4); and explain that the expression "benefit to the estate" as used in them though not capable of a precise definition meant "the preservation of the estate from extinction, the defence against hostile litigation affecting it, the protection of it or portions from injury or deterioration by inundation, and such like things" see page 718—Here we have no question of benefit to the estate but only whether there was necessity to incur the debt.

The position of the head of a Mutt and his powers were again considered by the Privy Council in deciding whether he could be described as a trustee within the meaning of Art. 134 of the Limitation Act in *Vidya Varuthi* v. *Balusami Ayyar* (5) and in that judgment their Lordships again affirm the proposition that except for unavoidable necessity the head of a Mutt cannot create any interest in the Mutt property to enure beyond his lifetime.

There is no doubt an observation in *Saminatha Pandara* v. *Sellappa Chetti* (6) that "acting for the whole institution, he (the Matathipathi) may contract debts for purposes connected with his Matam and debts so contracted might be recovered from the Matam property, and would devolve as a liability on his successor to the extent of the assets received by him" and this passage has been quoted by their Lordships of the Privy Council in *Vidya Varuthi* v. *Balusami Ayayr* (5). Reliance has been placed on it by the learned vakil for the respondent for his argument that it is sufficient that the debt is shown to be incurred for Matam purposes and not for the Matathipathi's private purposes to make it binding on Matam properties and that it was not necessary to prove any necessity for the borrowing. In my opinion this is a clear misreading of the observation. I understand it to refer to necessary purposes connected with the Matam as that is the proposition established by the authorities.

I do not think it necessary to discuss all the authorities cited to us as these recent Privy Council rulings are clear on the point. It follows that we cannot uphold the plaintiff's claim to have the plaint debt paid out of the Mutt properties in the defendant's hands unless there is clear proof of necessity for the borrowing. There are two things to be considered in this connection. The borrowing may be

1. (1917) 40 Mad. 709=44 I. A. 147=33 M. L. J. 1=21 C. W. N. 729=15 A. L. J. 485=1 Pat. L. W. 697=19 Bom. L. R. 567=22 M. L. T. 1=(1917) M. W. N. 507=26 C.L.J. 153=6 L. W. 222=39 I. C. 722. (P. C.)
2. (1875) 2 I. A. 145=14 B. L. R. 450=23 W. R. 253.
3. (1876) 2 Cal. 341=4 I. A. 452=3 Sar. 681.
4. (1856) 6 M. I. A. 393=18 W. R. (P. C.) 81.
5. 1922 P. C. 123=48 I. A. 302=44 Mad. 831; 41 M. L. J. 346; (1921) M. W. N. 449=15 L. W. 78=30 M. L. T. (P. C.) 66=26 C. W. N. 537=20 A. L. J. 497=24 Bom. L. R. 629=65 I. C. 161 (P. C.)
6. (1879) 2 Mad. 175.

for a purpose which is not in itself justifiable at all ; again the purpose may be a legitimate one but nevertheless the Matathipathi having enough funds of the Mutt in his hands at the time, there might be no necessity to borrow at all to meet the expenses ; in other words the question may be one of the legitimacy of the purpose for the debt or of the financial necessity to borrow. Now it was argued for the respondent that it was only the question of financial necessity, which would depend upon the amount of money available to the late Swami to meet the expenses, that was put in issue in the lower Court and not the legitimacy of the expenses themselves. I am unable to accept this argument. The defendant's written statement, paragraph 3 says after pleading that the Mutt had ample income to meet all necessary expenses that " the debts are not valid and binding against the defendant's Mutt or its properties as they were not and could not have been contracted for the benefit of the Mutt " ; and the wording of issue 2 is quite wide enough to include both objections.

I shall turn to consider whether debts in question are proved to have been incurred for necessary purposes. Ex. A is a settlement of account of the borrowings less repayments from July 1902 to August 1916. The total amount of debt with interest came to Rs. 27,435-0-11. The repayments with counter interest came to Rs. 11,463-6-3 leaving a balance of Rs. 15,871-10-8 for which Ex. A was executed. A perusal of the accounts and receipts in Ex. B. shows that the most part of this balance was borrowed during what is known as the " pariyaya " period of the Sirur Swami and in connection with the pariyaya expenses and for building a bhojanasala or dining hall during that period, the previous borrowings having been mostly repaid. To understand the case it is necessary to explain what is meant by the term " pariyaya." There are in the town of Udipi in South Canara eight Mutts presided over by eight Matathipathies. Plaintiff and defendant are two of those Matathipathies. Affairs of each Mutt are looked after by its own Matathipathi. They are all endowed with separate properties of considerable value. Besides these Mutts there is a Krishna Temple in the same place in which there is an idol of Sri Krishna which is worshipped. This temple is also richly endowed but there is no Swami or Dharmakartha to manage its affairs. Its affairs are managed by the eight Matathipathies in rotation each taking the management for two years at a time, beginning from January 15th of one year and ending in the January 15th of the 3rd year. The turn of each Swami is fixed according to custom. This method of management is called the pariyaya system and the Swami who is for the time being the manager is called the Pariyaya Swami for those years and the period of two years during which he is the manager is called his pariyaya period. The tradition about the way in which these eight Mutts and the temple came to be founded and the way in which their affairs are carried on is given in the South Canara District Manual. It is obligatory on each Swami when his turn comes to perform the pariyaya for the two years of his period. During that time he is entitled to get all the income of the Krishna temple which besides the income from its lands includes certain payments from the British and Mysore Governments and also Kanikais or offerings from the devotees and pilgrims who come to the temple to worship. It is also in evidence that the Swamis are able to save every year substantial sums of money from the income of their own Mutt properties after meeting their current expenditure. It would seem that the Swamis were in the habit of adding these moneys also to their income from the Krishna temple during the pariyaya period to meet the pariyaya expenses. It is the plaintiff's case that all these moneys are insufficient to meet the pariyaya expenses and it is necessary and usual for each Swami to borrow Rs. 30,000 to Rs. 40,000 to make up the deficiency for the two years. Plaintiff says that the plaint debt was mainly incurred in this manner to meet the pariyaya expenses of the Sirur Swami.

It is in evidence that the income of Krishna temple from all sources would amount to about Rs. 25,000 to Rs. 30,000 a year or Rs. 50,000 to Rs. 60,000 for the two years. The income of the Sirur Mutt is said to be about Rs. 10 to Rs. 15,000 a year from which Rs. 5,000 to Rs. 6,000 could be saved in ordinary years. During the pariyaya period the Swami brings away his own idol from his Mutt to the

Krishna temple and the expenses of his own Mutt are thus reduced. The Swami was thus in a position to utilise Rs. 12,000 or Rs. 15,000 of the income of his own Mutt during the two years for the pariyaya expenses. All these figures are of course only approximate. It is also in evidence that the Sirur Swami had about Rs. 30,000 in hand saved from his Mutt income for the previous years which he added to the other moneys. As explained by this Court in I. L. R. 2 Mad. 175 and other cases and accepted by the Privy Council in 44 Mad. 831 the 'Matathipathi has a large dominion over his surplus income and he is not bound to account for it and his discretion to use it as he likes is unfettered. It was thus open to the Sirur Swami to use that accumulated amount for the pariyaya expenses. Thus it would seem that the Sirur Swami had about a lakh of rupees at least to meet the pariyaya expenses for his term of two years. Plaintiff however contended that this amount was insufficient for the purpose as the expenses came to about Rs. 1,30,000 at least and borrowing was necessary. It may be conceded that all the moneys the late Sirur Swami got from his income and his earnings and his borrowings he spent for his pariyaya expenses, and for building the dining hall. But before we can justify his borrowing it must be shown that he was under a legal obligation to incur expenditure in the manner and to the extent that he did. The Subordinate Judge has not considered the case from this point of view at all.

There are no doubt certain poojas and ceremonies which have necessarily to be performed and any reasonable expenditure incurred for carrying them out will be binding on the Mutt. But there is no obligation to have the ceremonies performed on the scale that the Sirur Swami did. It was argued for the respondent that the scale on which the ceremonies should be conducted must be taken to be fixed by the long continued practice of the institution. Even so, there is no evidence on which we can find that any definite and clear practice existed with regard to that. It is more likely as one of the plaintiff's own witnesses P. W. 4 says that there is " no rule to the effect that any particular amount should be spent for the pariyaya but all the ceremonies should be performed according to mamool (or usage). The different Mutts are not equally wealthy ; the poorer ones must necessarily perform the ceremonies on a smaller scale so long as no ceremony is omitted. One main item of expense incurred is the feeding of the Brahmins in large numbers every day throughout the year. That evidently is a very elastic item over which much money could be spent or considerable economy exercised. There is really no evidence in the case on which we can rely to show that it was necessary to borrow to meet the legitimate expenses of the pariyaya. All that is attempted to be shown is that the money has been spent and that other Swamis have also been in the habit of borrowing during their time. Such evidence is quite inadequate in my view to show that there was necessity for borrowing the plaint debts.

As regards the *Bhojanasala*, the Sirur Swami not only seems to have re-built it but put up an upstairs to it. Surely it is not shown that there was any necessity to do all these. A sum of Rs. 1,000 of the plaint debt was borrowed for the construction of this dining hall but it is not shown whether it was borrowed for the construction of the hall downstairs or for the room upstairs. There was clearly no necessity to build the upstairs as it never existed before. It follows therefore that for this debt also necessity is not proved.

The failure to produce the accounts of the Sirur Mutt was commented upon by the learned Vakil for the respondent and we were asked to draw from that fact an inference that the borrowings were for necessity. It is not very clear on the evidence that the defendant is in possession of those accounts and is wilfully keeping them back. Secondly it is difficult to see how these accounts will help to show that the monies borrowed for the pariyaya expenses were borrowed for necessity. In the view I am taking that for all legitimate expenses the funds in hand were sufficient.

As regards the debts borrowed just prior to the pariyaya period there is no evidence why they were wanted. It follows that there was no necessity proved to borrow the plaint amount and the plaintiff is not therefore entitled to recover it from the Mutt lands.

The learned Vakil for the appellant also contended that in any event plaintiff is not entitled to have direct recourse to the Mutt properties for his debt as there was no express charge of mortgage for it on them and he relied on *Swaminatha Aiyar* v. *Srinivasa Aiyar* (7) and also on certain English cases of executors and trustees such as *Strickland* v. *Symons* (8), *In re Evans*: *Evans* v. *Evans* (9), *Forhall* v. *Forhall* (10), *In re Robinson's Settlement*: *Gant* v. *Hobbs* (11) and *In re Johnson*: *Shearman* v. *Robinson* (12). But it has been held in India that this rule does not apply to the case of Matathipathies. See *Shanker Bharathiswami* v. *Venkata Naick* (13); *Srimath Deivasikamani Pandarasannadhi* v. *Noor Mahomed Rowthen* (14), *Lakshmindra Thirthaswamiar* v. *Raghavendra Rao* (15) and *Sundaresan Chettiar* v. *Viswanatha Pandara Sannadhi* (16). In the view I am taking, it is not however necessary to decide this question.

It was finally contended that as the debt was found to be true and subsisting it is binding on the debtor, the late Swami personally and a decree should therefore be given against his personal assets if any. There is no express prayer to this effect in the plaint, but the defendant's Vakil does not object to such a decree being passed and I think therefore such a relief may be given.

In the result the decree of the lower Court is modified by confining it to a decree only against the personal assets, if any, of the late Sirur Swami in the defendant's hands. The plaintiff will pay the defendant's costs in both Courts as he has failed in his claim against the Mutt but he will get his costs from the personal assets of the late Swami.

7. (1917) 5 L. W. 323=32 M. L. T. 259=21 M. L. T. 91=(1917) M. W. N. 278=38 I. C. 172.
8. 26 Ch. D. 245.
9. 34 Ch. D. 597.
10. 7. Ch. D. 123.
11. (1912) 1 Ch. 717.
12. 15 Ch. D. 548.
13. (1885) 9 Bom. 422.
14. (1907) 31 Mad. 47; 17 M. L. J. 553=3 M. L. T. 95.
15. (1920) 43 Mad. 795=(1920) M. W. N. 568 =28 M. L. T. 269=39 M. L. J. 174=12 L. W. 139=59 I. C. 287.
16. (1922) Mad. 402=45 Mad. 703=43 M.L.J. 147=16 L. W. 83=31 M. L. T. (H.C.) 66=(1922) M. W. N. 444.

Ramesam, J.—The plaintiff is the Swami of the Admar Mutt in Udipi (South Canara District). The defendant is the Swami of the Sirur Mutt in the same place. He is now a minor represented by a guardian *ad litem*. These two and six other Mutts were founded, according to tradition, by Madhwacharya, the founder of the dual or dwaita philosophy. Each Mutt is presided over by a Sanyasi or Swami and has its own separate endowments. Besides the eight Mutts, there is, at Udipi, a temple of Krishna with income of its own. Each Swami takes charge of the temple for a period of two years so that the turn (technically called Pariyaya) of a particular Swami recurs once in sixteen years. The evidence in the case shows that the Swamis have taken for the celebration of the respective Pariyayas in recent times on a grand scale. It is said that the defendant's predecessor had borrowed from the plaintiff among others for the expenses of the last Pariyaya of the Sirur Mutt (January, 1914-1916) and on accounts being taken, it was found that the Sirur Swami was indebted to the plaintiff to the extent of Rs. 15,971-10-8 on the 14th August, 1916 (Ex. A). The present suit is brought to recover the said amount with interest. The Subordinate Judge gave a decree to the plaintiff and the defendant appeals.

The appellant has not pressed before us the grounds relating to the genuineness of Ex. A. He confined himself to two points (1) that the debt has not been shown to be for justifiable necessity and is therefore not binding on the defendant's Mutt and (2) in any event the Mutt is not liable as the debt was not charged on the properties of the Mutt.

The first point was the subject of the 2nd issue. The evidence of the plaintiff's 3rd, 4th and 7th witnesses shows that the Krishna temple gets a Tasdick (or allowance) of thirteen thousand rupees from the British and Mysore Governments, Rs. 500 cash and 500 Muras of rice (after paying Government Revenue) from its immoveable property and Rs. 10,000 or more by way of offerings from pilgrims. (A mura of rice is said to be worth Rs. 6). The item of offerings from pilgrims is a variable figure. The income of the Krishna temple may be taken to be about Rs. 26,500 per annum in the years in question.

The income of the Sirur Mutt according to P. W. 4 is 2,200 Muras of rice (out of which 1,200 Muras are spent for the ordinary expenses of the Mutt) and a cash rent of Rs. 7,000. There remains a net income of Rupees thirteen thousand. Accepting these estimates, the combined income of the temple and the Mutt amounted to Rs. 39,500 per annum. It is said that this income was not adequate for the expenses of the Pariyaya and the Sirur Swami had to borrow for defraying them. A list of his debts amounting to Rs. 25,000 is given by P. W. 4. As the Sirur Swami had, in his hands, savings to the extent of Rs. 30,000 he must have spent more than a lakh and thirty thousand rupees towards his Pariyaya expenses. The question is whether this expenditure can be regarded as justified so as to make the Mutt in the hands of his successor liable for the amounts borrowed. It is conceded for the plaintiff (P. W. 4) that there is no rule to the effect that a particular amount should be spent for the Pariyaya. But all the Viniyogas should be performed without omission according to mamool.

P. W. 3 says that two laks of rupees are required for the expenses. P. W. 4 similarly says that 15,000 Muras of rice and one or one and quarter lakhs of rupees are required. P. W. 8 the Swamiar of another Mutt gives details. About 15,000 Muras of rice, firewood costing Rs. 6,000, plantain tree garden costing 500 Muras and provisions costing Rs. 62,000 are required. Of these about 12 Muras of rice are required for the Naivedya (see P. W. 4) the ceremony of dedicating food to the deity. After the formal dedication the food is distributed to Brahmins. Now, it is well-known that the religious ceremony of the Naivedya can be performed at an expense of an anna or Rs. 10,000 according to the capacity of the worshipper. This is conceded by the learned Vakil for the plaintiff. No Hindu text has been cited to show that a particular quantity of food must be offered for the Naivedya. It depends on the capacity and the charitable disposition of the worshipper for the offering ultimately feeds the poor. Beyond the evidence that P. W. 8 spent a similar amount for his Pariyaya and that the deceased Sirur Swami contracted a debt of thirty thousand rupees for an earlier pariyaya there is nothing to prove a mamool or usage. The eighth witness says that, at the Pariyaya festival (first fifteen days of the period) about 10,000 persons were fed every day. During the other festivals about 2,000 persons are fed per day and 1,000 persons are fed daily at other times (see P. W. 4). It is obvious that the feeding charges have been responsible for the enormous increase in recent times of the pariyaya expenses. It is idle to pretend that the feeding could have gone on anything like this scale in all the six centuries during which these Mutts existed or even in the earlier years of the last century. When the witnesses say that so many muras are required for the expenses, all that they mean and could mean is that the quantities stated are required, if the festival is to be carried on in the manner the Swamis are now doing it.

In my opinion no usage or custom is proved. As their Lordships of the Privy Council point out in *Palaniappa Chetti* v. *Sreemath Deivasikamani Pandara Sannadhi* (1), it would be an instance of the misapplication of the word 'custom' and forgetfulness of essentials of a custom which modifies the ordinary law to say that the Mutts are bound by custom to feed every Brahmin that comes to the Pariyaya (as is stated in the South Canara Manual). The numbers may increase as the years roll on and the result of carrying out the ideal of feeding every one that comes, may be the destruction of the institutions themselves. The Swamis have a wide power over their income and Courts do not ordinarily scrutinise their manner of exercising it so long as they do not seek to bind their successors. If a successor is sought to be bound the borrowing must be for justifiable neccessity.

In *Abhiram Goswami* v. *Shyama Charan Nandi* (17), their Lordships of the Privy Council observe : " It is well settled that the power of the Mohant to alienate debuttar property is, like the power of the Manager for an infant heir, limited to cases of unavoidable necessity " citing

17. (1909) 36 Cal. 1003=36 I. A. 148=19 M. L. J. 529 ; 10 C. L. J. 284=6 A. L. J. 857=11 Bom. L. R. 1234=19 M. L. J. 530=14 C. W. N. 1=4 I. C. 449. (P. C.)

Prosunna Kumari Debya v. *Golab Chand* (2) and *Doorganath Roy* v. *Ramachander Sen* (18). In these two cases, the leading case of *Haunman Prasad* (4) (a case dealing with the manager of an infant heir,) was relied on as a guide in respect of dealings with *debuttar* property. See also *Vidya Varuthi* v. *Baluswami Iyer* (5). The present appeal is not a case of conferring benefits to the estate—such as the preservation of the estate from extinction, the defence against hostile litigation affecting it, the protection of it or portions from injury or deteriorations by inundation and such like things. See *Palaniappa Chetty* v. *Sreemath Deivasigamani* (1). In *Peary Mohun Mukherjee* v. *Narendra Nath Mookerjee* (19) the expenses in respect of which the shebait sought re-imbursement were either incurred in defending his position as shebait or performing the obligation imposed upon him by the original Will. In this case there is no proof of the obligation imposed upon the Mutts at the time of the foundation. The learned Vakil for the plaintiff relies on the following sentence in *Saminatha Pandara* v. *Sellapa Chetti* (6) " Acting for the whole institution he may contract debts for purposes connected with his mattam and debts so contracted might be recovered from the mattam property and would devolve as a liability on his successor to the extent of the assets received by him. I do not think that the learned Judges who decided *Saminatha Pandara* v. *Sellappa Chetti* (6) or the Judicial Committee who quoted the whole paragraph in I. L. R. 44 Mad. 831 at 844 for a different purpose, meant to lay down that a debt however extravagant and unnecessary it may be, incurred in the performance of festivities and ceremonies of the mutt, are binding on the mutt in the hands of a successor. Such a position would be inconsistent with the *ratio decidendi* of 2 I. A. 145 and 4 I. A. 52 applied to mutts in I. L. R. 36 Cal. 1003 and *Palaniappa Chetty* v. *Sreemath Deivasikamani Pandara Sannadhi*(1). In *Murugesan Pillai* v. *Manikavasaka Desika Gnana Sambhanda Pandara Sannadhi* (20) it was found that the head of a mutt at the very outset of his career, was handicapped by two litigations costing nearly two lakhs. In my opinion, the suit debt is not binding on the mutt and this is the conclusion of my learned brother Coutts-Trotter, J. and myself in S. A. No. 1899 of 1920 (a case relating to a debt of the same Mutt incurred for the same pariyaya of 1914-1916). In *LakshmindraThirthaswamiar* v. *Raghavendra Rao* (15) and *Srimath Deivasikamani Pandara Sannadhi* v. *Noor Mahomed Rowthen* (14) the cases came up on Second Appeal with a finding that the debt was incurred for necessary purposes. It may be that the law was too narrowly laid down in *Vidyapurna Tirtha Swami* v. *Vidyanidhithirtha Swami* (21) but this was set right in *Sreemath Deivasikhamony Pandara Sannadhi* v. *Palaniappa Chettiar* (22) (affirmed by the Privy Council in I. L. R. 40 Mad. 709).

It is said that the Swami of Sirur Mutt spent Rs. 20,000 for the repair of Bhojanasala. Apart from the fact that it is the duty of all the Swamis of the eight Mutts to contribute to the expenses of repairing the dining hall, the fact that an extension in the form of an upstair was added to the old building, disentitles the plaintiff from relying on this item. It is also conceded that only Rs. 1,000 out of the suit loan was spent on this item. I do not think this aspect of the plaintiff's case improves it.

Some complaint was made for the respondent that the question of justifiable necessity was not taken in the first Court. I think it was taken in para. 3 of the written statement. If this paragraph is not more explicit, this was because the allegation in the plaint is not more explicit and makes no reference to Pariyaya. The plaintiff had to prove necessity (on the 2nd issue) and was not prejudiced by any vagueness in the plea in the written statement. The defendant was not the borrower and was not bound to plead more clearly. In view of the conclusion on

18. (1876) 4 I. A. 52=2 Cal. 341.

19. (1910) 37 Cal. 229=37 I. A. 27=7 A. L. J. 125=7 M. L. T. 63=14 C. W. N. 261=11 C. L. J. 220=12 Bom. L. R. 257=20 M. L. J. 171=5 I. C. 404.

20. (1917). 40 M. 402=44 I. A. 98=21 M. L. T. 288=32 M. L. J. 369=15 A. L. J. 281=1 Pat. L. W. 457=5 L. W. 759=21 C. W. N. 761=19 Bom. L. R. 456=25 C. L. J. 589=(1917) M.W. N. 487=39 I. C. 659 (P. C.)

21. (1904) 27 M. 435=14 M. L. J. 105.

22. (1911) 34 Mad. 535=9 M. L. T. 83=20 M. L. J. 969=(1911) 2 M. W. N. 154=9 I. C. 281.

the first point, I do not think it necessary to express an opinion on the second point on which there is some conflict of opinion in this Court. The cases in I. L. R. 31 Mad. 47 and *Sundaresan Chettiar* v. *Viswanatha Pandara Sannadhi* (6) are against the appellant but he is supported by the decision in *Swaminatha Aiyar* v. *Srinivasa Iyer* (7). A number of English decisions have been cited before us, relating to trust and trustees (*Strickland* v. *Symons* (8) *In re Johnson*: *Shearman* v. *Robins* (12) (Jessel, M. R.) *Forhall* v. *Forhall* (10) *In re Robinsons's Settlement*: *Gant* v. *Hobbs* (11) in effect reversing *Watching* v. *Lewis* (23). After the expression of opinion in *Vidyavaruthi* v. *Baluswami Aiyar* (5) that Mutts are not in the nature of trusts in English Law it is not profitable to discuss these cases.

In the result the appeal is allowed so far as the Mutt properties are concerned, but the plaintiff will be entitled to a decree for the suit sum against the assets of the late. Swamiar in the hands of the defendant such as uncollected arrears since collected or investments of the late Swami which have not been incorporated with the Mutt properties.

I agree with my learned brother's order as to costs.

Decree modified.

23. (1911) 1 Ch. 414.

* **1923 Madras. 295.**

SPENCER AND VENKATASUBBA RAO, JJ.

Kachinamthodi Parambil Saharabi— ... Appellant. Defendant.

v.

Kachinamthodi Puthia Purayil Mammad's, son Chekkutti, and others ... Respondents.

Appeal No. 420 of 1921, dated 26th September 1922, against the order of the Court of the Sub. J. of South Malabar at Calicut in A. S. No. 83 of 1921.

Civil P. C., O. XXI R. 63—Order against claimant.

Notifying claims to intending bidders without investigating them is improper, and the order is not against the claimant; every order which is not in favour of a claimant is not necessarily an order against him.

T. A. Anantha Iyer—for the Appellant.

K. Kuttikrishna Menon—for the Respondents.

Spencer, J.—The District Munsif's order of 17th March, 1913, on the claim petition was an improper one as it followed the practice condemned in *Venkataratnam* v. *Ranganayakamma* (1) of notifying claims to intending bidders without investigating them.

But whatever was the order which should have been passed on the claim I am satisfied that the order that was actually passed was not an order against the claimant within the meaning of R. 63 of O. XXI (of the Code of Civil Procedure), as it did not negative his claim to an undefined share in the property attached. The claimant's petition was not dismissed The facts of this case are similar to those in *Lakshmi Ammal* v. *Kaderesan Chettiar* (2) and *Ayya Pattar* v. *Attupurath Manakkal* (3) and in the course of those decisions it was pointed out that every order which is not in favour of a claimant is not necessarily an order against him.

In this view the lower appellate Court was right in deciding that R. 63 of O. XXI, Civil Procedure Code, does not bar the present suit. As my learned brother agrees with me, the Civil Miscellaneous Appeal is dismissed with costs.

Venkatasubba Rao, J.—The question to be decided is: "Is the suit barred by Art. 11 of the Limitation Act?" The suit is for partition. The suit property had been attached in execution of a decree obtained by the 1st defendant against a certain person and the plaintiff then preferred a claim stating that the judgment-debtor had only a share in the property and that he himself was entitled to a moiety thereof. On the claim petition the Court made the following order:

"The petitioner's contention is that the defendant has only a share in the property and that the other shares belong to the peritioner and some others. Whatever right the defendant has, will pass by the sale. The petition does not require any further investigation. The claim put forward by the petitioner will be noted in the sale proclamation."

The sale was held and the 1st defendant became the purchaser. The plaintiff seeks in the present suit to recover his half share of the property from the 1st defend-

1. (1918) 41 Mad. 985; 35 M. L. J. 335=24 M. L. T. 197=(1918) M. W. N. 599=8 L. W. 292 =48 I. C. 270. (F. B.)

2. (1921) 41 M. L. J. 198=(1921) M. W. N. 495=14 L. W. 12=63 I. C. 431.

3. (1919) M. W. N. 805=52 I. C. 938.

ant. It is contended on behalf of the latter that the order referred to amounts to an order against the plaintiff under R. 63 of O. XXI of the Civil Procedure Code; and that the suit having been filed long after the lapse of a year from the date of the order the suit is barred under Art. 11 of the Limitation Act. The Subordinate Judge overruled this contention.

It seems to me that the Subordinate Judge's decision is correct. In the first place it is necessary to observe that in making the order referred to, the Court did not act in accordance with the provisions of the Civil Procedure Code. It was the duty of the Court to have investigated the claim, and if it was satisfied that the claimant made out his case, to have released the property from attachment, or if it arrived at a decision against the claimant, to have disallowed the claim. This course was obviously not followed by the District Munsif who made the order in question. At the same time it must be noted that an order to sell the property did not necessarily mean that the claim of the plaintiff was found against, because in any event the judgment-debtor was entitled to a share in the property. The District Munsif moreover expressly stated in his order that by the sale only the right of the defendant would pass. No doubt this is a truism. But we are not concerned with the propriety of the course followed by the District Munsif. The question is not, whether the District Munsif's order is legally sustainable, but whether the order that was made was an order against the plaintiff under R. 63 and under Art. 11. It is clear that the District Munsif did not intend to make an order against the plaintiff, and he in effect states that as by the sale, only the right of the defendant will pass and as the petitioner has not claimed the whole of the property, the petition does not require any further investigation. I cannot construe this order as an order against the plaintiff. The Courts have repeatedly condemned the practice followed in this instance by the District Munsif. But I fail to understand why the plaintiff should suffer on account of the erroneous order made on the claim petition. The combined effect of O. XXI R. 63, Civil Procedure Code and Art. 11 of the Limitation Act is to cut down the usual period of limitation which in many instances is 12 years to a year when the case falls within the terms of the said sections. The result is if a person whose property is attached takes no steps under the summary procedure available to him to get his right established, he has the usual period of limitation. But if he prefers a claim and an order is made against him he is bound to file a regular suit within a year of the order.

In this state of things when it is not clearly an order against the claimant as is contemplated by the provisions referred to above, I do not think the Courts will be justified in placing a forced construction upon the order for the purpose of deciding that it is an order against him though it is not on the face of it, and though it was not intended to be such an order.

The appellant strongly relied upon the decision of the Full Bench in *Venkataratnam* v. *Ranganayakamma* (1). It was held in it that an order refusing to investigate a claim on the ground that there was delay in filing it is an order passed "against" the claimant. The order to be construed in that case was in the following terms:—

> "The allegations of the Zemindarini will be notified to the bidders with the remark that the Zemindarini did not take steps, for her claim being enquired into during the last 10 months."

R. 58 of O. XXI, Civil Procedure Code enacts that no investigation shall be made, "where the Court considers that the claim or objection was designedly or unnecessarily delayed". But however the Full Bench decided that the order made was in effect an order rejecting the claim. Sir John Wallis, C. J., seemed to think that the claimant having been at fault in preferring his claim beyond the time allowed by the law, there was nothing unfair in requiring him to proceed to assert his title by suit within the shorter period of limitation prescribed. He observes at the close of his judgment "though the order only was that the allegations of the Zemindarini would be notified to bidders, we think it amounted and was understood to amount to a rejection of the claim on the ground that it was filed too late." We are bound by the decision of the Full Bench. But I cannot regard it as an authority which bears on this case. In *Lakshmi Ammal* v. *Kaderesan Chettiar* (2) the following order which was made on a

claim

"Sale stopped. The claim cannot be investigated by this Court. The petition dismissed."

had to be construed, and it was held that the order did not negative the right set up by the claimant. Mr. Justice Spencer bases his decision on this ground, and Mr. Justice Ramesam says:—

"I agree with my learned brother in holding that Ex. VII cannot be taken to be an order negativing the claimant's right."

And that learned Judge clearly says that that is the ground of his decision. In *Ayya Pattar* v. *Attupurathamanakka Vasudeva Bhattathiripad* (3), a Bench of this Court held that where a person objected to the attachment of property and filed a petition asking that his objection should be recorded, without asking for an investigation of his claim, and the Court recorded his objection, such recording did not amount to an order against the objector under R. 63 of O. 21. Abdur Rahim, J. refers to the decision of the Full Bench and observes:

"But it would be going too far to say that the rule applies to cases where a person, while putting in a petition setting out his objections, does not ask the Court to investigate his claim."

These two cases support the view which I am inclined to take.

The learned Vakil for the appellant has referred us to the decision in Civil Miscellaneous Appeal No. 423 of 1921 of Mr. Justice Krishnan and myself. In that case a claim petition was filed and an order was passed in these terms: "Withdrawn, closed". We decided that the word "closed" was tantamount to "dismissed" and we held that the point was concluded by the authority of the Full Bench ruling. The case was indistinguishable from the decision of the Full Bench and I therefore arrived at that decision. I may refer to the following passage in the judgment:

"The question whether an order is against the claimant or not does not depend on whether the Court had investigated the claim or not. It really depends upon the effect of the order and if in substance and in effect it negatives the claimant's claims and refuse to recognise it, that is an order which falls under Art. 11 of the Limitation Act."

I do not think this is a decision which helps the appellant. I am clearly of the opinion that the order in question is not in effect and in substance one negativing the plaintiff's claim. I do not think there is any justification for extending the rule laid down in *Venkataratnam* v. *Ranganayakamma* (1) to cases not really covered by it. For these reasons I entirely agree with the judgment delivered by my learned brother.

Appeal dismissed.

** **1923 Madras. 297.**

SPENCER AND VENKATASUBBA RAO, JJ.

(*Atluru*) *Saraswatamma* ... Appellant—(2nd defendant)

v.

(*Atluru*) *Paddayya and others* ... Respondents.

Appeal No. 422 of 1921, dated 11th October 1922, against the order of the District Court of Kistna, dated 29th August 1921, in A. S. No. 7 of 1920 from Sub. J. of Bezwada in O. S. No. 39 of 1918.

Registration Act, S. 49—Partition deed—Divided status.

To effect a severance of rights, an actual division by metes and bounds is not necessary. A deed which is ineffectual to effect a *de facto* actual division of the subject-matter may operate to effect a separation in interest and in right. A document which operates to convert a change in the status of the family and effect a division of right, when it is unregistered, is admissible in evidence to prove divided status. What is prohibited by the section is receiving a document *as* evidence of a transaction not merely receiving it *in* evidence, that is, as a piece of evidence having a bearing on the question to be ultimately decided. Though the recitals in certain petitions could not be used as evidence of a gift, still the petitions could nevertheless be referred to as explaining the nature and character of the possession thenceforth held by the donee. (Case law discussed).

[P. 298, Col. 2; P. 299, Col. 1; P. 300, Col. 1.]

Hindu Law—Partition—Unilateral intention not communicated not sufficient.

The alteration in the nature of the estate is an incident attached by Hindu Law to the divided status of the members of a Hindu family. A document merely creating a separation in status does not itself create any interest in immoveable property. Such an interest is created not by virtue of the instrument but by the operation of the rules of the Hindu Law (Case Law discussed). An agreement between all the co-parceners is not essential to the disruption of the joint status; and separation so far as the separating member is concerned, is a matter of individual volition. The intention to separate may be evidenced in different ways either by explicit declaration or by conduct, and if it is an inference derivable therefrom, it will be for the Court to determine whether the conduct or declaration was unequivocal and explicit. Coupled with declarations or conduct, there must be a communication of intention to the other members; then alone a division in status would result. A document therefore, which merely contains a declaration or affords evidence of conduct, does not of itself create a division in status.

[P. 299, Cols. 1, 2.]

C. V. Anantakrishna Aiyar—for A. Krishnaswami Aiyar and V. Suryanarayana—for Appellant.

P. Narayanamurthi—for Respondent.

Venkatasubba Rao, J:—The Temporary Subordinate Judge held that Ex. V was admissible in evidence and the District Judge disagreed with him and refused to admit it, on the ground that it was unregistered. The material question to be decided in this appeal is, whether there was a division between the plaintiff, the first defendant and the second defendant's husband and whether the document above referred to can be admitted in evidence. The facts necessary for the decision of this question may be very briefly stated.

The first defendant and the deceased husband of the second defendant were brothers, being the sons of the plaintiff. The suit is for partition. The second defendant contends that a partition was effected during the lifetime of her husband and that Ex. V embodies the terms thereof, that, under it, of the 12 acres of land which the family possessed, each son obtained about 5 acres odd, and the plaintiff, the father, was allotted for his maintenance 1 acre and 50 cents. It may be stated that the plaintiff ignoring this arrangement claims in the suit a moiety of the property: but there is an alternative prayer in the plaint to the effect that be may be allotted one-third of the property in the event of the Court holding that there was a partition in the lifetime of the second defendant's husband. The Subordinate Judge holding that there was a completed partition, dismissed the plaintiff's suit, and the District Judge, having decided that the partition was effected only between the two brothers and that the plaintiff was not a party to it and was not bound thereby and therefore that the plaintiff was entitled to a half share, reversed the decree of the Subordinate Judge and remanded the suit for disposal on the other issues framed in the case.

It must be stated at the outset that Ex. V the deed of partition relied on by the second defendant, was executed only by the first defendant and the deceased husband of the second defendant and that it was not registered.

The question whether the plaintiff was a consenting party to the division is a question of fact, and Mr. Anantakrishna Aiyar on behalf of the second defendant (appellant) argued that, though this finding of fact is binding upon him, it is open to him to contend that there was a division in status between the members of the family and that the District Judge acted erroneously in refusing to admit Ex. V for the purpose of showing that there was such severance.

The Subordinate Judge observes as follows in regard to Ex. V. "The plaintiff and the first defendant objected to its admissibility on the ground that it required registration. I overruled the objections because the second defendant was tendering the document to prove the status of the family but not the title of any particular sharer to any particular item."

The District Judge, while holding that there was no actual division, fails to consider the question whether there was a division of status. In this, I think he was clearly wrong. It has been held that, to effect a severance of rights, an actual division by metes and bounds is not necessary. A deed which is ineffectual to effect a *de facto* actual division of the subject matter may operate to effect a separation in interest and in right. In *Appuvier* v. *Ramasubbien* (1), their Lordships of the Privy Council had to consider the effect of a deed of partition executed by all the members of an undivided Hindu family which spoke of a division having been agreed upon to be thereafter made, and the contention that the deed was ineffectual to convert the undivided property into divided property until it had been followed up by an actual partition by metes and bounds, was rejected by their Lordships. Mr. Anantakrishna Aiyar on behalf of the second defendant appellant, argued that Ex. V effected in any event a division of right and that the document was admissible in evidence to prove such a division. The question then arises, is a document which operates to convert a change in the status of the family and effect a division of right, when it is unregistered, admissible in evidence? Mr. Narayanamurthy, on behalf of the respondent, strongly relied on *Ayyakutti Mankondon* v. *Periyasami Mankondan* (2) and *Pothi-*

1. (1866) 11 M. I. A. 75.
2. (1915) 30 M. L. J. 404=2 L. W. 1184=31 I. C. 615.

nayakan v. *Naganna Nayakar* (3). Both were Letters Patent Appeals and three learned Judges decided each of them, and the judgments are entitled to great weight. It was held in both the cases that a document merely effecting a division of status required registration, and if it was not registered, it was inadmissible in evidence. But the authority of these rulings is considerably weakened by the fact that in *Natesa Aiyar* v. *Subramania Aiyar* (4) Ayling and Seshagiri Iyer, JJ. (it will be noticed that the latter took part in both the Letters Patent Appeals) observed at page 309 as follows: "In this view it is unnecessary to consider how far the decision of this Court in *Pothinayakan* v. *Naganna Nayakar* (3) and *Ayyakutti Mankondan* v. *Periyaswami* (2) are reconcilable with the pronouncement of the Judicial Committee in *Girijabhai* v. *Sadasiva Doondiraj* (5). In *Subramaniya Aiyar* v. *Savitri Ammal* (6) Sankaran Nair, J. held that a document effecting merely a division in status did not require registration and in *Ayyakutti* v. *Periyaswami* (2), Spencer, J. adopted the same view and referred to *Subrahmanya Aiyar* v. *Savitri Ammal* (6). Sadasiva Aiyar, J. took a different view and the difference of opinion between the two learned Judges led to the Letters Patent Appeal. In *Pothinayakan* v. *Naganna Nayakar* (3) Sankaran Nair and Oldfield, JJ. differed, the former adhering to the view already expressed by him, and this difference of opinion led to the other Letters Patent appeal. Speaking for myself, with great respect, I am inclined to agree with Sankaran Nair, J. and Spencer, J. for, in the words of Sankaran Nair, J. the alteration in the nature of the estate is an incident attached by Hindu Law to the divided status of the members of a Hindu family. A document merely creating a separation in status does not itself create any interest in immoveable property. Such an interest is created not by virtue of the instrument but by the operation of the rules of the Hindu Law. Were it necessary to decide this question, we might refer it to the decision of a Full Bench, but it seems to me that for the determination of this case, the question as presented to us in the argument does not arise.

It has been repeatedly pointed out that an agreement between all the co-parceners is not essential to the disruption of the joint status; and that separation so far as the separating member is concerned, is a matter of individual volition. A very clear exposition of this principle is contained in the judgment of their Lordships of the Privy Council in *Girja Bhai* v. *Sadasiva Doondiraj* (5). At page 1050, their Lordships observe. "Some of the Courts in India have supposed Lord Westbury's expressions in *Appuvier* v. *Ramasubhian* (1) to imply that the severance of status can take place only by agreement. Their Lordships have no doubt that this is a mistaken view." Then it is pointed out that the intention to separate may be evidenced in different ways either by explicit declaration or by conduct, and if it is an inference derivable therefrom, it will be for the Court to determine whether the conduct or declaration was unequivocal and explicit. To the same effect was the law laid down in *Surajnarain* v. *Iqbal Narain* (7), "What may amount to a separation," their Lordships say "or what conduct on the part of some of the members may lead to disruption of the joint undivided family and convert a joint tenancy into a tenancy in common must depend on the facts of each case. A definite and unambiguous indication by one member of an intention to separate himself and to enjoy his share in severalty may amount to separation. But to have that effect, the intention must be unequivocal and clearly expressed."

These and similar observations make it perfectly clear that an inference of intention may be derived either from declarations or from conduct. For effecting a division in status, in addition to conduct or declarations, the intention must be unequivocally and clearly expressed to the other members of the family. For ascertaining whether a deed amounts to such conduct or contains evidence of it, or con-

3. (1915) 30 M. L. J. 62=19 M. L. T. 50=(1916) 1 M. W. N. 79=3 L. W. 115=32 I. C. 486.
4. (1918) 23 M. L. T. 307=(1918) M. W. N. 708=45 I. C. 535.
5. (1915) 43 Cal. 1031=31 M. L. J. 455. 43 I. A. 151=20 C. W. N. 1085=14 A. L. J. 822=20 M. L. T. 78=12 N. L. R. 113=(1916) 2 M. W. N. 65=18 Bom. L. R. 621=4 L. W. 114=24 C. L. J. 207=31 M. L. J. 455=37 I. C. 321 (P. C.).
6. (1908) 19 M. L. J. 228=4 M. L. T. 354.
7. (1912) 35 All. 80=43 I. A. 40=24 M. L. J. 345=13 M. L. T. 194=17 C. W. N. 333=11 A. L. J. 172=1913 M. W. N. 183=17 C. L. J. 288=15 Bom. L. R. 456=16 O.C. 129=18 I.C. 30.

tains declarations of intention, I fail to see why it should not be looked at although it may refer to immoveable property and is not registered. Coupled with declarations or conduct, there must be a communication of intention to the other members; then alone a division in status would result. A document therefore, which merely contains a declaration or affords evidence of conduct, does not of itself create a division in status, and I find no difficulty in holding that Ex. V, which as I already pointed out, is not an agreement between all the members of the family, and does not therefore as such, operate to create a division in status, is admissible in evidence for the purpose of proving the declarations or the conduct of the executants. It was agrued in *Natesa Aiyar* v. *Subramania Aiyar* (4) already referred to, that an unregistered document was inadmissible to evidence a unilateral declaration and the argument was rejected, the learned Judges observing, "We are not able to hold therefore that the documents cannot be looked into to ascertain the intention of the executants." S. 49 (*c*) of the Registration Act enacts, "No document required by S. 17 to be registered shall be received *as* evidence of any transaction affecting such property." The document containing a declaration or which affords evidence of conduct is not tendered *as* evidence of a transaction but only *in* evidence, in other words, the section makes inadmissible a document which records a transaction affecting immoveable property. It does not mean that no single piece of evidence affecting immoveable property can be admitted, if the evidence is contained in a writing which is not registered. For instance, if the question to be decided is whether a gift of a property is real or *benami* and if a letter written by the donor to the donee is sought to be put in evidence, it cannot be ruled out on the ground that it affects immoveable property. What is prohibited by the section is receiving a document *as* evidence of a transaction not merely receiving it *in* evidence, that is, as a piece of evidence having a bearing on the question to be ultimately decided.

Then there is another aspect of the question to be considered. It is said that the document itself refers to immoveable property and we cannot therefore look at it for any purpose whatsoever. This argument appears to be wholly untenable, in view of the decision of the Privy Council in *Varada Pillai* v. *Jeevaratnammal* (8) where their Lordships holding that the recitals in certain petitions could not be used as evidence of a gift, still held that the petitions could nevertheless be referred to as explaining the nature and character of the possession thenceforth held by the donee.

Now returning to Ex. V it affords clear evidence of conduct from which an intention to divide on the part of the executants is deducible and the declarations in it also lead to the same inference. Lakshminarayana, the first defendant and Sitaramayya, the deceased husband of the second defendant who are the executants, begin by describing the document as a "list of shares of division." Lands are first divided, then the residential house. The debts are said to amount to Rs. 1,060-14-10. They are divided and the document contains the statement: "Both of us have agreed to the said shares and effect settlement without any dispute whatever." The treasure box and cart are also divided and the document contains the further recital, "Out of the hayricks, the northern side of the hayrick has fallen to Lakshmi Narayanan's share and the southern side to Sitaramayya's share." All the co-parceners not being parties to this document it did not effect an immediate division in status, but the document is the clearest possible indication of the intention of the executants to remain divided.

We have been referred to some evidence that this intention has been communicated to the plaintiff, but the question was not definitely before the minds of the parties and it seems to me that the proper order to make would be to direct an additional issue to be raised, whether there was a division in status between the members of the joint family during the lifetime of 2nd defendant's husband and to allow the parties to adduce evidence in regard to this issue. It is scarcely necessary to add that to effect a division in status a document is not necessary and evidence may be given of acts of parties

8. (1919) 43 Mad. 244=46 I. A. 285=1919 M. W. N. 724=10 L. W. 679=24 C. W. N. 346=38 M. L. J. 313=18 A. L. J. 274 (P. C.).

or declarations independent of any document. As the attention of the Subordinate Judge was not directly called to this question there being no issue upon the point, and as the District Judge has altogether failed to consider it, I think the course suggested would be the proper course to follow. The order of the District Judge remanding the suit for disposal will stand, but the Court of the First Instance will be directed to frame an additional issue in the terms already mentioned and to try it.

SPENCER, J. :—I agree with my learned brother both as to the admissibility of Ex. V to prove division of status and as to the order proposed by him to be made for an additional issue to be framed.

I adhere to the opinion which I expressed in *Ayyakutti Mankondan* v. *Periasami Koundan* (2) following what Sankaran Nair, J. said in *Subrahmaniya Aiyar* v. *Savitriammal* (6) that even an unregistered document can be used as evidence of an intention on the part of members of an undivided family to become divided in status. I am glad to find that my learned brother agrees with the opinion which I then gave and that there have been several later pronouncements of great weight which tend to show that my view was correct.

I have the highest respect for the opinion of Sadasiva Aiyar, J. but I think he stretched too widely the meaning of the verb "affect" in S. 49 of the Registration Act. All sorts of transactions may remotely affect immoveable property. S. 49 of the Registration Act has to be read in the light of S. 17 of the same Act and S. 91 of the Evidence Act. If this is done, the word "affecting" will be seen to be only a compendious term for expressing the phrase of "purporting or operating to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest whether vested or contingent." Thus applications for the mutation of names in the Government registers or agreements to become divided in status may be said to "affect" in an indirect sense immoveable property, but they do not of themselves purport to pass any right to immoveable property and so do not require to be registered. The decision of the Privy Council in *Varada Pillai* v. *Jeevarathanammal* (8) has made this clear as regards the former kind of documents. On the same principle I think that documents which are instruments of partition, as defined in S. 2 (15) of the Stamp Act that is instruments whereby co-owners of any property divide or agree to divide such property in severalty, are required by S. 17 of the Indian Registration Act to be registered when the property to be divided is immoveable property over Rs. 100 in value, and if they are not so registered they cannot by reason of S. 49 be admitted as evidence of the transaction they purport to effect; but they may be used for the collateral purpose of proving division of status among the parties to the documents. When so used they do not "affect" immoveable property, nor is the division of status a transaction affecting immoveable property in the sense intended by the Act to be given to the word 'affect.' Documents that do not fall under the above description are not required to be registered at all and are admissible in evidence without registration. All costs hitherto incurred to be costs in the cause.

1923 Madras. 301.

SPENCER AND VENKATASUBBA RAO, JJ.

(*Chintalapudi*) *Sanyasirao minor by next friend Vanapillai Atchayya* ... Appellant (Defendant).

v.

(*Chintalapudi*) *Venkatrao minor by guardian* ad litem *Chintalapudi Chinnayya* ... Respondent (Plaintiff).

Appeal No. 438 of 1921, dated 11th October 1922, against the order of the Court of the Sub. J. of Vizagapatam, dated 30th September 1921.

Civil P. C., Sch. II, Para. 15—*Legal misconduct.*

It is improper on the part of an arbitrator to get information from one side in the absence of the other or to utilise information not accessible to others but consent of parties who are *sui juris* will cure the defect but a minor's guardian cannot waive the minor's right to object to irregular procedure.

[P. 302, Col. 2 ; P. 303, Col. 2.]

A. Krishnaswami Iyer—for Appellant.

B. Satyanarayana—for Respondent.

SPENCER, J. :—The plaintiff a minor represented by his natural father, sued to establish that he was the adopted son of

Chintalapudi Sanyasayya. The defendant who is the minor *aurasa* son of the said Sanyasayya represented by his mother, opposed the suit. There was a reference to arbitration without the intervention of the Court. The defendant's mother agreed to the dispute being referred to be settled by a single arbitrator and in the *muchilika* that was drawn up she consented to be bound by and act according to the decision the arbitrator might give either on his own information or upon other information known in the village or by examining the witnesses of both parties, should he think it necessary. The agreement to refer goes on :—

"We shall not, before you give a decision regarding the said disputes between us, cancel this *muchilika* executed by us, by one of us alleging among others that you are doing injustice, or that you are partial and that your arbitration is not necessary and that you should not give decision. We shall agree to your decision itself as the final decision. We shall not contend for any reason and in any manner either in Courts or in any other places that your decision is not proper and that it cannot bind us."

The arbitrator admits that he enquired of witnesses behind the back of the parties and that he collected imformation and obtained an admission from the defendant's mother without noting them down in writing. The question is whether the minor defendant is bound by such a surrender by his guardian of his legal right that the witnesses should be examined in the presence of the parties and whether such procedure makes the award "otherwise invalid" within the meaning of S. 15 of the Second Schedule, Civil Procedure Code.

The Subordinate Judge quotes *Lachmi Narain* v. *Sheonath Pande* (1) and observes :

"If the parties agreed that there was no need for him to take any evidence, and that the arbitrator should decide the dispute between them on his own knowledge, no misconduct could be implied if he decided accordingly."

That is a perfectly sound proposition provided that the parties are *sui juris*. But the question here is whether it was a reasonable and prudent act on the part of the guardian of a minor thus to commit the interest of her ward into the absolute power of a single person whom she permits to follow a procedure opposed to natural justice. It is improper on the part of an arbirtator to get information from one side in the absence of the other or to utilise information not accessible to others; vide *Gregson and Armstrong Re* (2), *Harvey* v. *Shelton* (3) and *Dobson and Sutton* v. *Groves* (4). The arbitrator examined by the Court admits that he acted thus and it also appears from the statement of plaintiff's guardian that the arbitrator acted on information obtained before the reference. I am of opinion that his procedure vitiated the award given in the present case and that the defendant's guardian could not waive her son's right to object to irregular procedure. *Vide Swamirao* v. *The Collector of Dharwar* (5) which follows *Rhodes* v. *Swithenbank* (6). I would go further and characterise her conduct as gross negligence on the part of a guardian ; and it has been held by this Court in *Lakshminarayana Tantri* v. *Ramachandra Tantri* (7), *Chunduru Punnayyah* v. *Rajam Viranna* (8) that gross negligence on the part of a next friend or guardian entitles a minor to impeach an award or a judgment passed against him. The appeal is allowed and the suit is dismissed. No costs.

VENKATASUBBA RAO, J. :—The appellant attacks the judgment pronounced by the Subordinate Judge giving effect to an award made in favour of the plaintiff. The facts of the case may be very briefly stated. One Sanyasayya died leaving the defendant, his natural son, and his widow Ammanna, the mother of the defendant. The plaintiff claimed that he was adopted by Sanyasayya and stated that the defendant was born subsequent to the adoption and that Ammanna denied the adoption and refused to maintain the plaintiff. The disputes were then referred to the arbitration of a gentleman by name Boddu Appanna Doragaru and the submission was executed by the natural father of the plaintiff acting on behalf of the latter and by Ammanna acting on behalf of the defendant. The arbitrator was

1. 42 All. 185=18 A. L. J. 78=1 U.P. L.R. (H.C.) 177=54 I. C. 443.

2. (1894) 70 L. T. 106.
3. (1844) 7 Beav. 455 at p. 462=49 E.R. 1144.
4. (1844) 6 Q. B. Rep. 637=115 E. R. 239.
5. 17 Bom. 299.
6. 22 Q. B. D. 577.
7. 34 M. L. J. 71=23 M. L. T. 89=45 I. C. 763.
8. 1922 Mad. 273=45 Mad. 425=42 M. L. J. 429=1922 M. W. N. 213=15 L. W. 427.

to decide whether the plaintiff was the adopted son of Sanyasayya and to what rights he was entitled. The arbitrator made an enquiry and passed an award declaring that the plaintiff was the adopted son of the deceased Sanyasayya and awarded to him a fifth share of the estate. The plaintiff then made an application under paragraph 20 of Sch. 2 of the Civil Procedure Code that the award be filed in Court and the application was numbered and registered as a suit and the Subordinate Judge ordered the award to be filed and pronounced judgment according to the award. The defendant contended that the award was not binding upon him for the reason *inter alia* that the arbitrator examined witnesses in the absence of the parties and instituted private enquiries and passed his judgment upon information so obtained. The Subordinate Judge refers to this contention in the following passage in his judgment. "The arbitrator does not pretend that he reduced the evidence of the witnesses he examined, to writing nor did he examine them in the presence of the parties."

This conduct on the part of the arbitrator is justified by a reference to the terms of the submission. The part of the submission material for this purpose is as follows :—

"Therefore we have executed this Yeka Panchayat Muchilika agreeing to be bound by and act according to the decision you might give either on your own information or upon other information known in the village or by examining witnesses of us both parties should you think it necessary. We shall not, before you give a decision regarding the said disputes between us, cancel this muchilika executed by us alleging that you are doing injustice or that you are partial and that your arbitration is not necessary. We shall agree to your decision itself as the final decision."

The first question that arises is, apart from any covenants in the submission, is an arbitrator under the general law entitled to act on information received in the absence of the parties or on his own knowledge of the facts in regard to the matters in issue between the parties ?

The law is perfectly clear on the point, that an award based on such information or knowledge is invalid. In *Harvey* v. *Shelton* (3) an award was set aside on the ground that the arbitrator interviewed one party in the absence of the other. Lord Langdale, M. R., says :

"In every case in which matters are litigated, you must attend to the representations made on both sides and you must not, in the administration of justice in whatever form whether in the regularly constituted Courts or in arbitrations, whether before lawyers or merchants, permit one side to use means of influencing the conduct and the decisions of the Judge which means are not known to the other side."

The Master of Rolls also observes :

"There is no proof, nor in such a case do I apprehend there could be proof that the result to which Mr. Wakefield came was in any way prejudicial to Mr. Harvey."

Still the award was set aside on the ground that :

"It is an ordinary principle in the administration of justice that no party can be allowed to use any means whatsoever to influence the mind of the Judge which means are not known to and capable of being resisted by the other party."

This view was acted upon in numerous other cases in England and was accepted in several decisions of the Indian High Courts. See *Daya Kissen* v. *Dham Das* (9) *Lachmi Narain* v. *Sheo Nath Pandey* (10) *Ganes Narayan Singh* v. *Malida Koer* (11) and *Hari Singh Nehal Chand* v. *Kankinarah Co., Ltd.* (12)

It is also settled that if the parties agree that the arbitrator shall decide the dispute on his own knowledge or that there is no need for him to take any evidence, no misconduct can be imputed. See *Lachmi Narain* v. *Sheo Nath Pandey* (10). Lord Denmore, C.J., observes in *Dobson and Sutton* v. *Groves* (4) that no information ought to be received by the arbitrator in the absence of the parties unless the arbitrator has an express power reserved for that purpose or the parties agree that he shall exercise it. If the parties to this reference were *sui juris*, the arbitrator would have been justified in acting as he did and his award would not be liable to be set aside on the ground of misconduct. But on behalf of the defendant who is a minor his mother and natural guardian consented to the terms contained in the reference and it cannot be held that the act of the mother is beneficial to the defendant. Such covenants are sometimes found in submissions executed by parties who are *sui juris*. But when a guardian is acting on behalf of a minor, I do not

9. 4 A. L. J., 159=(1907) A. W. N. 75.
10. (1920) 42 All. 185=18 A. L. J., 78=1 U. P. L. R (H. C.) 177=54 I. C. 443.
11. (1911) 13 Cal. L. J., 399=10 I. C. 450.
12. 34 Cal. L. J. 39=66 I. C. 389.

think it can be said that in any case it will be in the interest of the minor for the guardian to consent to the arbitrator possessing such wide powers. However, no special grounds have been shown to exist in this particular case which would justify the empowering of the arbitrator to depart from the usual rules of procedure indispensable to the impartial administration of justice.

There is one matter to which I must advert. It has been said that the arbitrator after making enquiries of other persons interviewed the defendant's mother herself and that she admitted the plaintiff's adoption. In regard to this, it is necessary to point out that the arbitrator in his award does not refer to this incident and does not profess to base his judgment upon this admission. What the actual statement made by the mother, if any, was, there is no means of knowing because it has not been recorded. In what circumstance the admission was made, we are not in a position to say. Whether the admission was qualified or absolute does not appear. Whether she admitted the factum of adoption or the validity of the adoption we have no means to find out. It must be remembered that so-called admission is not a statement by one of the parties to the suit but only a statement made by guardian of one of the parties. Such a statement could not be conclusive against the defendant as an admission. In any event, it is settled law that if evidence is improperly admitted, the Courts will not consider the question whether such evidence had or had not an effect upon the arbitrator's mind, and in this case the arbitrator having made private enquiries and obtained information, his award is thereby vitiated. In *Dobson and Sutton* v. *Groves* (4), Lord Denman, C. J., observes:

> "When once the case is brought within the general principle by a possibility that the arbitrator's mind may have been biassed, there is a sufficient objection."

In *Walker* v. *Frobisher* (13) the arbitrator swore that though he heard certain persons in the absence of one of the parties the information had no effect upon his award. Lord Chancellor Eldon said:

> "I believe him. He is a most respectable man. But I cannot, from respect for any man do that, which I cannot reconcile to general principles. A Judge must not take upon himself to say whether evidence improperly admitted had or had not an effect upon his mind. The award may have done perfect justice but upon general principles it can not be supported".

I am constrained for these reasons to set aside the award and allow the appeal. From the judgment of the Subordinate Judge it is clear that the arbitrator acted honestly and no prejudice or desire to do wrong can be imputed to him. But nevertheless, the procedure adopted by him is illegal and his acts amount to legal misconduct and his award is therefore bad. I agree with the order proposed by my learned brother.

Appeal allowed.

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* **1923 Madras. 304**

KUMARASWAMI SASTRI, J.

Thavasimuthu Nadar and others ... Plaintiffs.

v.

Balaguruswami Nadar and others ... Defendants

M. C. T. Muthia Chetty... Applicant.

Original Civil Jurisdiction No. 655 of 1921, dated 4th April 1922.

Practice—Right of Third party to apply to Court.

When a Receiver has been appointed, third party whose property is being interfered with under a claim by a Receiver or the parties to the suit may apply to the Court for redress. The only other way in which the applicant can have any redress would be to file a separate suit, getting the leave of the Court and implead the Receiver and then ask by means of an application that the parties to that suit and the Receiver should be restrained from interfering with his rights.

[P. 305, C. 2.]

S. G. Sadagopa Mudaliar—for the Applicant.

A. Doraiswami Iyer, S. Muthiah Mudaliar and K. Ramachandran—for the Defendants.

JUDGMENT.—These are two applications made by Sir M. C. T. Muthia Chetty for an injunction restraining the plaintiffs and defendants and the Receivers appointed in the suit from interfering with or disturbing his possession of the village of Melamamdur, which the parties to the suit seem to claim as their property. This village was the subject of a mortgage

13. (1801) 6 Ves. Jun 70—31 E. R. 943.

decree obtained in the year 1905. This decree was assigned to Sir M. C. T. Muthiah Chetty and he brought the village to sale which was held on 15th July, 1915. The Nadars represented by the plaintiffs and defendants in this suit objected to the proclamation of sale and on their petition being disallowed, they filed an appeal which was also dismissed by the High Court. The sale took place on 15th July, 1918. An application was made to set aside the sale. That application was also dismissed by the lower Court. Against this an appeal was filed to the High Court and it was also dismissed. The sale, therefore, in execution of the decree is now final and binding on the Nadars. The sale certificate has been issued in favour of Sir M. C. T. Muthia Chetty. On the 11th September, 1918, Sir M. C. T. Muthia Chetty agreed to sell and convey the properties to one M. T. K. L. Annamalai Chetty for a profit of Rs. 20,000 but Annamalai Chetty did not carry out the terms of the agreement and we may, therefore, dismiss him from consideration. So far, therefore, as the applicant in the present application is concerned, he has got a valid title to the property which cannot be impeached by the Nadars. He also got symbolical possession from Court. As the property is in the possession of the tenants the only possession he can get is symbolical possession under O. 21, R. 96, of the Civil Procedure Code. He also got rental agreements from the tenants and according to his affidavit filed with the application, he got possession from the tenants but in getting the harvested crops, he is being obstructed by one Singaravelu Nadar, who purports to act on behalf of defendants 2 to 5. The present application is for an injunction restraining the defendants and Receivers from interfering with the possession. So far as the defendants are concerned, it is alleged that, Sir M. C. T. Muthia Chetty is under an agreement to reconvey the property to them and that he has received Rs. 85,000 deposited with him by the deceased Guruswami Nadar in the name of his wife Rajarajeswari Ammal and a sum of Rs. 12,000 deposited by the 1st defendant. Out of this sum of Rs. 12,000 the first defendant has already withdrawn Rs. 5,000 to meet payments directed by an order of this Court. It seems to me that it is unnecessary to decide on this application whether there was or was not an agreement to reconvey the property. No writing is produced evidencing the agreement to reconvey to the Nadars. That agreement under S. 54 of the Transfer of Property Act conveys no title in the property. It is an executory contract which has to be fulfilled by the Nadars by paying the balance of the purchase money, even if their case is true, and executing a sale deed after the payment of the moneys due. It is not necessary to go into this question in this application and I shall say nothing as regards the rights of the parties under the agreement. It is enough to state that so far as the Civil Procedure Code and the Transfer of Property Act are concerned there can be no question of the purchase having been made benami or of any possession having passed under the agreement. As a matter of fact, having regard to the Full Bench decision in 29 Mad. 331, an agreement to sell gives no right to the parties to remain in possession and if they were in possession, the person having valid title can eject them. That being the case, it seems to me the question is whether on this application having regard to what has happened, the applicant is not entitled to ask that the title which he has got by the Court sale and possession he has got thereunder by O. 21, R. 96, and the tenants attorning to him, should not be maintained. A preliminary objection is taken that the Court has no jurisdiction to pass an order on an application in a suit to which the applicant is not a party. When a Receiver has been appointed, I see no valid objection to third party whose property is being interfered with under a claim by a Receiver or the parties to the suit from applying to the Court for redress. The only other way in which the applicant can have any redress would be to file a separate suit, getting the leave of this Court and implead the Receivers and then ask by means of an application that the parties to that suit and the receivers should be restrained from interfering with his rights. I think the authorities are clear. In cases where the Court can give adequate relief where a Receiver has been appointed, the proper course for the Court will be to pass directions on this application and not compel or drive the applicant to file a separate suit and render the

estate liable for costs. The authorities referred to by the Advocate-General 17 Cal. 205; 15 C. W. N. 27 and 366; 36 Cal. 713; 60 Eng. Reports 693 which was confirmed on appeal in 42 Eng. Reports 344, and Woodroffe on Receivers, p. 74, support the view that the proper course is an application to be made in the suit in which Receivers have been appointed. When the Receivers are appointed in this suit they represent the parties and the properties are in *custodia legis*. It seems to me to be unnecessary to compel the applicant to file a separate suit against the Receivers and parties for an injunction and for other reliefs which only throw additional burden on the estate. I am, therefore, of opinion that I have got jurisdiction to pass an order. On the merits, it seems to me, none of the parties to the suit have got any right, under colour of an alleged title to the property, to interfere with the possession of third persons. The attorney for the Receivers states that he has has done nothing to interfere with the possession of Sir M. C. T. Muthiah Chetty and that he does not want to do anything : but the position taken up by Mr. K. Ramachandran for defendants 2 to 5 is certainly ambiguous. He states that though it is alleged Sivalinga Nadar is interfering with the possession of the applicant on behalf of defendants they did not give him authority to do any unlawful act. But there can be little doubt that Sivalinga Nadar is there on their behalf and that he is doing his best to see that the tenants do not pay any rents to Sir M. C. T. Muthiah Chetty as they are bound to do. I think, therefore, injunction should be granted. There will be an injunction restraining 1 and 2 plaintiffs and their next friend and 1, 2 and 3 defendants from interfering with the possession of the applicant. 1, 2 and 3 defendants will pay the taxed costs of these applications. The taxed costs of the Receivers will come out of the estate.

Applications allowed.

1923 Madras, 306.

SCHWABE, C. J. AND WALLACE, J.

Para Dekkan (alias) Peria Pachai and another ... (Appellants) Plaintiffs.

v.

Khan Bahadur T. Ameeruddin Sahib by agent T. S. Raghupathi Iyer... (Respondent) —Defendant.

S. A. No. 1310 of 1921, dated 13th November 1922, against the decree of the Dt. Court of North Arcot at Vellore in A. S. No. 141 of 1920.

Madras Estates Land Act, S. 26—Tenant paying lesser rent from inception under agreement, not affected by S. 26.

S. 26 is dealing with cases where there has been an actual prior rent greater than the rent claimed by the tenant and does not deal with a case where a ryot is setting up that *ab initio* the rent payable was the lower rent and setting up that the terms of tenancy always had been the lower rent but to be increased to the higher rent in certain eventualities. The lawful rent payable is not necessarily or invariably the faisal rate fixed by Government but may be a contract rate on which the occupancy is based.

This is a matter which has to be proved.

[P. 307, Col. 2.]

A. C. Sampath Aiyangar—for the Appellants.

A. Visvanatha Iyer—for the Respondent.

SCHWABE, C. J.—This is an appeal from the judgment of the District Judge of North Arcot who reversed the decision of the Sub-Collector of Tirupattur, Mr. V. P. Row. The suit was by ryots to compel the mittadar under whom they held the land to grant them patta at a rent of Rs. 12-1-3 per annum. The defendant's claim was that they were only entitled to have the land at a rent of Rs. 25-7-10.

It appeared on the evidence that, so far as could be traced back the amount actually paid has always been Rs. 12-1-3 and not Rs. 25-7-10. But it also appeared from certain documents produced that the Rs. 12-1-3 was arrived at by a deduction from the sum of Rs. 25-7-10. The mittadar set up that the reason of this was that the land had originally been held by a karnam or a gumastah and that in consideration of services rendered in those capacities, the full rent of Rs. 25-7-10 had been reduced to Rs. 12-1-3. The mittadar wholly failed to prove any such case. In fact it was established quite clearly on the

evidence that this lower amount of rent had been paid by persons, who were not in the position either of karnams or gumastahs who enjoyed the land. Another reason for the payment of lower amount was given in the evidence on behalf of the plaintiffs. Their account was that a considerable part of the land owing to its saline nature, was not under cultivation and never had been under cultivation and that throughout the terms of the occupancy were that although the full amount of rent for the whole land at the local current rate for cultivable lands would be Rs. 25-7-10 so long as the part remained owing to its saline nature uncultivable, the amount payable should be Rs. 12-1-3. The learned Sub-Collector who heard the case and heard the evidence accepted that view and in my judgment, he was perfectly right to accept it on the evidence that he received, of the value and the condition of the land and the way in which this lower rate has been received for a very long time.

It was then contended on behalf of the Mittadar that in certain documents apparently of a recent date, the word used for describing the deduction was 'riyayat' and that this word means, and can only mean a "voluntary remission by the landholder or by Government." As to this, the learned Sub-Collector did not attach any weight to the use of the word. He said that the exact meaning was not beyond doubt and that to translate it as "remission" was to prejudice its nature, for remission is *prima facie* a matter of grace and indulgence. He said he would prefer to translate it as 'deduction'. When the case came before the District Judge, he based his whole judgment on the meaning of this word, and in order to ascertain it he turned to Maclean's Manual of Administration in Madras, where the word is somewhat differently spelt, and stated to be derived from Arabic 'rau' meaning 'to abstain' and is then translated "favour, specially a remission of the Government claim." The District Judge read that to mean a voluntary remission. Having so satisfied himself that it was the only meaning of the word, he decided the case accordingly. A little further investigation into other recognised works of reference might have resulted in his considering that the point was not quite so clear, for in the "Manual of North Arcot District", the word is merely translated as "an abatement of assessment," and in Wilson, the words used are capable of meaning an "abatement" either in the sense of voluntary or compulsory remission of rent. In any view, there is no help to be gained in the proper decision of this case from the use of the word 'riyayat'.

There were then two other words which appeared in the document of 1885, the words being 'istamulla varayil' (meaning, "so long as it pleases") and they are put with the words 'riyayat' against the figure showing the whole amount of remission allowed in the case of this village. The only evidence as to this document is that of the writer of part of it. It was an account of the rents of this village written in Telugu and a summary of these was written in Tamil by the witness, D. W. 2 who says that he wrote it while he was sixteen years old and was learning with his father to be a karnam, the father at the time being the karnam in charge. That he or his father had any knowledge of these remissions of deductions or that they ever considered whether any and which of these were voluntary or involuntary does not appear and I agree with the view taken by the Sub-Collector that the use of those words in that particular document does not carry the matter any further.

It was then argued before us and our attention has been called to cases in support of this argument that under S. 26 (1) and (3) of the Madras Estates Land Act it was not open to the plaintiffs in this case to prove the agreement they alleged, namely that the rent should be so much so long as the land remained saline, and so much more if it became cultivable. I do not think that the case cited to us, *Karuppa Kavundan* v. *Narayana Chettiar* (1) and *Palani* v. *Paramasiva* (2) decide anything of the kind. Nor do I think that that is the proper interpretation of the section of the Madras Estates Land Act of 1908. S. 26 is dealing with cases where there has been an actual prior rent greater than the rent claimed by the tenant and does not deal with a case where a ryot is setting up that *ab initio* the rent payable was the

1. (1918) M. W. N. 188=24 M. L. T. 35=7 L. W. 376=45 I. C. 406.
2. (1890) 13 Mad. 479.

lower rent and setting up that the terms of tenancy always had been the lower rent but to be increased to the higher rent in certain eventualities. In my judgment, it makes no difference that in various documents it is described as a higher rent reduced to a lower amount, those even-atulities not having happened.

A point was taken under the limitation clause of the Madras Estates Land Act, but the point was not raised by the pleadings or in the Court of first instance. An attempt was made to raise the point before the District Judge and the District Judge in my judgment, perfectly rightly, refused to go into it, for he pointed out that if it had been raised, the plaint might perhaps have been amended, or the suit withdrawn at once and a fresh suit filed then and there. Now, I do not wish unnecessarily to discuss to what extent this Court ought to listen to points under the Limitation Act not taken in the Court below. We must strongly be inclined not to do so, but where a point of limitation of this nature, which is a mere objection to the suit then before the Court does not in the least affect the rights of the parties because it is admitted in this case that if the point had been taken and succeeded, a fresh suit could have been brought the next day, I should hesitate very much before I should allow the point to be taken because the presumption that I should make is this: that for some reason of which we have no knowledge, it has been definitely decided by the appellant in the first instance not to raise the point knowing either that a good answer might be made to it if taken or knowing that if he takes it and succeeds he will have to face a fresh suit the next day with the ame result but that additional costs will have to be incurred by both parties. In thse circumstances, I do not think it is a proper case for us to allow the raising of such points at this stage.

It follows from the view that we take of this case that if the saline portion of the land becomes cultivable it will be open to the mittadar to take proper steps to have the rent increased.

For these reasons in my judgment, the judgment of the Sub-Collector was right and the judgment of the District Judge was wrong. This appeal must be allowed with costs.

WALLACE, J.—I agree.

I only wish to say as regards the interpretation of S. 26 (3) that it does not seem to me that "the lawful rate payable" is necessarily or invariably the faisal rate fixed by Government but may be a contract rate on which the occupancy is based. This is a matter which has to be proved and in this case, on the evidence, it appears to me that the lawful rate payable was the contract rate *viz.* Rs. 12-1-3, a permanent deduction from what would have been the rent if the whole land was cultivable having been allowed, because it was saline and so long as it remained so.

I therefore agree the patta is a proper patta in terms of Ex. B and the plaintiff's suit must be allowed.

Appeal allowed.

1923 Madras, 308.

SPENCER AND VENKATASUBBA RAO, JJ.

V. Parthasarathy Aiyangar and others ... Plaintiffs.

v.

Doraiswami Naicker and another ... Defendants.

R. C. No. 6 of 1922, dated the 15th November 1922.

Madras City Tenants Protection Act, S. 9—Tenant of trust land.

The trustees of temples, mosques, and other religious endowments are "landlord" within S. 2 of Madras Act No. III of 1922, as they certainly are persons entitled to collect the rent of the land on behalf of another person. The Legislature did not intend to so endanger the preservation of trust properties as to include them under the definition of "land" which can be conveyed "under any power." Therefore a tenant cannot compel a trustee of a temple to sell the land on which the tenant has constructed a building. [P. 309, Cols. 1, 2.]

N. Srinivasachariar—for the Plaintiffs.

C. Aiyasami Sastry—for the Defendants.

SPENCER, J.:—The question referred to us is whether a tenant in occupation of trust lands belonging to a temple or mosque can enforce a complusory sale under S. 9 of the Madras City Tenants Protection Act and require the temple or mosque to deliver the land to him on a valuation to be made by the Court.

There is no difficulty to my mind in including the trustees of temples, mosques and other religious endowments within the definition of "landlord" in S. 2 of Madras

Act No. III of 1922, as they certainly are persons entitled to collect the rent of the land on behalf of another person. A greater difficulty arises when we come to consider S. 9. This section provides for the compulsory sale by a landlord of land in the possession of a tenant in the City of Madras from which the tenant is sought to be ejected in a suit instituted under the Presidency Small Cause Courts Act. The explanation to this section defines "land" as "the interest of the landlord in the land and all other interests which he can convey under any power." What are the interests which he can convey under any power? If they signify easements and other subsidiary interests, it would have been easy for the Act to so describe them. If the title to the land is intended to be included, has a trustee power to convey it? In *Palaniappa Chetty* v. *Sreemath Devasikahmoney Pandara Sannadhi* (1) the Judicial Committee quoting the words of Lord Justice Knight Bruce in *Hanooman Persaud Pandy* v. *Mussammat Babooee Munraj Koonwaree* (2), observe "the power of the Manager for an infant heir to charge an estate not his own is under the Hindu Law a limited and qualified power. It can only be exercised rightly in a case of need, or for the benefit of the estate." And at page 716 quoting Sir Montague E. Smith's words they say; "There is no doubt that, as a general rule of Hindu Law, property given for the maintenance of religious worship and of charities connected with it, is inalienable." Then they proceed to consider what kind of benefit will justify an absolute alienation of temple property. Among benefits to an estate they include the preservation of the estate from extinction, the defence against hostile litigation affecting it, the protection of it from injury or deterioration. These and such like things they say would obviously be benefits. In *Bawa Magniram Sitaram* v. *Kasturbai Manibhai* (3), there is an observation: "The disability of a *shebait* to make a permanent grant is not absolute." A trustee then, like the guardian of an infant, has power to convey portion of the *corpus* of trust property under circumstances of necessity or where the conveyance will be for the benefit of the estate. As the Act which we are considering creates a statutory necessity for landlords to sell portions of their land where the conditions fulfil the terms of the Act, it may be argued that even trustee landlords are under the necessity of selling land to their tenants as provided in S. 9. A similar statutory necessity arises when land is acquired by Government under the Land Acquisition Act. S. 31 of that Act speaks of persons "having a limited interest" in land and provides for cases where there is "no person competent to alienate the land." S. 32 also speaks of certain persons as having "no power to alienate" lands acquired under the Act. In *Kamini Debi* v. *Pramatha Nath Mookerjee* (4) Mookerjee, J. observes that trustees will come under the category of persons who have "no power to alienate" land dedicated to an idol or to religious and charitable purposes. In this Presidency also it is the practice to apply these sections whenever land belonging to temples and mosques is acquired for public purposes. But S. 32 provides a safeguard for the preservation of the money awarded as compensation by directing that it shall be invested in the purchase of other lands and meanwhile deposited or invested in some approved securities. Madras Act III of 1922 does not contain any such safeguard. The presumption, therefore, is that the Legislature did not intend to so endanger the preservation of trust properties as to include them under the definition of "land" which can be conveyed "under any power." I am, therefore, of opinion that the question referred to us should be answered in the negative.

VENKATASUBBA RAO, J.:—I entirely agree.

The question to be determined in this reference is whether a tenant cannot compel a trustee of a temple under S. 9 of the Madras City Tenants Protection Act (Madras Act No. III of 1922), to sell him the land on which the tenant has constructed a building. The point has been refer-

1. (1917) 40 Mad. 709 (715)=44 I. A. 147 =21 C. W. N. 729=15 A. L. J. 485=1 Pat. L. W. 697=33 M. L. J. 1=19 Bom. L. R. 567=22 M. L. T. 1=1917 M. W. N. 507=26 C. L. J. 153= 6 L. W. 222=39 I. C. 722 (P. C.).

2. (1856) 6 M. I. A. 393=18 W. R (P. C.) 81.

3. (1922) P. C. 163=49 I. A. 54=46 Bom. 481 =26 C. W. N. 473=30 M. L. T. (P. C.) 268 =24 Bom. L. R. 584=20 A. L. J. 871= 1922 M. W. N. 319=35 C. L. J. 421=66 I.C. 162.

4. (1911) 39 Cal. 33 (38)=13 C. L. J 597= 10 I. C. 491.

red for the opinion of the High Court by the Judge of the City Civil Court, Madras, who states that more than a hundred ejectment suits are now pending disposal in respect of land belonging to a temple or a mosque or other charitable or religious trust and that he entertains considerable doubt regarding the interpretation of the word 'land' in S. 9 of the said Act.

The object of the Act is stated to be to give protection to tenants who in many parts of the City of Madras have constructed buildings on other's lands in the hope that they will not be evicted so long as they pay a fair rent for the land.

S. 3 provides that every tenant shall on ejectment be entitled to be paid as compensation the value of any building erected upon the land.

S. 4 enacts that, in a suit for ejectment in which the landlord succeeds, the Court shall ascertain the amount of compensation payable under S. 3, and direct that, on payment by the landlord of the amount so found due, the tenant shall put the landlord into possession of the land with the building thereon.

It will be seen that the effect of Ss. 3 and 4 is that the landlord becomes on payment of a price the owner of the tenant's building.

S. 9 provides for cases where tenants are not anxious to obtain compensation for the buildings, but on the contrary are desirous of obtaining the land on which the buildings stand. It enacts that any tenant, who is entitled to compensation under S. 3 and against whom a suit in ejectment has been instituted, may apply to the Court for an order that the landlord shall be directed to sell the land for a price to be fixed by the Court. The Court shall then fix the price and shall order that the tenant shall pay into Court the price so fixed. On payment of the price the Court shall pass a final order directing the conveyance of the land by the landlord to the tenant. Under S. 9, therefore, the tenant instead of parting with his building, becomes the owner of the land on which the building has been constructed.

The term 'landlord' is defined by clause 3 of S. 2. "Landlord" means any person owning any land, and includes every person entitled to collect the rent whether on his own account or on behalf of another person or by virtue of any transfer from the owner or of any order of a competent Court or of any provision of law.

The definition is comprehensive enough to include trustee of a charitable endowment. I may state that a farmer of rents, a usufructuary mortgagee, a receiver appointed by Court, a committee of a lunatic or a guardian of a minor would undoubtedly come within the definition. But the difficulty is created by the explanation to S. 9. It runs thus: "'Land' means the interest of the landlord in the land and all other interests which he can convey under any power". A person absolutely owning the land can convey it, but what is the interest that can be conveyed in the case of a person who is entitled to an interest short of absolute ownership? If a lease is granted by a usufructuary mortgagee or by a lessee for a term of years, if either of them files a suit against a tenant who has erected a building, it cannot possibly be contended that by a conveyance under S. 9 a higher right can pass to the tenant than is possessed by the mortgagee or the lessee, the plaintiff in the suit. But there is a class of landlords who occupy a position very different from that occupied either by absolute owners or persons with admittedly a very limited right in the property such as lessees for a term of years or usufructuary mortgagees. To take only a few cases, managers of joint undivided Hindu families, Hindu widows, trustees of temples or other religious endowments, and guardians of minors would fall in this category. There are no words in the Act which indicate the intention of the legislature in regard to these various classes of landlords. It is indeed strange that an Act, whose assumed object is to afford protection to tenants should be silent on matters so vital as this. On behalf of the tenants it has been argued before us that we must presume that the legislature intended to protect tenants irrespective of considerations that have reference to the extent of interest possessed by the landlords in the land leased. I do not think we would be justified in presuming anything of the kind. We must gather the intention of the Act, if possible, from the words used.

What is the meaning of the words 'under any power,' used in S. 9? The word 'power' occurs both in Indian Acts and decisions of the Judicial Committee of

the Privy Council and of various Courts in India.' Confining my observations to the case of trustees, I may first refer to *Prosunno Kumari Debya* v. *Golab Chand Baboo* (5) where Sir Montague E. Smith in delivering the judgment of their Lordships observes: "But notwithstanding that property devoted to religious purposes is, as a rule, inalienable it is, in their Lordships' opinion, competent for the shebait of property dedicated to the worship of an idol to incur debts and borrow money for the proper expenses of keeping up the religious worship, repairing the temples or other possessions of the idol, defending hostile religious attacks and other like objects. The *power*, however, to incur such debts must be measured by the existing necessity for incurring them. The authority of the shebait of an idol's estate would appear to be in this respect analogous to that of the manager for an infant heir."

Regarding the power of the manager for an infant heir, the observations of Lord Justice Knight-Bruce in *Hanooman Persaud's case*, (2) are quoted. "The power of the manager for an infant heir to charge an estate not his own is, under the Hindu law, a limited and qualified power. It can only be exercised rightly in a case of need or for the benefit of the estate."

In *Palaniappa Chetti* v. *Daivasikhamani* (1) the power of a trustee to grant a permanent lease of temple lands was considered. Their Lordships of the Judicial Committee held that, unless a trustee is constrained thereto by unavoidable necessity or any benefit accrued to the charity, he cannot grant a lease in perpetuity of debuttar lands at a fixed rent. They observe that it is impossible to give a precise definition of "benefit to the estate", but they indicate that the preservation of the estate from extinction, the defence against hostile litigation affecting it, the protection of it or portions from injury or deterioration by inundation would be benefits.

Referring to *Hanooman Persaud's case* (2) their Lordships observe; "In that particular case in reference to which this language was used, the 'necessity' for the loan would appear to have been plain and imperative, the benefit to the estate, the preservation of its existence, obvious."

5. (1877) 2 I. A. 145 (151)=4 B. L. R. 450=3 Sar. 449=23 W. R. 253=3 Suther. 102.

This and similiar passages in the judgment will make it clear that the word 'benefit' is used in this context in a special sense.

In the course of the judgment their Lordships further observe that it is a breach of duty on the part of a shebait in the absence of necessity or benefit to grant a lease in perpetuity at a fixed rent.

An argument was advanced before the Judicial Committee that the charity will be benefited by a transaction which put at the shebait's disposal a sum of money capable of being profitably used. Their Lordships say that no authority has been cited giving any countenance to the notion that a shebait is entitled to sell debuttar lands solely for the purpose of investing the price so as to bring in an income larger than that derived from the probably safer and certainly more stable property, the land itself.

These principles have not in the slightest degree been departed from in *Bava Magniram Sitaram* v. *Kasturbhai Manibhai* (3) where it was held that the disability of a shebait to make a permanent grant is not absolute and that although the manager for the time being has no power to make a permanent alienation in the absence of proved necessity, yet the existence of justification may be presumed from the long lapse of time between the alienation and the challenge of its validity. In that particular case there was an interval of a hundred years between the date of the alienation and the date of challenge of its validity.

It is not necessary to refer to further decisions on this subject and it may be taken to be settled law that the power of a trustee of temple property is limited and that an alienation by him in the absence of necessity or benefit will not be upheld.

This being the state of the law, what do the words under any power' in S. 9 connote. Can it be said that the trustee can convey the interest which he can convey only when necessity exists or when the alienation is for the benefit of the estate?

In other words, if the construction urged on behalf of the tenants is adopted, the explanation to S. 9 will be equivalent to this: Land means the full interest which a trustee can convey under the power possessed by him to convey trust property when necessity exists or the alienation is for the benefit of the estate.

I do not think that this construction can be adopted. It has been argued that there is a statutory liability imposed in virtue of the Act itself upon trustees to convey the land and that this constitutes sufficient necessity to justify an alienation. This argument begs the question because the point to be decided by us is—Does the Act impose such a statutory liability?

The decisions bearing upon the interpretation of the word 'power' used in various Acts such as the Civil Procedure Code and the Insolvency Act give us very little assistance in understanding the expression 'under any power' in S. 9. I may refer to *Fakir Chand Mothi Chand* v. *Mothi Chand Jurreck Chand* (6) which deals with the power vested in the Official Assignee to dispose of the insolvent's son's interest in ancestral property for the payment of his debts and two other similar cases, *Rangayya Chetty* v. *Thanickachala Mudali* (7) and *Nunna Setti* v. *Chidara Boyina* (8), I may also refer to *Jagabhai Lalu Bhai* v. *Bhukandoss Jagivandoss* (9) which refers to the expression in S. 263 of the Civil Procedure Code (Act XIV of 1882) "has a disposing power which he may exercise for his own benefit."

The provisions of the Land Acquisition Act I of 1894 seem to me to furnish a guide in regard to the determination of the question at issue. In that Act are to be found three expressions, (1) persons 'interested in the land' (2) persons 'entitled to act' (3) persons 'competent to alienate the land' or 'having power to alienate the same.' S. 3 (*g*) mentions trustees among persons 'entitled to act.' The clause runs thus: 'The following persons shall be deemed persons entitled to act as and to the extent hereinafter provided, that is to say, trustees, for other persons beneficially interested, shall be deemed the persons entitled to act with reference to any such case and that to the same extent as the persons beneficially interested could have acted if free from disability.'

If there are no persons competent to alienate the land the Act prescribes that the compensation shall be deposited in Court and the Court shall order the money to be invested in the purchase of other lands. In *Kamini Debi* v. *Pramatha Nath Mookerjee* (4) and *Rama Prasanna Nandi Chowdhuri* v. *Secretary of State for India* (10), it was held that a shebait is a person incompetent to alienate for the purposes of Ss. 31 and 32 of the Land Acquisition Act (Act I of 1894).

S. 10 contemplates the various interests possessed by co-proprietors, sub-proprietors, mortgagees and tenants.

Ss. 29 and 30 deal with the apportionment of the compensation.

In great detail provision is made in the Land Acquisition Act to safeguard the interests possessed by various persons in the land acquired. No such provisions are to be found in the Act under consideration. Are we to assume that the legislature intended that the trustee should be compelled to sell the land and that he should *in lieu* of it receive money which should be thenceforward at his absolute disposal? If the lands in possession of trustees were intended to be included, certainly we should expect to find some provision in the Act dealing with [illegible] vestment of the funds. To [illegible] construction suggested on be[illegible] tenants would be in effect to b[illegible] legislature intended the conversi[illegible] lands into money without provi[illegible] the protection of the money so obtained.

We cannot assume that breaches of trust were intended to be facilitated by the Act.

These observations may apply to the cases of all limited owners, but we have nothing to do with the consequences that may follow from our interpretation of the sections of the Act. If the legislature deems it necessary or desirable to extend further protection to tenants, the Act may be amended but we have nothing to do with it.

It is said that this interpretation will cause hardship to the tenants. Under S. 9 the tenant *may* apply for an order directing the landlord to sell the land. There is nothing in the section to compel the tenant to do so. On his applying for a direction the Court is required to pass an order directing the conveyance of such interest as the landlord can pass. If the landlord cannot pass any interest the tenant cannot acquire it.

6. (1883) 7 Bom. 438 at p. 441.
7. (1895) 19 Mad. 74.
8. (1902) 26 Mad. 214.
9. (1886) 11 Bom. 37.
10. (1913) 40 Cal. 895=19 C W. N. 652=22 I. C. 272.

tenant, it is too late for the tenant to apply to the Court that passed the decree for an order directing the landlord to sell the land to him. On this ground the application must fail and the appeal is therefore dismissed with costs.

VENKATASUBBA RAO, J. :—I am also of the opinion that the appeal should be dismissed with costs.

The suit was in ejectment and the City Civil Court passed a decree on the 13th August, 1920, and it was confirmed in appeal by the High Court on the 7th February, 1922. The Madras City Tenants Protection Act (Act III of 1922), came into operation on a subsequent date. *See* S. 81 of the Government of India Act, 1915. The defendant was a Mahomedan woman. Her daughters applied to the City Civil Court on the 27th February, 1922, some time after the Act came into force, for an order under S. 9 to direct the plaintiff to sell the land on which the superstructure stands for a price to be fixed by the Court. The learned City Civil Judge dismissed the application on the ground that the petitioners should get their title declared to succeed to their mother, apparently being of the opinion that he could not decide in the proceedings before him, the question as regards their title to represent the deceased defendant. In this he was obviously wrong. It was his duty to have adjudicated on their title if there was any contest regarding it. The defendant was either a tenant liable to pay rent or a person who continued in possession after the termination of the tenancy. *See* S. 2 Cl. (4). The legal representatives of the defendant would be entitled to the same rights as herself.

But the appeal may be disposed of on another ground which is fatal to the appellants. S. 9 refers to a tenant against whom a suit in ejectment has been instituted. The words 'has been' are material. I do not think a tenant, against whom a decree for ejectment was passed prior to the coming into force of the Act, can apply under S. 9. S. 10 places the matter beyond doubt. It refers to suits 'which are pending' or 'in which decrees for ejectment . . . . . have been passed but have not been executed before the coming into force of this Act.' A distinction is made between suits which are merely pending and those in which decrees in ejectment have been passed. S. 10, while stating that Ss. 4, 5, 6 and 8 shall apply to suits which are pending or in which decrees for ejectment have been passed, makes no reference to S. 9.

I therefore hold that the appellants are not entitled to make an appliaction under S. 9. *Appeal dismissed.*

1923 Madras. 321.

WALLACE, J.

Jagannatha Sastry ... (Petitioners.)

v.

Sarathambal Ammal and others ... Respondents.

C. R. P. No. 308 of 1922, dated 30th November 1922, under S. 115 of Act V of 1908 and S. 107 of the Government of India Act praying the High Court to revise the order of the Court of the District Munsif of Mayavaram, dated 22nd February 1922.

Civil P.C., O. 26, R. 1—O. 16, R. 19—Revision.

The balance of authority is in favour of the view that, (1) ordinarily, in the case of a witness not under the control of the party asking for the commission, who resides beyond the limit fixed under O. 16, R. 19 (*b*) C. P. C. a commission should issue as a matter of right, unless the Court is satisfied that a party is merely abusing its authority to issue process, and (2) that is not for the Court to decide whether the party will be benefited thereby or not ; that is a matter entirely for the party. It is clearly the duty of High Court to interfere, even in interlocutory proceedings, rather than permit a trial to go on an illegal course, which must entail unnecessary expenses to the parties and useless waste of time. [P. 322, Col. 1.]

K. Sankara Sastri—for Petitioners.

A. Krishnaswami Iyer and C. A. Seshagiri Sastri—for Respondents.

JUDGMENT :—In this case the lower Court refused to issue a commission for the examination of two of the petitioner's witnesses, who live more than 200 miles from the Court-house, and cannot therefore be compelled to attend by ordinary process.

The petitioner contends that, as a matter of law, the Court was bound to issue a commission. The respondent contends that it was entirely a matter for the discretion of the Court. The point is one on which reported authorities speak with an uncertain voice.

The practice in English Courts undoubtedly is that it is a matter of judicial discretion for the trying Court to issue a commission, and the Calcutta High Court has usually interpreted the pertinent sections of the old and the present Civil

Procedure Codes in that sense : *vide* cases reported in *Amrith Nath Jha* v. *Dhunput Singh Bahadur* (1), *Adamji Khadi Bhai* v. *Issuf Ahmed Mulla* (2), and *A. E. Saleji* v. *Ahmed Munsaji Salaji* (3); though in the 20 W. R. case, it was held that, ordinarily, where the witness is a stranger residing beyond the limit fixed by law for the service of direct process, and is not a person under the control of the party applying for the commission, such a commission should issue. The Calcutta case in *Huree Dass Bysack* v. *Meer Muzzum Hossein* (4) may be read as laying down that a party has a legal right to have a commission issued.

In the Madras High Court, a single Judge in *Chinnu* v. *Sambandha Moorthi* (5) held that the matter is one of judicial discretion, while a Bench in *Sitaramma* v. *Subraya* (6) held that it was a matter of statutory right. From the arguments in the latter case it clearly appears that the issue argued was whether a party had a statutory right to a commission or whether the Court had discretion to refuse it, and the Court held that the former view was correct. In *Veerabadran Chetty* v. *Nataraja Desikar* (7) though the matter of the issue of a commission to a witness more than 200 miles from the Court-house did not arise, it was held that the Court had power to refuse direct process in its inherent power to prevent abuse of its process.

The balance of authority is in favour of the view that, (1) ordinarily, in the case of a witness not under the control of the party asking for the commission, who resides beyond the limit fixed under O. 16, R. 19 (*b*) C. P. C. a commission should issue as a matter of right, unless the Court is satisfied that a party is merely abusing its authority to issue process, and (2) that it is not for the Court to decide whether the party will be benefited thereby or not; that is a matter entirely for the party.

In the present case, the two witnesses for whom a commission was asked are pleaders residing at Salem, more than 200 miles from the Court-house, one being the father of the petitioner. Neither is under his control. The lower Court has given no definite ground for refusing a commission, and certainly it does not say that the petitioner was attempting to abuse its power of issuing process. I am satisfied, that, even if the matter of the issue of the commission was one within its judicial discretion and not a matter of statutory right, it has not exercised that discretion judicially.

Some useful guidance may be gained from a comparison of the language of O. 26, R. 4, C. P. C., with that of R. 1. In R. 1 the word "may" must mean "is given authority to". I am not prepared to accept the respondent's suggestion that the word "may" is explained by, and refers to, no more than the alternative method prescribed of proceeding either by "interrogatories or otherwise." I think that R. 1 clearly means that, in the case of persons who, owing to illness, etc., are unable to attend the Court, the Court cannot refuse to issue a commission. If that is not the meaning of the rule, then it is useless. And if the word "may" implies so much in R. 1, it is reasonable to conclude that in R. 4, where the same phrase is used, it has the same meaning: that is the Court must, when moved, issue a commission.

My view therefore is that the law directs the Court to issue a commission in a case like the present unless it is satisfied, for reasons to be stated, that the request for the commission is an abuse of its process, and that the lower Court has therefore acted contrary to law. In a case where the lower Court has not obeyed the law, I think it is clearly the duty of this Court to interfere, even in interlocutory proceedings, rather than permit a trial to go on on an illegal course, which must entail unnecessary expenses to the parties and useless waste of time.

I therefore set aside the lower Court's order and direct it to issue the commission prayed for by the petitioner; but before issuing the commission it should decide whether the third defendant, the contesting respondent of this petition, is a necessary party to the suit. The petitioner will get his costs in this petition in any event from 3rd defendant. *Petition allowed.*

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1. (1873) 20 W. R. 253.
2. (1912) 16 I. C. 750.
3. (1913) 19 I. C. 643.
4. (1871) 15 W. R. 447.
5. (1914) 15 M. L. T. 339=23 I. C. 522.
6. (1911) 21 M. L. J. 889=12 I. C. 74.
7. (1904) 28 Mad. 28=14 M. L. J. 329.

1923 Madras. 323.

SCHWABE, C. J.

A. S. Krishna Iyer ... Petitioner (Defendant.)

v.

N. Subramania Iyer ... Respondent (Plaintiff).

Civ. Rev. No. 309 of 1922, dated 23rd November 1922, under S. 115 of Act V of 1908 and S. 107 of the Govtenment of India Act, praying the High Court to revise the order dated 27th March 1922.

Presidency Towns Small Cause Courts Act (15 *of* 1882) *Ss.* 41, 47—*Judge has no jurisdiction.*

The words of S. 47 leave no discretion to the Judge of the Court of Small Causes at all. The rule is that when proceedings of a summary nature are taken under S. 41, the occupant whom it is proposed to eject shall have a right to say to the Small Cause Court. "I want to have this case tried in the High Court and I am prepared to bind myself with two sureties for the probable costs of the suit. Such an application need not be supported by an affidavit. It is not open to the Judge to dismiss the application as frivolous on the ground that it was not supported by an affidavit unless it was called for. The words "on an application" in s. 47, do not mean at some early time during the currency of such proceedings. They mean at any time during the currency of the proceedings.

W. V. Rangaswami Aiyangar—for the Petitioner.

S. Venkatarama Iyer—for the Respondent.

JUDGMENT :—In this case the learned Judge of the Court of Small Causes has held that he has a discretion under S. 47 of the Presidency Small Cause Courts Act as to whether or not to stay a suit in the Small Cause Court pending a suit in the High Court when the occupant is prepared to bind himself with sureties to institute a suit for compensation for trespass. He says that the application is not *bona fide*, and he bases his decision on the acts of the occupant, that he has already delayed proceedings in the Small Cause Court under S. 41 and in a manner which quite properly did not commend itself to the Judge of the Small Cause Court : and he also puts his decision on another ground, namely, that the application was not supported by an affidavit. The case here is also argued on a further ground, namely, that, in S. 47, the words "whenever on an application being made under S. 41" mean at some early stage in the proceedings on that application, it is suggested, either at the first hearing or within a reasonable time thereafter. In my judgment, the words of the section leave no discretion to the Judge of the Court of Small Causes at all. The rule is that when proceedings of a summary nature are taken under S. 41, the occupant, whom it is proposed to eject shall have a right to say to the Small Cause Court,

"I want to have this case tried in the High Court and I am prepared to bind myself with two sureties for the probable costs of the suit."

In my judgment, the legislature, in its wisdom, in S. 47 gave no discretion to any one to refuse such an application when made. I can find no ground to say that such an application must be supported by an affidavit. My attention has not been called to any rule to that effect and the statute says nothing about affidavits, though I must not be understood to say that the learned Judge would not be justified, if he thinks that the application was not a genuine one at all, in adjourning the case for some short time for an affidavit.

Generally I should think he would be satisfied on the material before him namely, a statement in writing by the vakil for the first defendant and the first defendant saying that they are ready to file a suit in the High Court and to give the necessary bond though there may be cases where he would be justified in requiring more, and then it would be open to the Small Cause Court Judge to call upon them to put in an affidavit. In my judgment it was not open to him to dismiss the application as frivolous on the ground that it was not supported by an affidavit.

As to the point taken as to the proper interpretation of the words "on an application" in S. 47, that these words mean 'at some early time during the currency of such proceedings. I can find nothing in the Act to justify such an interpretation. It seems that the idea of the Act was that these proceedings are not to last long and I think it was intended that at any time during the currency of the proceedings' these applications could be made and I am confirmed in this view by the sub-clause to S. 47 which obvious-

ly contemplates such an application being made after an order has been made under S. 43 of the Act.

This revision petition must therefore be allowed with costs and the case must go back to the Small Cause Court to proceed according to the provisions of S. 47 as explained above.

Petition allowed.

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* **1923 Madras. 324.**

KRISHNAN, J.

Arunachala Thevan ... Petitioner (Complainant).

v.

Vellachami Thevan and another ... Respondents (Petitioner and Accused).

Petition Nos. 373 and 322 of 1922, dated 13th November 1922, under Ss. 435 and 439, Cr. P. C., 1898, and S. 107 of Government of India Act to revise order of Sub-Magistrate of Uslampatti, dated 29th November 1920 and made on the petition of Criminal Appeal No. 94 of 1920.

Cr. P. C., Ss. 517 and 520—Power of Sub-Divisional Magistrate in appeal.

The District Magistrate alone can pass orders on an application under S. 520, when such an application is made to itself. But where on hearing an appeal against a conviction, the Sub-Divisional Magistrate is asked to set aside an order under S. 517, he can, treating it as part of the proceedings in the appeal itself, make an order under S. 520, for the disposal of the property concerned in the case. When a District Magistrate has directed a case or a certain class of cases to be heard by a Sub-Divisional Magistrate, and under S. 407 he hears the appeal, his Court comes within the words "Court of Appeal" as used in S. 520 for that particular case or class of cases. Moreover S. 423 (*d*) authorises appellate Magistrates to pass consequential orders, and orders under S. 520 are usually consequential orders based on the findings in the Appeal. When an appeal is confined entirely to a question of disposal of property, the District Magistrate should hear the petition. Ordinarily in such cases it is desirable that notice should be given, especially if the order is not passed on the day the appeal is disposed of; but there is no rule of law that requires that such notice is absolutely necessary. The words 'and make any further orders that may be just' are quite wide enough to empower the Court to direct the return of property.

[P. 324, Col. 2; P. 325, Cols. 1, 2.]

S. Subramania Aiyar—for the Petitioner.

K. Ramanatha Shenai — for the Respondent.

ORDER :—This is an application by the complainant in C. C. No. 422 of 1920, on the file of the Second Class Magistrate of Tirumangalam, to have an order passed by the Sub-Divisional Magistrate of Usilampatti, who heard the appeal against the conviction in that Calendar Case, regarding the disposal of two bulls which formed the subject matter of the complaint set aside.

The complainant's case was that the bulls were entrusted to the accused, and that he committed breach of trust in respect of them. The accused was convicted in the first Court, and the bulls were ordered by that Magistrate to be handed over to the complainant under S. 517, Criminal Procedure Code. On appeal the conviction was reversed by the Sub-Divisional Magistrate, but apparently he forgot to pass any orders regarding the bulls at the time. A month afterwards on a petition filed by one Vellachami Thevan, the person from whom the bulls were seized, he passed an order directing that the two bulls should be handed over to him, and this order he passed without any notice to the complainant. It is this order that the complainant asks this Court to revise.

Several points are taken before me in revision. It is first argued that the Sub-Divisional Magistrate had no jurisdiction whatever under S. 520, Criminal Procedure Code, to pass the order that he did pass. It seems to me that this depends on the question whether the petition filed a month after the disposal of the Appeal could be considered as part of the proceedings in the Appeal itself or a new proceeding altogether. If it is to be treated as a new proceeding, I must follow the ruling of this Court in *Jogi Venkiah* v. *Station House Officer of Narsapur*, (1) which says that the District Magistrate alone can pass orders on an application under S. 520, when such an application is made to itself. But I have no doubt that that ruling will not apply, where, on hearing an appeal against a conviction the Sub-Divisional Magistrate is asked to set aside an order under S. 517. It seems to me that he can, treating it as part of the proceedings in the appeal itself, make an order under S. 520, for the disposal of the property concerned in the case.

1. 1922 Mad. 78=1922 M. W. N. 191=30 M. L. T. 251=42 M. L. J. 401=15 L. W, 534=67 I. C. 339.

I sent for the records of the two cases cited in, namely, Criminal Revision Case No. 525 of 1905 and 84 of 1908 and I find they are both cases where the applications were confined to S. 520, and were entirely unconnected with any Criminal Appeals. The expression in S. 520 " any Court of Appeal " has no doubt been construed in these cases as meaning " Courts to which appeals ordinarily lie " ; but, I think, when a District Magistrate has directed a case or a certain class of cases to be heard by a Sub-Divisional Magistrate, and under S. 407 he hears the appeal, his Court comes within the words "Court of Appeal" as used in S. 520 for that particular case or class of cases. In fact, it is the common practice in this Presidency for such Magistrates to pass orders under S. 520, if necessary, when disposing of the appeal. I see no reason to interfere with this practice. Objection has never been taken to such orders as having been passed without jurisdiction. It will also be noted that S. 423 (*d*) authorises appellate Magistrates to pass consequential orders, and orders under S. 520 are usually consequential orders based on the findings in the Appeal. According to the contention of the petitioner in every case where some question of disposal of property comes in, the Sub-Divisional Magistrate after hearing the appeal will have to stay his hands and let the parties go before the District Magistrate for an order regarding the disposal of property ; this would seem to introduce an unnecessary and cumbersome procedure. S. 517, Cl. 3, which directs that an order for disposal of property should not be carried out until the period for filing an appeal is over or when an appeal is filed, until that appeal is disposed of, clearly indicates that the Court which hears the particular appeal can pass orders regarding the disposal of the property at the time the appeal is heard. But it is altogether a different question when an appeal is confined entirely to a question of disposal of property for, in such a case, I agree, that the District Magistrate should hear the petition.

There is another case in *In re Subba Naidu* (2) where it was held that where a Sub-Divisional Magistrate disposing of a Criminal Appeal fails to pass an order under S. 520, it will be open to his successor to do so. This would depend upon whether the subsequent order could be treated as part of the original appeal proceedings. I see no reason why it should not ordinarily be treated as such, unless it is very clear from the circumstances of the case that the two are so dissociated in fact that they could not be treated as parts of the same proceedings. That may happen when the time that has elapsed is so very great that such an inference can be drawn.

I am, therefore, of opinion that the first objection, that the Sub-Divisional Magistrate had no jurisdiction to pass the order, must be overruled.

The next point taken is that notice should have been given of the petition before any orders were passed. Ordinarily in such cases it is desirable that notice should be given, especially if the order is not passed on the day the appeal is disposed of ; but there is no rule of law that requires that such notice is absolutely necessary. However, as in this particular case, it is not unlikely that the absence of notice of the hearing of the petition by the Sub-Divisional Magistrate has led to the passing of a wrong order for, it is not very clear from the records whether the bulls really belong to the petitioner or to the accused—I think it better that this case should be sent down to the Sub-Divisional Magistrate, requesting him to give a reasonable opportunity to the complainant to place his contention before him, and then to pass final orders as regards the disposal of the bulls.

I may refer in this connection to *In re Lakshman Rangu Rangaji* (3), where it was held by a Bench of that Court that in reversing an order under S. 517 the Magistrate should not act without giving notice to the complainant ; the learned Judges went to the length of saying that the Magistrate, (who in that case was the District Magistrate) was clearly wrong in upsetting the order of the trying Magistrate merely on the representation of the opponent. I think this rule should ordinarily be followed, unless there is good reason for dispensing with it. As in this case no notice was given, the case, as I have said, will be sent back to the Sub-Divisional Magistrate for fresh disposal. He would come to a clear finding as to whom the bulls belong on the materials

2. 1922 Mad. 329=43 M. L. J. 87=15 L. W. 664=(1922) M. W. N. 494=31 M. L. T. 367.

3. (1901) 35 B. 253=13 Bom. L. R. 131=12 Cr. L. J. 169=9 I. C. 947.

which may be placed before him before passing his final orders.

It is also argued that the first Magistrate having once given over the bulls to the complainant in the first Court, it is no longer open to any Court to direct them to be returned to the accused. There is no provision in the new Code of Criminal Procedure which restricts the powers of the Court in this manner under S. 520. In fact, the new section has added the words "and make any further orders that may be just." These words seem to me to be quite wide enough to empower the Court to direct the return of property. This contention also must therefore be overruled.

The Order of the Sub-Divisional Magistrate, dated the 29th November 1920 is set aside, and he is directed to pass fresh orders in the light of the observations above made.

Order set aside.

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* **1923 Madras. 326.**

OLDFIELD AND DEVADOSS, JJ.

Sikka Goundan and others ... Petitioners —Accused.

Cr. Mis. Petitions Nos. 333 and 384 of 1922, dated 13th October 1922.

(*a*) *Criminal P. C., S. 526—Case without jurisdiction.*

A case in a Court without jurisdiction cannot be transferred.

(*b*) *Criminal P. C., S. 439—Void proceedings*

A proceeding which is void for want of jurisdiction cannot be literally quashed but the High Court can direct further proceedings to be stayed.

V. N. Venkatavaradachariar—For the Petitioners.

The Public Prosecutor (*J. C. Adam*)—For the Crown.

ORDER :—There is before us first an application for the transfer of C. C. No. 2 of 1921 from the file of the Village Magistrate of Keeripatti to any other Village Magistrate and next an application for quashing the Village Magistrate's proceedings in that case. The relief asked for in the latter application is described somewhat inaccurately. For it does not appear that there are any proceedings by the Village Magistrate, which can be quashed or set aside. What has happened is that the Village Magistrate received an oral complaint against the petitioners and issued process to them thereon. They did not comply with that process on the ground that the occurrence in question did not take place within the Magistrate's jurisdiction and he had no power to issue process in respect of it. On that default the Village Magistrate filed a complaint against them, which was heard, of an offence punishable under S. 174, Indian Penal Code. In dismissing that complaint, the Sub-Magistrate accepted the petitioner's contention that the Village Magistrate had no jurisdiction. Afterwards, however, the Village Magistrate took a sworn statement from the complainant, in which it was alleged that the occurrence was within his jurisdiction, and now proposes to proceed with the trial. It is not disputed that the offence referred to in the sworn statement just mentioned was identical with the offence, which was the subject of the oral complaint.

The fact that the complainant in the sworn statement alleged that the occurrence took place within the jurisdiction is of course of no avail whatever. We have, however, a judicial decision, no doubt in collateral proceedings, but still one of which in our opinion we can in proceedings such as these legitimately take account, that the occurrence was outside the Village Magistrate's jurisdiction; and we accept that decision as the basis for our conclusion. So accepting it, we clearly cannot transfer this case, which is at present in a Court without jurisdiction and therefore has never been legally instituted [see *Ledgard* v. *Bull* (1)], to any other Court.

To turn then to the petition to quash the proceedings, for the reasons given we cannot comply with it literally. In the circumstance however we think we are justified with reference to our inherent power of superintendence in directing the Village Magistrate of Keeripati not to proceed further with the complaint of Muthusawmi Goundan, at present pending before him. It will be for Muthusawmi Goundan, if he is so minded, to file a new complaint in any competent Court.

Petitions allowed.

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(1) (1887) 9 All. 191=13 I. A. 134=4 Sar. 741

*** 1923 Madras. 327.**

KRISHNAN, J.

(Paravada) *China Venku Naidu* ... Petitioner (Accused).

Cr. Rev. Case No. 397 (Petition No. 346) of 1922, dated 13th December 1922, under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Dt. Magistrate of Vizagapatam in his proceedings in L. Dis. No. 437 of 1922-C 2, dated 21st February 1922

(*a*) *Criminal Trial—Evidence.*

Evidence taken by one Magistrate is not evidence in a trial before another Magistrate unless some provision of law expressly makes it so. Mere consent of parties will not do.

(*b*) *Criminal P.C. S.* 346—*Decision by Magistrate on evidence recorded.*

Passing orders on evidence taken by another Magistrale who was not competent to try the case after merely hearing arguments, cannot be considered to be a " trying the case himself".

(*c*) *Criminal P.C., S.* 437—*Notice.*

Notice is not absolutely necessary in such cases especially where the accused cannot be said to have been prejudiced by want of it, the question being one of law on which the order was set aside and the accused being heard in full before the High Court. As a general rule notice should go to the party before an order is made to his prejudice.

S. Subramania Sastry—for the Petitioner.

The Public Prosecutor (J.C. Adam)—for the Crown.

ORDER:—In this case the Sub-Divisional Magistrate acting soley on the evidence taken by the 2nd Class Magistrate who had sent up the case to him under S. 346 of the Code of Criminal Procedure because he could not himself try the offence disclosed by the evidence, discharged the accused. The Prosecuting Inspector who was conducting the case for the Crown seems to have agreed to this course. The District Magistrate however set aside the order of discharge on the ground that the course pursued by the Magistrate was illegal and has ordered a fresh inquiry. It is argued before me that the view taken by the District Magistrate is wrong.

Now, it may be taken as a general principle of the Code of Criminal Procedure that evidence taken by one Magistrate is not evidence in a trial before another Magistrate unless some provision of law expressly makes it so. Mere consent of parties will not do. See *Kottammall Kalathingal Ummer Hajee in re*, (1). No doubt that was a case where the Court's interference was sought on behalf of the accused. The same rule, it seems to me, should apply to the case of the prosecution also. The ruling in *Jainab Bibi Saheba* v. *Hyderally Sahib* (2) referred to was in a civil case and does not apply to a criminal case at all.

S. 346, Criminal Procedure Code, Cl. (2) says what the Magistrate to whom the case is submitted is to do. He may try the case himself or refer it to any Magistrate subordinate to him having jurisdiction or commit the accused for trial. In this case the Magistrate elected to adopt the first alternative ; he was therefore bound to try the case himself. I do not think passing orders on evidence taken by another Magistrate who was not competent to try the case after merely hearing arguments, can be considered to be a "trying the case himself." When the Code intends that the Magistrate o whom a case is submitted may act on evidence already taken, it makes it quite clear as in S. 349, Criminal Procedure Code.

It was also objected that the accused had no notice before the order of discharge was set aside. Notice is not absolutely necessary in such cases and in this case the accused cannot be said to have been prejudiced by want of it as the question is one of law on which that order was set aside and the accused had been heard in full before me. The want of notice is thus not a ground in this case to set aside the order of the District Magistrate, though as a general rule notice should go to the accused before an order is made to his prejudice.

The petition fails and is dismissed.

Petition dismissed.

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1. (1922) 43 M. L. J. 659=(1922) M. W. N. 644=16 L. W. 697.

2. 43 Mad. 609 ; 38 M. L. J. 532=28 M. L. T. 23=(1920) M. W. N. 360=12 L. W. 64=56 I. C. 957 (F. B.).

1923 Madras. 328.

OLDFIELD AND RAMESAM, JJ.

(*Mandayapurath Eresa*)

Kutty Moopan and another ...Appellants —Accused.

Appeal Nos. 1160 of 1922, and 653 of 1922, dated 15th November 1922, against the sentence of the Court of the Special J., Malabar, Calicut, in case No. 118 of 1222.

Cr. P. C., S. 196—Sanction without naming persons to whom it is addressed.

Where the order ran as follows :—His Excellency the Governor in Council in exercise of the powers conferred on him by S. 196, Criminal Procedure Code, hereby sanctions the prosecution of the said persons before a Special Judge for offence punishable under S. 121, Indian Penal Code *Held*, the order was sufficient in law. Even if there was a defect, it was an irregularity not vitiating the conviction.

K. P. M. Menon, P. Govinda Menon and K. P. Abdulla Kutti—for the Appellants.

The Public Prosecutor (J. C. Adam)—for the Crown.

OLDFIELD, J.:—Preliminary objection has been taken to the trial in the lower Court in this appeal and a similar objection on an identical ground has been taken to the trial in Criminal Appeal No. 847 of 1922. We have accordingly heard the learned counsel in both these cases before giving judgment. Our decision on the objection in this case will apply also to the objection in Criminal Appeal No. 847 of 1922.

The objection is that, the case being instituted under an order of the Local Government based on S. 196 of the Criminal Procedure Code, the order, Ex. A, in the present case being similar to the order in the other already referred to, is not such as is contemplated by law, and a condition precedent to the validity of the proceedings is therefore wanting; or more definitely that the order of authorization by Government is not given to any determinate person, as (it is said) S. 196 impliedly requires. This objection was not taken in either case in the grounds of appeal in any specific way; but the learned Public Prosecutor has not demurred to our proceeding at once. It is further material that in neither case was any such objection taken at the trial. This might be important if we proposed to deal with the matter under the explanation to S. 537 of the Criminal Procedure Code or the last portion of S. 16 of the Ordinance 1 of 1922. For we have not been shown how the accused were prejudiced in any way in the disposal of the case on the merits. Nothing of that sort is in fact alleged; and, when the question is only of the machinery for the institution and prosecution of the proceedings and not of the mischief, which S. 196 is designed to prevent—the institution of proceedings in respect of grave political offences without the approval of the Government at all—we should be prepared to hold that we are concerned only with an irregularity covered by S. 537, or S. 16 of the Ordinance, not with an illegality, by which the proceedings would be vitiated.

But in fact there is in our opinion, neither illegality nor irregularity. The order in question no doubt runs simply :—

"His Excellency the Governor-in-Council in exercise of the powers conferred on him by S. 196, Criminal Procedure Code, hereby sanctions the prosecution of the said persons before a Special Judge for offences punishable under S. 121, Indian Penal Code."

But this order was communicated and is and must be taken as addressed to the three persons designated below it; the District Magistrate, Malabar; the Public Prosecutor, Malabar and the Senior Special Judge, Malabar. It was evidently communicated to the Senior Special Judge as the person concerned in the holding of trials. There is some difficulty about the Public Prosecutor, Malabar. But we are informed that appointments of Public Prosecutors, who are no doubt called additional Public Prosecutors, have been made for the whole of the Malabar District, and not, as the appointment of the ordinary Public Prosecutors attached to the existing Sessions Court is made, for North and South Malabar. The important point, however, is the communication of the order to the District Magistrate, because he is the officer who in Malabar, as elsewhere, is entrusted with the duty of initiating prosecutions generally for offences punishable under the Indian Penal Code. There is no suggestion that the District Magistrate is not directly or indirectly responsible for the prosecution. The complaint was presented and the prosecution was carried on by Mr. Rama Pattar, who signs and describes himself as additional Public Prosecutor, South Malabar; we must then apply to what he did, S. 140 of the Indian Evidence Act and particularly illustration

(*e*) thereto ; and it must be presumed that Mr. Rama Pattar was a person duly empowered to initiate and carry on the proceedings. No objection was taken at the trial to that presumption and there is nothing on the record to support any objection to it. In these circumstances we do not think that any objection to the order of the Government, as insufficient in itself or as insufficient to justify the initiation and carrying on of the proceedings by Mr. Rama Pattar, has been established.

We turn then to the contentions peculiar to Appeal No. 1160 of 1922 ; and we have first to deal with an application, Criminal Miscellaneous Petition No. 653 of 1922, for the admission in evidence of the depositions of two police officers in another case or for their examination now as witnesses. The circumstances are that these two police officers gave evidence in Case No. 7 of 1921 on the 7th October 1921 and succeeding days ; that is to say over six months before the trial in the present case was held. The petition is argued on the ground that the accused could not, in the exercise of reasonable diligence, have known of or adduced this evidence, which is said to be material. We cannot see how there was anything in the circumstances to prevent their knowing of and adducing this evidence, when what these witnesses spoke to had been public property for over six months before the trial. We have moreover had the evidence read ; and we do not see how it can be regarded as material. Criminal Miscellaneous Petition No. 653 of 1922 therefore fails and is dismissed.

On the merits of the present case, as disclosed by the evidence, there are the statements of the 3rd, 4th, 5th, 6th and 7th Prosecution Witnesses, eye witnesses. There is no doubt that, if those statements are believed, the charge against the accused is amply made out. Against the the 3rd, 5th, 6th, and 7th Prosecution witnesses there is nothing, either in the shape of enmity or against their credit. The credit of the 4th prosecution witness may be doubtful, since he is a dismissed village servant. Of these witnesses, 7th Prosecution witness says that he gave information to the authorities a few days after the occurrence ; and that is not contradicted, 6th prosecution witness was a Head constable who might very naturally meet or remember the names of these two accused, since they were both prominent persons, having been Secretary and President of the Local Khilafat Association. The witnesses deposed consistently, no successful attack being made on their evidence in cross-examination. The main objection to the prosecution case is based on the delay, after which it was instituted and there is also the allegation of the accused that they were living in their usual homes and that they surrendered at once, when a warrant for them was issued. That they were living in their usual homes is not however supported by any evidence on their side and no questions were put to the prosecution witnesses on the point. It is possible that more important occurrences, in which loss of life or direct responsibility for destruction of property engaged the attention of the authorities in the first instance. In any case this delay is quite inconsistent with the suggestion, which has also been made that the accused have been prosecuted because of their prominence in the Khilafat movement. There is further *alibi* evidence, and we concur in the lower Court's estimate of it adding only that the evidence of the 2nd defence witness, relating to the 1st accused is not even, if believed, necessarily conclusive.

Taking this view of the evidence we think that reasonable doubt as to the convictions is excluded. We therefore confirm them and also the sentence dismissing the appeal.

Appeal dismissed.

1923 Madras. 329.

OLDFIELD AND RAMESAM, JJ.

Rangare Ramudu ... Appellant (Prisoner).

Cr. A. No. 1566 of 1922, dated 12th December 1922, against the order of the Court of Session of the Anantapur Division in case No. 44 of the Calendar for 1922.

Criminal P. C., S. 297—Misdirection.

Where the Sessions Judge did not explain in what the offence of theft with which the accused was charged consisted. *Held* there was no want of direction where no question as to whether there was a legal possession or as to whether dishonest intention, was established.

The Public Prosecutor (*J. C. Adam*)—for the Crown.

OLDFIELD, J:—The only question is whether the learned Judge's direction to the jury was sufficient, when he did not explain in what the offence of theft with which the accused was charged consisted, but simply began his charge : "The accused is charged with committing theft." The learned Judge in fact further said to the jury : "I have only to explain to you that theft is committed as soon as the property which the thief intends to steal has been moved with that object." It is material that there was in this case no question as to whether there was legal possession or as to whether dishonest intention was established. We can distinguish the case before us from the decision in *Mari Valayan* v. *Emperor* (1), because there the learned Judge in his charge to the jury omitted to explain the meaning of the term "robbery", not "theft", and other considerations might arise. There is no reason in the present case for supposing that the jury were in any doubt as to the meaning of the offence charged. No further misdirection has been pointed out or suggested. The conviction must therefore stand. The sentence is proper and the appeal is dismissed.

Appeal dismissed.

1. (1907) 30 Mad. 44=1 M. L. T. 399=5 Cr. L. J. 78.

** **1923 Madras. 330.**

WALLACE, J.

Kosalai Ramu Pillai and others ... Petitioners.

v.

Pulasthiam Pillai ... Respondent.

Civ. Rev. Nos. 663 to 667 of 1921, dated 24th November 1922, under S. 115 of Act V of 1908 and S. 107 of the Government of India Act praying the High Court to revise the order, dated 9th of March 1921.

Contract Act, S. 25 (2)—Voluntary promise.

The plaints only alleged that according to a village custom subscriptions are raised from persons of the caste of plaintiff and defendants for conducting a festival, and it was not alleged that it was in consequence of any prior agreement by these defendants that plaintiff incurred obligations. And it was also neither alleged nor proved that there was any promise by defendants to compensate plaintiff for something which plaintiff had already voluntarily done for the petitioners. *Held* the promise by defendants to pay was purely voluntary, for no legal consideration, and payment is not therefore enforceable in law as payment of money due under a contract.

S. Ramaswamy Iyer—for the Petitioner.

P. N. Appaswamy and *P. V. K. Sawmy*—for the Petitioner.

JUDGMENT:—I am quite clear that in these cases before the Village Munsif there was no contract on which a suit could lie. The plaints only allege that according to a village custom subscriptions are raised from persons of the caste of plaintiff and defendants for conducting a festival. It is not alleged that it was in consequence of any prior agreement by these defendants that plaintiff incurred obligations, nor so far as appears from the records is there any proof therefor. The principle quoted by respondents in *Kadaranath* v. *Gorie Mahomed* (1) has therefore no application. All that is relied upon is a subsequent promise by petitioners to subscribe for the expenses already incurred by plaintiff ; and it is also neither alleged nor proved that there was any promise by petitioners to compensate plaintiff for something which plaintiff had already voluntarily done for the petitioners, hence S. 25 (2) of the Indian Contract Act will not avail.

2. So far as appears on these plaints and the judgment of the Village Munsif, the promise by petitioners to pay was purely voluntary for no legal consideration, and payment is not therefore enforceable in law as payment of money due under a contract. Hence the Village Munsif under S. 13 of the Village Courts Act has no jurisdiction to entertain the plaints ; and his decrees are contrary to law.

3. Obviously when decrees of Subordinate Courts are contrary to law, this Court should interfere. I therefore reverse and set aside the order of the District Munsif dismissing the petitioner's petitions before him and set aside the decrees of the Village Munsif in these suits. Each petitioner will get his costs here and in the lower Court and share the Vakil's fee, fixed at Rs. 50 (equal to Rs. 10 for each case).

4. This order will not bar plaintiff from framing proper plaints on his alleged cause of action and presenting them in the proper Court. *Order reversed.*

1. [1888] 14 Cal. 64.

* **1923 Madras. 331 (1).**

SPENCER AND VENKATASUBBA RAO, JJ.

Malayandi Goundan and others ... Appellants.

v.

Bomman Poosari ... Respondent.

Appeal No. 220 of 1921, dated 16th October 1922, against the order of the Court of the Sub. J. of Trichinopoly in A. S. No. 33 of 1920.

(a) *Civil P. C. O. 41, R. 23—No remand where all issues are decided by trial Court—Appeals.*

Where the first Court has framed a number of issues arising out of the points on which the parties joined issue in their pleadings and has decided every one of them in its judgment, it is not open to an appellate Court to remand the case under R. 23 of O. 41, as though the suit had been decided on a preliminary point An appeal against such a remand order will lie as the order must lie deemed to be under O. 41, R 23 and not under S. 151, C. P. C.

(b) *Civil P. C. S. 151—Limitation on power.*

Where the Code expressly limits the power of a Court, there cannot co-exist an inherent power in that Court to disregard the limitation.

T. V. Muthukrishna Iyer—for the appellants.

K. S. Lakshmana Iyer—for the Respondents.

JUDGMENT:—The procedure of the Subordinate Judge in remanding the whole suit for retrial after framing 4 additional issues is a procedure not provided by the Civil Procedure Code and is further more one not conducive to the expeditious settlement of the disputes between the parties.

In a case like the present where the first Court has framed a number of issues arising out of the points on which the parties joined issue in their pleadings and has decided every one of them in its judgment, it is not open to an appellate Court to remand the case under R. 23 of O. 41, as though the suit had been decided on a preliminary point. vide *Sultan Beg* v. *Sukdeo Nandram* (1). Granting that the appeal could not well be disposed of in the manner provided by O. 41, R. 24 owing to the question of the 6th defendant's hereditary powers not having been considered at the trial, the proper course for the Appellate Court was to frame the essential issues and to call upon the District Munsif to return findings on them, after allowing each aside to adduce additional evidence.

We set aside the order of remand and direct that the case be remitted to the Subordinate Court in order that the appeal may be further dealt with and disposed of according to law.

The costs of this appeal will abide the result.

A preliminary objection was taken to the admissibility of this appeal on the ground that O. 43, R. 1 (*a*) only provides for an appeal in a case, where the first Court had disposed of the case on a preliminary point, and as there was no such disposal here, the Subordinate Judge must have acted in the exercise of his inherent power under S. 151 of the Code of Civil Procedure. In answer to this objection it is sufficient to refer to the observations of the learned Chief Justice, in his judgment in Full Bench case in *Raman Nayar* v. *Krishnan Nambudripad* (2) where he points out that where the Code expressly limits the power of a Court, there cannot co-exist an inherent power in that Court to disregard that limitation.

As the Subordinate Judge does not refer to S. 151 in his judgment, we may assume, that he was acting under R. 23 of the O. 41 and not under S. 151.

If he purported to act under a power that he possessed but made a wrong order in the exercise of that power, an appeal will lie. In the present case the appellant has also filed a revision petition, so that we have undoubtedly power to make the order as set out above.

Order set aside.

1. (1918) 46 I. C. 922.

2. (1922) Mad. 505=45 Mad. 900=16 M.L.W. 425=43 M. L. J. 354=1922 M. W. N. 589=31 M. L. T. 208=69 I. C. 828.

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* **1923 Madras 331. (2).**

RAMESAM, J.

(Allu) Ramalingier (dead) and another ... Petitioners.

v.

Subramania Pillai and another—Respondents (Defendants).

Civ. Rev. Pet. No. 900 of 1921, dated 13th October 1922, under S. 115 of Act V of 1908 and S. 107 of the Govt. of India Act, praying the High Court to revise the order, dated 16th November 1921.

Civil P. C. O. 1, Rr. 1 & 3 —Old and New C. P. C.—Distinction.

Even before the change of law due to the different language of the present Civil Procedure Code, separate causes of action in respect of several defendants might be joined provided they related to the same matter. But separate causes of action in respect of several plaintiffs could not be joined. The present C. P. C. permits different causes of action to be joined even in respect of several plaintiffs or several defendants provided they satisfy the conditions of O. 1, R 1, or O. 1, R. 3.

C. V. Ananthakrishna Iyer—for the Petitioners.

K. V. Krishnaswami Iyer—for the Respondents.

JUDGMENT.—I am of opinion that the order of the learned Subordinate Judge is not correct. I do not think the suit is bad for non-joinder of parties or causes of action. Even before the change of law due to the different language of the present Civil Procedure Code, separate causes of action in respect of several defendants might be joined provided they related to the same matter. But separate causes of action in respect of several plaintiffs could not be joined. *Smurthwaite* v. *Hannay* (1) and *Carter* v. *Rigby & Co.* (2). After these two English decisions the language of O. 15, R. I in England was changed and the change there was followed by corresponding changes in India. The effect of these changes is to permit different causes of action to be joined even in respect of several plaintiffs or several defendants provided they satisfy the conditions of O. 1, R. 1 or O. 1, R. 3, of the Code of Civil Procedure as the case may be [see Vaughan Williams, L. J. in *Stroud* v. *Lawson* (3)]. The last mentioned case does not help the respondent. In that case the transactions of the two reliefs were different and could not form a series. The evidence for both parts of the claim was also different. (See Chitty, L. J., and A. L. Smith, L. J.). In this case all the conditions of O. 1, R. 3 are satisfied. The Subordinate Judge's reasoning based on the fact that the 2nd defendant is not interested in the relief claimed about the assignment cannot be accepted. If all the defendants are to be interested in all the reliefs, the words "jointly or severally or in the alternative" become useless.

I therefore set aside the order of the Subordinate Judge and direct him to dispose of the case according to law. Costs will abide the result.

Order set aside.

1. (1894) A. C. 494=66 L. J. Q. B. 737=6 R. 299=71 L. T. 157=43 W. R. 113=7 Asp. M. C. 485.
2. (1896) 2 Q. B. 113.
3. (1898) 2 Q. B. 44=67 L. J. Q. B. 718=78 L. T. 729=46 W. R. 626=14 T. L. R. 421.

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* **1923 Madras. 332.**

KRISHNAN, AND RAMESAM, JJ.

Rathnamasari declared mad and others ... Appellants.

v.

The Secretary of State for India in Council by the Collector of Salem ... Respondent.

Appeal No. 250 of 1921, dated 10th November 1922, against the award of the District Court of Salem in Land Acquisition Case No. 9 of 1915.

Evidence Act, S. 124—Waiver at one stage.

Copies of documents had been filed in the lower Court apparently without any objection that they were privileged documents under S. 124 which should not be admitted in evidence. It cannot be claimed any more that they are communications made in official confidence. 32 M. 62 ; 39 M. 304 Dist.

[P. 333, Cols. 1, 2.]

Evidence Act, S. 35—Reports not ordered by law..

The Tahsildar made reports in obedience to an order passed by his superior officer and in discharge of his official duty ; whether it is a duty enjoined on him by the law of the country to send up these reports or not, he was bound as an officer subordinate to the Deputy Collector to make the report when he was called upon to do so and the report was made as an official report after such enquiries as the Tahsildar could make, and his report was kept on the record of the land acquisition case in the Collector's office *Held*, it comes expressly within the words of S. 35.

[P. 333, Col. 2.]

Land Acquisition Act, Ss. 23 and 24—Building surrounded by garden land.

The market value of a big piece of land cannot be determined from the acquisition money of parts for when very small plots are acquired the actual rates at which they are acquired are not often properly scrutinised, the whole cost of the acquisition being small

[P. 334, Col. 1.]

A plot consisting of a house and a garden is much more satisfactorily valued at twenty years purchase by capitalizing the rental, in the absence of other evidence which would give a more satisfactory value. The method o f capitalization ofthe rental value is not a proper method to use for ascertaining the value of garden land. It is much better to take the value of the land in the neighbourhood. Interest under S. 28 of the Land Acquisition Act on the excess awarded over the

amount given by the Collector should be decreed at 6 per cent. from the date the Collector took possession of the land to the date of payment into Court of the excess which has been awarded to him.

[P. 334, Col. 2.]

L. A. Govindaraghava Iyer, S. T. Srinivasa Gopalachari and K. S. Rajagopala Iyengar—for the Appellants.

The Government Pleader—for the Respondents.

JUDGMENT.—This is an appeal in a land acquisition case against the decree of the District Court of Salem. Three plots of land, Survey Nos. 29, 34 and 35, suitable for house-building, were acquired for the purpose of building a hostel for the Salem College in 1915, the date of the notification being July, 1915. On plots Nos. 34 and 35, there was a bungalow and that was also acquired. The Deputy Collector awarded in the first instance for the three plots of land including the bungalow and the houses standing on them Rs. 12,170-13-8 and 15 per cent. the statutory compensation in addition. The District Judge has increased that award to Rs. 15,620 including the 15 per cent. for compensation. The claimants have appealed to this Court and they claim that their properties are worth much more and that they should get Rs. 8, 333-5-7 extra, that is, Rs. 23,953-5-7 in all.

At the opening of the case the learned Advocate for the appellants wanted us to admit in evidence in this Court the Tahsildar's reports of the 18th June, 1913 and the 26th September, 1913 and a special valuation statement submitted by him on the 12th June, 1913. With reference to that prayer we called for a report from the lower Court and also the original documents in a sealed cover. The report and those doucuments have now come up before us. The learned Government pleader has objected to their being admitted in evidence under S. 124 of the Indian Evidence Act and also because he contended that they were irrelevant as evidence. As regards S. 124 of the Indian Evidence Act, it is hardly necessary to go into any detailed consideration of the meaning of that section, for we notice that copies of all these three documents had been filed in the lower Court as Exs. A and J, apparently without any objection on the part of the Government Pleader that they were privileged documents under S. 124 which should not be admitted in evidence, for we do not see anything in the lower Court's records or judgment to show that any objection was raised. These copies were proved to be correct copies taken by one of the claimants and he swore to that effect in the witness-box. After having done that we do not think it can be claimed any more that they are communications made in official confidence. If the Government intended to take the objection under S. 124, the learned Government Pleader in the lower Court should have objected to these copies going on record. Now that these copies are on record in this case we cannot consider the communications made to be communications made in confidence. That being so, we must overrule the objection under S. 124 of the Evidence Act. It is not necessary to refer to the authorities cited on the point namely *Venkatachella Chettiar* v. *Sampathu Chettiar* (1) and *Nagaraja Pillai* v. *Secretary of State* (2). They do not touch the point before us.

As regards the next plea that the documents are irrelevant, we are unable to uphold that contention of the learned Government Pleader. We think they are relevant under S. 35 of the Evidence Act. The Tahsildar made these reports in obedience to an order passed by his superior officer and in discharge of his official duty. Whether it is a duty enjoined on him by the law of the country to send up these reports or not, he was bound as an officer subordinate to the Deputy Collector to make the report when he was called upon to do so and the report was made as an official report after such enquiries as the Tahsildar could make. His report is kept on the record of this land acquisition case in the Collector's Office and thus it comes expressly within the words of S. 35. But it is hardly necessary to put the originals on record because there are correct copies already filed and it is sufficient to refer to them if necessary for our purposes here. As a matter of fact we may observe that no reliance has been placed upon these documents by either side.

As regards the merits of the case we may observe at the outset that there is very little evidence on record to enable us to come to a satisfactory conclusion as to

1. (1909) 32 Mad. 62=19 M. L. J. 263=1 I. C. 705.
2. (1914) 39 Mad. 304=26 I. C. 723.

the market value of the properties acquired. Properties forming Survey Nos. 34 and 35 seem to stand on a somewhat different footing from property forming survey No. 29, for the two former are accessible to the road on two sides whereas the latter is not so and is inferior land with no road access and faces the river. We will therefore consider their market value separately.

Taking Survey Nos. 34 and 35 with the buildings standing on them first, the District Judge has adopted the method of capitalising the rental value of these plots. They are 8 1/2 acres in extent and have a fairly large building on them. They have been let for twenty years prior to 1911 to the Police Department for Rs. 75 a month, subsequently to Government for the Sankari Deputy Collector's Office, and for a few months thereafter to one Mr. Levinge. All through the rent has been Rs. 75 except during the short period when Government was in occupation for the purpose of locating the Deputy Collector's Office when the Municipal tax was paid by Government. The learned Judge capitalises the net rental at twenty years' purchase and arrives at the figures Rs. 13,100 as the proper value of the plot. It has been argued strenuously before us by the learned Advocate for the appellant that this method was not correct and that the land and the buildings should have been valued separately and the District Judge should have taken into consideration the compensation paid by Government for a former acquisition of a plot of land, 18 cents in extent, under Ex. H, for the purpose of laying a road. The price then paid was at the rate of Rs. 15 a cent, which would work out to Rs. 1,500 an acre. We do not think that this acquisition of such a small plot of land for which only a small sum of money was paid can be made the basis of valuation for a large plot like the one now in question before us. It is impossible to say that such an acquisition stands on the same footing as the present acquisition, nor can we properly deduce the market value of the land from such an acquisition as that for when very small plots are acquired the actual rates at which they are acquired are not often properly scrutinised, the whole cost of the acquisition being small.

The appellant's next contention is that the 8½ acres of land on which the buildings stand should be valued separately and that the buildings should also be valued separately and the two added together to get the total market value of the plots with the buildings standing thereon. That is hardly the way in which property consisting of a house and garden is valued in the market. We think that a plot consisting of a house and a garden is much more satisfactorily valued in the manner in which the District Judge has done, by capitalizing the rental, in the absence of other evidence which would give a more satisfactory value. Taking the monthly rental in this case, *viz.*, Rs. 75 and making allowance for the municipal tax payable on the land Rs. 150 and the payment to the Mittadar Rs. 20 a year, charged upon this land, and deducting also what one of the claimants who gave evidence in the case says he spent for the repairs and up-keep of this building, *viz.*, Rs. 50 we get a net annual rent of Rs. 680. The learned District Judge has taken a month's rental as the cost of repairs. That will ordinarily be so, but here we have special evidence, and there is nothing to contradict it, that Rs. 40 or Rs. 50 were spent for repairs. Taking therefore Rs. 680 as the net annual rental and taking twenty years' purchase, which we think is a fair figure to adopt and a figure which is oridinarily adopted in most cases, the value of these two plots with the buildings on them will come to Rs. 13,600. This we think may well be accepted as the total value of these two plots.

It is in evidence that the building itself is separately valued at Rs. 6,300 and odd. Deducting that figure from this and taking the rest as the value of the land, the value of the land would work out to Rs. 850 an acre, which we think under the circumstances of the case, is not at all an improper value, for evidence has been adduced on behalf of Government Exs. I, II and III, which would show that the value of the land in the neighbourhood would seem to have been Rs. 400 an acre. It is quite true that those lands were lands of an inferior character being rather low in level and requiring to be raised for building purposes. That would of course account for the difference in the amount that we are now awarding for the land acquired under the Act and their market value.

It is also suggested that in taking this method of rental valuation for calculation of the value, we ought not to include the whole of the 8½ acres as part of the property but should allot a certain proportion of the land to the bungalow reasonably sufficient for the comfortable occupation of the bungalow and take the value arrived at by the capitalisation method as the value of that portion of the land and the bungalow, valuing separately the rest of the land ; because it is contended that this is a good building site and the rest of the land could be utilised for building purposes. There is in this case no evidence of the existence of any scheme for building on this property nor of any intention either by the owners or by others to build on it. Furthermore it is a matter for speculation as to how much of the land should be allotted to the bungalow and whether if such an allotment is made, the rent may not be effected. We do not think that we will be justified in making any speculation such as this and therefore we take it that the value arrived at correctly represents the market value of these two plots.

Turning now to plot No. 29 we think the value given by the lower Court is too low for this. It is not used at present as a building site but as a garden. The method of capitalisation of the rental value is not a proper method to use for ascertaining the value of such a land. We think it is much better to take the value of the land in the neighbourhood as proved by Government itself as the value of this land also. The Deputy Collector has arrived at the figure of Rs. 400 an acre. As regards this land also we do not think it necessary to reduce that figure at all. Taking the value then at Rs. 400 an acre, 3 acres and 15 cents will be worth Rs. 1,260. From this has however to be deducted a certain amount representing the capitalised value of the assessment payable to the Mittadar. The total assessment was Rs. 30 on these three plots. We have already given credit for Rs. 20 on the two plots Nos. 34 and 35 leaving Rs. 10 to be allowed for this plot. Taking twenty years' purchase here also, we must deduct a sum of Rs. 200 as the capitalised value of the Mittadar's assessment leaving Rs. 1,060 as the value payable to the claimants.

The claimants have also been awarded the value of certain trees standing upon these lands, *viz.*, Rs. 162 and this has also to be added to the price of the property. The total price according to us will therefore come to Rs. 14, 822. To this must be added 15 per cent the statutory allowance under the Act, which comes to Rs. 2,223-4-9. Thus the total comes to Rs. 17,045-4-9 and this is our award in the place of that made by the District Judge.

The learned Advocate for the claimants claims that he should be given interest under S. 28 of the Land Acquisition Act on the excess awarded over the amount given by the Collector. We think he is justly entitled to this and we award him interest at 6 per cent. from the date the Collector took possession of this land to the date of payment into Court of the excess which has been awarded to him by us.

The final question which we have to decide is as regards costs. The Government have filed a memorandum of objections claiming the costs in the lower Court. What the learned Judge did there was to refuse to give costs to the claimants because they have exaggerated their claim considerably. We do not think there is any ground for interference with that order. As regards the costs of this appeal we think a similar order will be the most proper in this case. There will therefore be no order as to costs either in the appeal or in the memorandum of objections.

1923 Madras. 335

OLDFIELD AND DEVADOSS, JJ.

(Karumuri) Ramalakshmi alias Rattamma and others ... Appellants.

v.

Boda Nagaratnam and others ... Respondents.

S. A. No. 444 of 1921, dated 1st November 1922, against the decree of the Court of the Sub. J. of Cocanada in A. S. No. 602 of 1920.

Hindu Law—Widow—Acceleration.

Where a widow gitted to her daughter the estate supposed by her to be willed to her by her husband and after her to her daughter but where the will was found to be not genuine. *Held* that the the gift did not accelerate the estate of the daughter.

G. Lakshmanna and B. Satyanarayana —for the Appellants.

Y. Suryanarayana—for the Respondent.

JUDGMENT :—The foundation of the lower appellate Court's judgment is that

Ex. IV is a surrender of the interest of the 1st defendant. The appeal is argued on the footing that Ex. IV operates merely as a gift to the 1st defendant's daughter, Subbamma, now deceased of the 1st defendant's interest in the suit property under the will, Ex. V, purporting to have been executed by her husband now deceased. It is necessary to and that Ex. V has been found not to be genuine. Though there is no finding before us as to the 1st defendant's responsibility for its being put forward, the basis of our decision as to the character of Ex. IV must be the intention of the executant, the first defendant.

That intention we have to collect from the wording of the document ; and that wording fortunately is in our opinion clear. Ex. IV is headed as a gift-deed, that description being repeated in its 1st paragraph. The second paragraph runs in this way :

"My husband late Korumadi Venkata Papayya Garu had executed a will on 2—5—1903 arranging among others that I should enjoy until my death the under-mentioned immoveable property and other moveable property belonging to my husband as his self-acquisition, and that after my death you and your descendants should enjoy the same with powers of gift and sale. As I too am now 68 years old, as I have much affection towards you and as you and your husband have been protecting me amicably from the time of my husband's death till now, I have arranged that you should protect me in future until my death and have this day given away to you as gift the right and enjoyment possessed by me at present in the immoveable property worth Rs. 3,000 comprised in the said will executed by my husband. Therefore you yourself shall henceforth pay the entire taxes payable and enjoy the property from generation to generation with powers of gift and sale."

The material fact, on which we base our finding as to the first defendant's intention in this document is that she proceeded throughout with reference to her husband's will, first referring to it as the origin of her right to the property she was disposing of, next referring to it as defining the estate, which she was disposing of. In these circumstances our construction of Ex. IV is that she was giving away what the will purported to give her. Reference has been made to the will as purporting to give her the estate she conveyed, not as really giving it to her in consequence of the lower appellate Court's finding that the will is not genuine. But that finding cannot affect the view we have to take of the first defendant's intention in Ex. IV. We must reach a conclusion as to what she wished to give with reference to what she was assuming in the document as to the genuineness of the will.

Construction of the actual terms of the document as a justification for the lower appellate Court's judgment failing, we have been asked to construe it in favour of the plaintiff, respondent, with reference to what is alleged to be a rule of construction authorised by two decisions of the Allahabad High Court. That rule as proposed to us is that gift by a widow to a daughter or more generally a gift by a widow to another reversioner must be regarded, whatever its terms, as an acceleration of the other reversioner's interest. The exact question which the learned Judges were dealing in *Bhupal Ram* v. *Lachma Kuar* (1), is not clear. But we do not find that they intended to enunciate such a general rule as we are asked to adopt. In *Rup Ram* v. *Musammat Rewati* (2), *Bhupal Ram* v. *Lachama Kuar* (1), is no doubt followed, though apparently with some hesitation on the part of one of the learned Judges. But in fact we are unable to collect from either of these decisions that the Allahabad High Court has held anything, which will be of any use to the plaintiff in the present case. The two decisions we have referred to no doubt lay down that a transfer by a widow to her daughter or other next reversioner will ordinarily be regarded as an acceleration of the next reversioner's interest : but the learned Judges do not say and we do not think that they meant that this would be the case, when, as here, there are material portions of the particular document, by which the transfer is effected to support the existence of a different intention. Taking this view we cannot read Ex. IV as effecting acceleration of the plaintiff's interest or as anything except a gift of what the widow believed to be her own interest in the suit property under the will to her daughter Subbamma and Subbamma's heirs in case Subbamma should die before the widow herself. The result is that the second appeal must be allowed, the plaintiff's suit being dismissed with costs throughout.

Appeal allowed.

1. (1889) 11 All. 253=9 A. W. N. 22.
2. (1910) 32 All. 582=7 A L. J. 645=6 I. C. 541.

The contrast between S. 9, of the Act and S. 16 of the Land Acquisition Act is very marked. Under the latter, when the Collector has made an award the land 'vests absolutlely in the Government, free from all encumbrances.' The absence of these words in S. 9 indicates conclusively that the sale to the tenant does not vest in him the land absolutely.

For these reasons I would answer the question referred to us in the negative.

Reference answered in the negative.

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* **1923 Madras, 313.**

PHILLIPS AND DAVADOSS, JJ.

Bappu alias *Venkataramier and another* ... Appellants.

v.

V. A. Annamalai Chettiar and another ...Respondents.

Appeal No. 21 of 1922, dated 21st December 1922, against the decree of the Court of the 2nd Addl. Sub J. of Madura in O. S. No. 12 of 1921.

Specific Relief Act, S. 27, (b) (c)—Coparceners—Minor members.

The Specific Relief Act is an exhaustive Code, for it is an Act "to define and amend the law relating to certain kinds of specific relief obtainable in Civil suits," and consequently S. 27 must be read as defining every class of persons against whom specific performance may be enforced.

In order to enforce a contract against a coparcener, it must be shown to be beneficial or necessary, and this principle has been adopted in all cases of necessity in which cases the coparcener would probably come under cl. (c), because the contracting party has a right to displace his title in cases of benefit or necessity. The clause (c) undoubtedly would apply to the many cases in which a decree for specific performance has been given even against minor members of an undivided family, when the contract was for sale of land for family necessity. Looking broadly at S. 27, it would appear that contracts for purchase are not included amongst the contracts which can be enforced against persons other than the contracting party himself. S 23 which specifies the persons, who can enforce specific performance, includes "the representatives in interest" of the parties to the contract, and is consequently very much broader than S. 27 which makes no mention of such representatives. 40 Bom. L. R. 997 Diss.

[P. 314, Col. 1 ; P. 315, Col. 1.]

A. Krishnaswami Iyer and S. Doraisami Iyer—for Appellants.

K. Rajah Iyer—for 1st Respondent.

Phillips, J :—In this case the plaintiff entered into a contract with the 1st defendant for the sale of his land and brought this suit for specific performance of the agreement. The 1st defendant, who agreed to purchase the property, pleaded that the contract had been rescinded, but died shortly afterwards, and his sons defendants 2 to 4, the 4th defendant being a minor, were impleaded, and a decree for specific performance was prayed for as against them. These defendants adopted their father's written statement, so far as it was not opposed to their interest, and also pleaded that the suit was not maintainable against them. The Subordinate Judge has found that the contract was not rescinded and this finding is accepted in appeal. He has also found that defendants 2 to 4 are liable to perform the contract entered into by their father. He has come to this conclusion on broad grounds which he sums up as follows: "The price is not inadequate. The assent was not obtained by questionable means. Plaintiff has a clear and marketable title. It would cause no hardship on the defendants. Plaintiff has gained no unfair advantage by the transaction. Viewed from any aspect, the contract for specific performance can be enforced against defendants 2 to 4 who are bound to execute the contract, in place of their father who is now dead". In coming to this conclusion, he has made no reference to section 27 of the Specific Relief Act, which specifies the persons against whom specific performance of a contract can be enforced. The Specific Relief Act is an exhaustive Code, for it is an Act "to define and amend the law relating to certain kinds of specific relief obtainable in Civil suits," and consequently we must read this S. 27 as defining every class of persons against whom specific performance may be enforced. Unless, therefore, defendants 2 to 4 can be brought under this section, there will be no right to enforce specific performance against them. The plaintiff in this case has not claimed damages for breach of covenant, and consequently we need not consider against whom he can bring such a suit for damages.

It is argued for the appellants that the defendants, who are members of an undivided Hindu family, do not come under any of the definitions in S. 27. The two clauses of the section which, it is contended for respondents, are applicable are

(*b*) and (*c*). Cl. (*b*) reads as follows :—"any other person claiming under him by a title arising subsequently to the contract . . . . . ." Here it is suggested that the sons, defendants 2 to 4, do claim under their father, 1st defendant, by a title arising subsequently to the contract. It is however well settled that a member of a joint family does not inherit under his father but takes by survivorship, for, on his birth he obtains a right in the whole family property and not merely in a portion of it. No doubt when one member of the coparcenary dies his share passes to the others, but it is more a question of lapse of the title of the deceased person rather than an acquisition of title in the survivors, for even before the death of the one coparcener they had a right in the whole of the property including the share of the deceased member. It is therefore difficult to hold that, even as regards their father's share defendants 2 to 4 claim under him by a title arising subsequently to the contract. No doubt in *Venkateswara Aiyar v. Raman Nambudri* (1), Coutts Trotter, J. appears to have accepted the contention that a co-parcener in a joint Hindu family does come under the definition in S 27 (*b*) and treated the matter as a question of Hindu Law without discussing the meaning of the words of the section, but he also held that, in order to enforce a contract against a co-parcener, it must be shown to be beneficial or necessary and this principle has been adopted in all cases of necessity in which cases the co-parcener would probably come under cl. (*b*), because the contracting party has a right to displace his title in cases of benefit or necessity.

Coming to the definition of S. 27 (*c*), we find that it includes "any person claiming under a title which, though prior to the contract and known to the plaintiff, might have been displaced by the defendant". This clause (*c*) undoubtedly would apply, as suggested above, to the many cases in which a decree for specific performance has been given even against minor members of an undivided family, when the contract was for sale of land for family necessity. In such a case, the manager of the family has a right to displace the title of the other members in the family property when it is requisite to do so for purposes of family necessity. Cases of this kind are reported in *Shanmugam Chetty* v. *Subba Reddi* (2), *Ramachandra Aiyar* v. *Sundaramurthi Mudali* (3) and *Krishna Aiyar* v. *Shamanna* (4), and there are many others. The Courts have not in all cases referred in terms to S. 27 (*c*) as covering the case, but have based their decision on the proposition that, if a contract when executed would be binding on the minor members of the family, it is incumbent on them to fulfil it after the contracting party's death. However in all these cases the co-parceners come within the definition in cl. (*c*).

It is now contended for the plaintiff that the same principle must be applied to the present case and that, this being a case of purchase of immoveable property the contract can be enforced against the co-parceners, because the purchase must be deemed to be for the benefit of the family. This argument is based on an alleged presumption that every purchase of immoveable property must be for the benefit of the family, for no evidence has been let in on this point. There is no such presumption in law, and if we look on it as a presumption of fact, it must depend upon the circumstances of each case. Here the defendants are a trading family whose interests might be better served by the investment of any surplus cash in their trade rather than on purchase of immoveable property. There are many other conceivable circumstances in which a purchase of land would not be for the benefit of the family. We cannot therefore in the absence of evidence make any such presumption, and consequently it is necessary for plaintiff to prove this benefit by evidence, if he claims a decree on that ground.

Returning to the question of whether defendants 2 to 4 come within the definition of cl. (*c*), we have to consider what is the title under which they can be said to claim. It is, I think, clear that the title referred to there is title to property which is the subject-mattter of the contract. Here the property is merely a sum of money which the father had promised to

1. (1916) 3 L.W. 435=19 M. L. T. 329=33 I. C. 696.

2. (1915) 31 I. C. 1.

3. (1893) 4 M. L. J. 9.

4. (1912) 23 M. L. J. 610=(1912) M. W. N. 1188=17 I. C. 497.

pay. It is not in evidence that there was any definite sum of money lying in his hands nor the manner in which the father was going to obtain it. He might have intended to obtain the money by begging, borrowing or even stealing, in which case these co-parceners could not possibly claim under a prior title. It is argued that the purchase-money must eventually come out of the family property or at least out of the father's share of the property and that, therefore, the title in question is the title to the family property. As I pointed out above, it is not necessary that the money should come from any family property but might have been obtained by the father from some outside source. In this view defendants 2 to 4 would not claim under any title to it. If that is so, it would appear that these defendants do not come within the definition in cl. (*c*). Looking broadly at S. 27, it would appear that contracts for purchase are not included amongst the contracts which can be enforced against persons other than the contracting party himself. S. 23 which specifies the persons, who can enforce specific performance, "includes the representatives in interest" of the parties to the contract, and is consequently very much broader than S. 27 which makes no mention of such representatives. As regards contracts for purchase, it is not difficult to suggest a reason for their exclusion from contracts of which specific performance can be decreed, for it is of no special benefit to the vendor to get his money from the contracting party rather than from some one else, and, even though the price from the other person may be less than the agreed price, he always has his remedy against the contracting party in damages, so that he will suffer no loss from the reduction in price. On the other hand when the property to be transferred is land, nothing else can adequately be substituted for it, and consequently a suit for the specific performance of a contract to sell land is more freely allowed, as no other remedy would be adequate. However this may be, I think it is quite clear that we cannot bring defendants 2 to 4 within the definitions in S. 27 (*b*) or (*c*). If that is so, no decree for specific performance can be given against them. I now refer to some cases cited firstly, to the Full Bench decison reported in *Rangayya Reddy* v. *Subramania Aiyar* (5). There the real question at issue was not identical, but Wallis, C. J. and Sadasiva Aiyar, J., were both of opinion that co-parceners could not be compelled to perform a contract entered into by another co-parcener. There is a case in *Bhagwan* v. *Krishnaji* (6), in which a Bench of the Bombay High Court has held that S. 27 (*c*) does include the members of a joint Hindu family, and this decision appears to be based not on the language of the section itself, but from the illustrations to Cl. (*c*), the reason given being that, unless these illustrations are to be made applicable to a joint Hindu family, the large majority of Hindus would be excluded from the benefits of the section. With all respect I am unable to agree with this view, as it seems to me impossible to bring co-parceners within the definition in either clause, except in the cases I have referred to, namely, when the contract is by a manager as such for necessity or for the benefit of the family.

It is next argued for the plaintiff that defendants 2 to 4 are liable under the pious obligation imposed by Hindu law to repay their father's debts, and that the father's liability to pay the purchase-money must be considered to be a debt. Even if the obligation undertaken by the father can be said to be a debt, and I do not think it can, for it was at best a potential debt, we are not here concerned with their liability to repay it, but with the question whether they can be made to perform a particular contract, for this suit is not one for damages, in which other circumstances might possibly have to be considered.

There is yet another broad principle of equity upon which the refusal to allow specific performance can be based and that is, that, when one of the parties is a minor, a Court will not compel him to do anything unless it is satisfied that such act is for the benefit of the minor. It is argued that it has not been shown that this contract would be detrimental to the minor, but that is not sufficient, for, if there is any possibility of there being any detriment, the Court will require to be satisfied that the possibility no longer exists before it takes action. For this reason also, I

5. (1916) 40 Mad. 365 : 32 M. L. J. 575= 5 L.W. 797=21 M. L. T. 385=40 I. C. 429 (F.B.)
6. (1920) 22 Bom. L. R. 997=58 I. C. 335.

think the contract could not be enforced against the 4th defendant.

In this view the appeal must be allowed and the suit dismissed with costs throughout.

DEVADOSS, J. :—I concur.

Appeal allowed.

1923 Madras. 316

RAMESAM, J.

Rama Pattar and others—Petitioners (Defendants.)

v.

Kumaran Chidayath Karnavan and others ... Respondents (Plaintiffs.)

C. R. P. Nos. 92 to 95 of 1922, dated 30th November 1922, under S. 25 of Act IX of 1887, praying the High Court to revise the decrees of the Court of the District Munsif of Alatur, dated 17th September 1921

T. P. Act S. 6—Assignment of rent.

An assignment of rent cannot operate in respect of future possible leases that may come into existence as the result of a renewal.

T. R. Ramachandra Iyer, T. R. Krishnaswami Iyer and N. A. Krishna Iyer—for Petitioners.

C. V. Ananthakrishna Iyer—for Respondents.

JUDGMENT :—These are revision petitions against the judgments of the District Munsif of Alatur in four small cause suits. The facts out of which the suits arose are practically admitted. The plaintiff is the Karnavan of a Tavazhi known as the Kumarachiddyath house. Besides this, there were in the Tarwad two other Tavazhis, *viz.*, the Eravamannattil house and the Puliyankalath house. In a litigation of 1887, there was a compromise between all the Tavazhis by which " the michavaram collected from the tenants of " Kuzhalamannom " was allotted for the expenses of the members of the first house (Ex. A). Relying on this compromise the present suits are filed for recovering the michavaram from four of the kanom tenants in Kuzhalmannom amsom. The tenants pleaded that the rents were paid to the karnavan of the tarwad who is D. W. 1 and that the plaintiff is not entitled to the rents.

The District Munsif thought that plaintiff's claim falls within the exception to the rule " that strangers to a contract cannot enforce." It is conceded before me by Mr. Ananthakrishna Aiyar, the learned Vakil who appeared for the respondents, that neither the rule nor the exception have any application to the cases. The payment of michavaram under the contracts (which are contained in Ex. F series) was not to third persons but to the karnavan of the tarwad in whose favour the kychits were taken. But Mr. Anantakrishna Aiyar argues that Ex. A amounts to an assignment of the right to collect the michavaram. I agree with him that Ex. A ought to be construed to be an assignment of the right of the main tarwad. Mr. Ramachandra Aiyar, who appeared for the petitioners does not seriously dispute this ; but he contends (1) that the assignment could be operative only in respect of the michavaram due for the remaining years of the kanoms existing in 1888 and cannot operate for the michavaram due in respect of renewed kanoms as it was dependent on the possibility of renewal.

I agree with this contention. The cases relied on by Mr. Ananthakrishna Aiyar *viz.*, *Allen* v. *Bryan* (1), and *Williams* v. *Hayward* (2) do not help him as, in these cases, the assignments of rents for definite periods (being in each case the remainder of the term of the lease) were in question. I do not think that an assignment of rent can operate in respect of future possible leases that may come into existence as the result of a renewal. (S. 6 of the Transfer of Property Act). Mr. Ananthakrishna Aiyar tried to get over the difficulty by arguing that the transfer was of an interest in immoveable property. I do not think that the difficulty can be got rid of in this way. The interest transferred includes possibilities and is very indefinite.

In the result, the revision petitions are allowed and plaintiffs' suits are dismissed, with costs throughout.

Petitions allowed.

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1. 5 B. and C. 512.
2. 1 E. and E 1040

* **1923 Madras. 317 (1).**

KRISHNAN, J.

Rukmani Ammall ... Petitioner.

v.

Ramachandra Thondaman Sahib by agent Pothan and another ... Respondents.

Civ. Rev. Nos. 103 to 105 of 1922, dated 14th November 1922 under S. 115 of Act V of 1908 and S. 107 of the Government of India Act praying the High Court to revise the orders dated 8th February 1922 of the Court of the Addl. Sub. J. of Trichinopoly.

Execution—Party.

A beneficial owner can ask to be added as a party to a pending execution application. A part transferee of a decree can apply to execute it even though there was an agreement to the contrary. The principle is clearly that parties should be allowed to join the record when their rights are in danger.

T. Narasimha Iyengar and N. S. Ramaswami Iyengar—for the Petitioner.

Respondents were unrepresented.

JUDGMENT :—This was an application by the petitioner as the person beneficially entitled to the fruits of the decree in O. S. No. 293 on 1899 on the file of the Court of the District Munsiff of Trichinopoly which had been obtained by one Krishnaswami Aiyangar, to be made a party to the appeal against the order of the District Munsiff removing the obstruction of the respondent Ramachandra Thondaman by agent Pothan, against possession of the property, purchased in execution, being taken. The learned Subordinate Judge has dismissed the application holding that petitioner should file a fresh execution application and cannot claim to join in the present proceedings relying on *Manikkam* v. *Tatayya* (1). In that case such a point was not discussed or decided. That case really decided that the beneficial owner can come in and execute a decree obtained by a benamidar and if there was any dispute about the decree being benami the executing Court should decide it.

Dwar Buksh Sirkar v. *Fatik Jali* (2), shows that a beneficial owner can ask to be added to a pending execution application and it has been held in *Muthiah Chettiar* v. *Govinddoss Krishnadoss* (3) that a part transferee of a decree can apply to execute it even though there was an agreement to the contrary. The principle is clearly that parties should be allowed to join the record when their rights are in danger. In this case therefore petitioner should have been added as party respondent.

There is no meaning in telling petitioner to bring a fresh application for execution as the execution has been almost completed by sale of the property and the only thing now remaining being to give possession to the auction-purchaser.

I would therefore set aside the order of the lower appellate Court and direct the Subordinate Judge to add petitioner as party respondent and dispose of the appeal according to law. There will be no order as to costs here. This order will govern all the three petitions before me.

Petitions allowed.

1. 21 Mad. 388=8 M. L. J. 48.
2. 26 Cal. 250=3 C. W. N. 222.
3. 44 Mad. 919=41 M. L. J. 316=1921 M. W. N. 649=14 L. W. 287 (F. B.).

* **1923 Madras. 317** (2).

PHILLIPS AND DEVADOSS, JJ.

D. Subramania Iyer ... Appellant (Plaintiff).

v.

Chokkalinga Mudaliar and others ... Respondents (Defendants 1 and 3 to 5).

S. A. Nos. 180 and 181 of 1922, dated 21st November 1922, against the decree of the Dt. Court of East Tanjore at Negapatam in A. S. Nos. 18 and 17 of 1921.

(a) *Civil P. C., O. 21, R. 51—Non-compliance*

Under O. 21 R. 51, the method of attaching a promissory note is by actual seizure and by bringing it into the Court. Where the orders that were passed and said to be orders of attachment are really prohibitory orders that were addressed to creditor and debtor forbidding them to receive or pay respectively, the amount due under the note. *Held* attachment was not effected. [P. 318, Col. 1.]

(b) *Pro-note—Effect on previous debt.*

The execution of a promissory note in satisfaction of a debt does not necessarily mean that the original debt is extinguished but the note may operate as a substitute for that debt and the original debt is kept in abeyance pending the discharge or otherwise of the promissory note. It is, however, certainly open to parties to treat the original debt as discharged and substitute therefor the obligation under the promissory note. [P. 318, Col. 2.]

(c) *Negotiable Instruments Act, S. 9—Knowledge of defect.*

When a person is under a disability with respect to his property, his title thereto is not without defect. If the endorsee is aware of this disability he has sufficient cause to believe that a defect existed. He is not therefore a holder in due course.

[P. 319, Col. 2,]

T. M. Krishnaswami Iyer—for Appellant.

A. Srirangachari—for 2 to 4 Respondents

A. V. Visvanatha Sastri—for 1st Respondent.

PHILLIPS, J.—The facts of this case are as follows: One Chokalinga Mudali (called the first defendant) received a sum of Rs. 3,000 from one Kumaraswami Pillai. The latter died on the 29th June, 1917. The first defendant executed a promissory note for the Rs. 3,000 to Kumaraswami Pillai's son Sadasiva Pillai. There were many creditors of Sadasiva Pillai and suits were brought against him and several orders were passed in respect of this promissory note. Subramania Ayyar (called the plaintiff) is the receiver in one of those suits in which a decree was obtained against Sadasivam. In that suit an order was passed on the 31st July, 1917 attaching this promissory note. On the 20th August, 1917, a similar attachment was taken out by Kuppuswami Ayyangar (called the second defendant). There were various other attachments also, and, on the 18th March, 1918, the promissory note was endorsed by Sadasivam to Kuppuswami Ayyangar. The plaintiff now brings the suit to recover Rs. 3,000 from the maker of the note, and Kuppuswami Ayyangar, the second defendant in that suit has also filed a suit to recover the amount due under the promissory note. The lower Courts have found that there was no valid attachment of the promissory note and that the second defendant is a holder in due course and have consequently decreed the second defendant's suit and dismissed the plaintiff's suit. The plaintiff therefore appeals in both cases.

Under O. 21, R. 51, the method of attaching a promissory note is by actual seizure and by bringing it into Court. Admittedly this has not been done with reference to the promissory note executed by the first defendant. The orders that were passed and said to be orders of attachment are but really prohibitory orders that were addressed to Sadasivam Pillai and the first defendant forbidding them to receive or pay respectively, the amount due under the note. It dces appear from one execution petition of the 7th October, 1917 that an attempt was made to seize the note but it could not be found and an attachment was not effected.

It is now contended in appeal firstly, that the attachment was a valid attachment and that, therefore, the endorsement in favour of the second defendant was invalid and under S. 64 of the Civil Procedure Code is void as against the plaintiff's claim; and secondly that, even if the attachment is not a valid attachment, the second defendant has abused the process of the Court by getting an endorsement of the note after he had obtained the orders of the Court prohibiting the parties to the note from taking action thereon. As regards the first ground it is said that, although there was no attachment in the form prescribed for attachment of negotiable instruments, the prohibitory orders must be deemed to be attachment of the original book debt which has not been discharged by the promissory note. The execution of a promissory note in satisfaction of a debt does not necessarily mean that the original debt is extinguished but the note may operate as a substitute for that debt and the original debt is kept in abeyance pending the discharge or otherwise of the promissory note. It is, however, certainly open to parties to treat the original debt as discharged and substitute therefor the obligation under the promissory note, and, in this case, we have the finding of both the lower Courts that the book debt of Rs. 3,000 was discharged by the execution of the promissory note. This finding is based on the intention of the parties and consequently I do not think it is open to this Court in Second Appeal to interfere with that finding. We must take it therefore that the book debt had been discharged on the date of the prohibitory order, and consequently the procedure prescribed for the attachment of debts not secured by negotiable instruments is inapplicable to the present case. It is therefore quite clear that the attachment of the promissory note was not a valid attachment.

One of the most important questions to be considered in deciding whether an attachment is valid or not is whether the

order has been communicated to all parties concerned so as to make it effective. If a promissory note is left in the hands of a party and there is merely a prohibitory order telling him not to receive the money due thereunder, it is always possible that he may negotiate the instrument or, in the case of a note payable to bearer, he may hand it on to a third party, who would be quite unaware that there was any order of Court restricting dealings with the note. Unless, therefore, the actual note is seized there is always a danger that third parties may *bona fide* become possessed of it, and, if the prohibitory order were held to be a valid attachment, they would be prejudiced by such an order of which they were unaware. I therefore agree with the lower Courts that the attachment was invalid, and consequently S. 64 of the Civil Procedure Code is not applicable.

I next have to consider the question whether the second defendant has abused the process of the Court. The order obtained by him, Ex. II, was an order prohibiting Sadasivam from receiving any amount on account of the promissory note from the first defendant and an order prohibiting the first defendant from paying any amount under the note. Most of the prohibitory orders were in similar terms but it does appear that one of them Ex. II (c) prohibited Sadasivam Pillai from receiving any amount on account of the promissory note or from adjusting that promissory note in any other way. The second defendant died during the pendency of the proceedings, but Sadasivam was examined and he admits that the second defendant was a friend of his and that he was probably aware of these prohibitory orders. I think we may take it that the second defendant was undoubtedly aware of the many orders which had been passed against Sadasivam and realised the risk he was taking in dealing with this promissory note. He himself obtained an order of Court prohibiting the first defendant from paying the amount and Sadasivam from receiving the amount, and having obtained this order and knowing that many similar orders had also been obtained, he went to Sadasivam and obtained an endorsement from him in contravention of the letter Ex. II and of the spirit of the other prohibitory orders. It seems to me that this action on his part was fraudulent being designed to secure himself and to defeat the claims of the other creditors, who had obtained prohibitory orders.

It is suggested that he did not actually disobey the order of Court or induce Sadasivam to disobey it, but assuming that he was aware of Ex. II (c) that argument is certainly incorrect; and, even as regards the other orders it is clear that he intended to obtain the money from the first defendant notwithstanding the order prohibiting the payment. I am therefore inclined to hold that the whole of this transaction of endorsement is vitiated by fraud and that 2nd defendant's claim being based on his fraud, should not be allowed, but in the view I take of the next ground of appeal it is unnecessary to finally decide the case on this point.

There is yet another point which has been taken in appeal and that is that the second defendant was not a holder in due course as found by the lower Courts, and this I think is a valid objection. Under S. 9 of the Negotiable Instruments Act a holder in due course means the payee or indorsee thereof (namely the promissory note) if payable to order before the amount mentioned in it became payable, and without having sufficient cause to believe that any defect existed in the title of the person from whom he derived his title. In this case the title to the note still remained in Sadasivam after the prohibitory order, but he was unable to deal with the note or to receive money under it and to that extent his title was defective, for I do not think it can be said that, when a person is under a disability with respect to his property, his title thereto is without defect, as is argued for the respondents. The second defendant was aware of this disability and therefore he had sufficient cause to believe that a defect existed. He is not therefore a holder in due course.

It is then argued that, although he is not a holder in due course, he is yet the holder of the note and that, under S. 78 of the Negotiable Instruments Act, payment of the amount due on a promissory note must, in order to discharge the maker or the acceptor, be made to the holder of the instrument. A holder of the promissory note means any person entitled in his own name to the possession thereof and to receive or recover the amount due thereon from the

parties thereto. At the time the second defendant became the actual possessor of the note, Sadasivam was restrained from receiving the amount from the maker and also from adjusting the note in any way. He cannot transfer any better title to the second defendant. The endorsement is invalid for the purpose of making the second defendant a holder in due course and I do not think that it can then be treated as being sufficient to make the second defendant a holder, for it is an invalid endorsement.

Apart from that endorsement the second defendant is not entitled in his own name to the possession of the note nor to receive or to recover the amount due thereon. If he is neither the holder nor the holder in due course within the meaning of the Act, it follows that he has no right to recover the amount of the note from the first defendant.

On the other hand the plaintiff is entitled to recover the amount from the first defendant as garnishee and therefore these appeals must be allowed and the plaintiff's suit decreed with costs throughout and the second defendant's suit similarly dismissed. The first defendant is in no way liable for these proceedings and his costs in each case must be paid by the unsuccessful party.

Devadoss, J. :—I agree.

Appeals allowed.

1923, Madras. 320.

SPENCER AND VENKATASUBBA RAO, JJ.

Latifa Bi and another ... Appellants—(Petitioners).

v.

Mottai Ammal and others ... Respondents.

Appeal No. 182 of 1922, dated 20th November 1922, against the order of the City Civil Court, Madras, D. 23—3—1922.

Madras City Tenants Protection Act Ss. 9 & 10 —Decree prior to Act.

Persons claiming to be legal representatives of tenants are entitled to have the question whether the interest of their mother had devolved on them decided by the Court to which they made their application. The general frame of the Act, including S. 10, makes it clear that S. 9 was not intended to enable tenants to apply for sale of the land to them under this section after the ejectment suit, to which they were parties, had been decreed before the Act came into force.

S. Krishnamachariar—for the Appellants.

C. Veeraraghava Iyer—for the Respondent.

SPENCER, J.—The City Civil Judge's order so far as he referred the petitioners to separate proceedings for a declaration that they were entitled to whatever rights their mother possessed at the time of her death from her status as tenant cannot be supported. They were entitled to have the question whether the interest of their mother had devolved on them decided by the Court to which they made their application. Another obstacle to appellants' success however exists. The application was one under S. 9 by persons claiming to be tenants under Madras Act III of 1922. S. 9 speaks only of tenants "against whom a suit in ejectment has been instituted."

In this case a decree was passed against petitioners' mother in the City Civil Court on 13th August, 1920 and was confirmed on appeal in this Court on 7th February, 1922, that is, before the Act came into force.

The general frame of the Act, including S. 10, makes it clear that S. 9 was not intended to enable tenants to apply for sale of the land to them under this section after the ejectment suit, to which they were parties, had been decreed.

S. 10 permits Ss. 4, 5, 6 and 8 to be applied to suits in which decrees had been passed for ejecting tenants before the Act came into force but not executed. S. 5 provides the manner in which the amount of compensation to be paid to tenants is to be determined and subsequently modified. S. 6 provides for the determination of a reasonable rent when the landlord cannot or will not pay compensation. S. 4 deals with the effect of suits for ejectment being dismissed, and S. 8 with the effect of rents being determined.

There is a noticeable omission of S. 9 from mention in S. 10, It is suggested that this may be due to S. 9 having been inserted in the Act after the other sections had been incorporated, and that but for an oversight S. 9 would have found mention in S. 10.

Whatever may be the explanation, the Act, as it has been enacted, gives no retrospective effect to S. 9. Consequently where a decree has been passed before the Act came into force for the ejectment of a

1923 Madras. 337.

SCHWABE, C. J., AND WALLACE, J.

Mohana Velu Mudaliar ... Defendant—Appellant.

v.

Annamalai Mudaliar and another ... Plaintiffs—Respondents.

S. A. No. 252 of 1921 dated 19th November 1922, against the District Court of North Arcot at Vellore in Appeal Suit No. 5 of 1920.

(*a*) *Will—Executors—Right to sue.*

Authority by co-executors to execute all the duties of the executors in collecting and managing the estate does not authorise executors to sue on behalf of the estate in their own names. It might be sufficient authority to these to take proceedings in the name of all.

(*b*) *Civil P. C. O.*, 1, *R.* 9 *and S.* 99—*Non-joinder.*

If a defendant is sued by one only of two persons with whom he has contracted or by one only of two persons who have a joint cause of action against him, he has a right to have the action dismissed unless the other is joined. This is not merely technical.

SCHWABE, C. J. :—This is an action by two executors under a will which appointed twelve executors. The will has been admitted to probate. Three executors have been removed and there are at present nine. Seven have given a power of attorney to the other two, which in effect authorises the two to execute all the duties of the executors in collecting and managing the estate: but, in my view, that does not authorise those two executors to sue on behalf of the estate in their own names. It might have been sufficient authority to these two to take proceedings in the name of the nine. But that is a point which must turn on the construction of the power of attorney and it is unnecessary to decide it here, because it is not what has been done. Therefore, in my view, this action is wrongly conceived and must fail for non-joinder of necessary parties.

Under S. 99 of the Code of Civil Procedure no decree is to be reversed on account of any misjoinder of parties not affecting the merits of the case or the jurisdiction of the Court, and it has been held,—how far correctly I am not prepared at present to say—that "misjoinder" in that section includes non-joinder. See *Yakkanal Eacharaunni* v. *Manekkar Vasunni* (1). But if a defendant is sued by one only of two persons with whom he has contracted or by one only of two persons who have a joint cause of action against him, he has a right to have the action dismissed unless the other is joined. This is not merely technical. It may be of great importance, because, as was pointed out in *Ramesebuk* v. *Ramlala Koondoo* (2) he ought to be in a position to recover his costs if he succeeds as against all the parties. If there are many executors some of whom are solvent and some insolvent, it might be to the prejudice of the person against whom the estate has some claim that particular executors should be able to sue him with the result that, if he succeeded and got the suit dismissed with costs, he might find no one against whom he can execute his decree for costs, and the law is correctly stated in Woodroffe and Ameer Ali's Code of Civil Procedure, Second edition, at page 543, that if the defendant takes the objection at a proper time, it is his right to have all the proper persons joined as plaintiffs, and if, after the objection has been raised, the plaintiff proceeds with the suit without taking steps to add the person or persons whose non-joinder has been objected to, and the Court finds that the objection is well founded, the suit must be dismissed. In this case the objection was taken at the earliest stage in the written statement. It was argued before the District Munsif and before the District Judge, and both those tribunals held, and in my view wrongly, that these two executors by reason of the power of attorney could sue in their own names without joining the others. No application was made to either of those Courts to amend the plaint by joining the other executors, but probably if an application had been made to the District Munsif he would have permitted such amendment on terms as to costs. The position of the District Judge might have been more difficult, although there too the position is not so difficult as it is in this Court on second appeal, where one is conscious of the working of the rule against appeals on questions of fact, because if we allow the amendment now, it might put the

1. (1910) 33 Mad. 436=7 M. L. T. 102=20 M. L. J. 344=5 I. C. 774.
2. [1883] 6 Cal. 815=8 C. L. R. 457.

defendants in a worse position than they would have been if the amendment had been allowed in the first instance: and that may be the defendant's objection to further plaintiffs being added at this stage even if the consent of these proposed plaintiffs were obtained. I think there is no course open to us but to dismiss the suit with costs of both defendants here and in the Courts below-two sets. The appeal will be allowed with two sets of costs one to the appellant and the other to the second respondent, payable by the first respondent. The first respondent's memorandum of objections must be dismissed and the second respondent's memo. of objections must be allowed both without costs.

WALLACE, J.:—I agree and have nothing to add.

Appeal allowed.

1923 Madras. 338.

WALLACE, J.

(*Kakarla*) *China Chendrayya* ... Petitioner—(Counter-Petitioner.)

v.

Maddukuri Subbarayudu ... Respondent (Petitioner-Complainant).

Cr. Rev. No. 490 of 1922 and Cr. Rev. Pett. No. 416 of 1922, dated 31st October, 1922, under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Addl. Dt. Munsif of Kistna, L. Dis. No. 23—7835 of 1922, dated 1st May, 1922.

Criminal P. C., S. 197—Addl. Dt. Magistrate's power.

Additional District Magistrate has authority though not specially empowered by designation by the Local Government to pass an order of sanction under S. 197, Criminal Procedure Code. Action taken under S. 197 is more of the nature of executive than judicial action, and there is no irregularity in not recording reasons. Sanction to be used to validate a trial on a complaint already laid without sanction, would be no good. No notice before sanction is granted is necessary. [P. 339, Col. 1.]

V. Suryanarayana,—for the Petitioner.

F. S. Vaz—for the Public Prosecutor for the Crown.

ORDER:—The first point taken in this petition is that an Additional District Magistrate has no authority unless specially empowered by designation by the Local Government to pass an order of sanction under S. 197, Criminal Procedure Code.

It is not d isputed in this case that by G. O., dated 9th October, 1874, the Local Government has empowered all District Magistrates to pass orders of sanction under S. 197, Criminal Procedure Code, and that by G. O., dated 24th January, 1922, it conferred on Mr. Senneck "all the powers of a District Magistrate." This last power is conferred under the provisions of S. 10 (2) Criminal Procedure Code, which enables the Local Government to appoint an Additional District Magistrate and to confer on him "all the powers of a District Magistrate under this Code." The ordinary powers of a District Magistrate under that Code are set out in Sch. III (v) which makes no reference to S. 197. Petitioner contends that the scope of the powers conferred under S. 10 (2) is limited by its language to the powers set out in Sch. III (v). On consideration I am of opinion that this view is too narrow. Under the first G. O., noted above, the District Magistrate had, on the date of the second G. O., the power to pass an order of sanction under S. 197, Criminal Procedure Code, and was exercising that power under that Code. It was in fact then one of the powers of the District Magistrate exercised by him under the Code, which therefore may be passed on by the Local Government under S. 10 (2) to the Additional District Magistrate. To view the point from another angle, S. 197 authorises the Local Government to designate some officer as the officer empowered to act under S. 197, just as S. 10 (1) authorises it to designate some officer as District Magistrate by virtue of which designation he is empowered to exercise *inter alia* the powers set out in Sch. III (v). And S. 10 (2) authorises it to transfer to the Additional District Magistrate all the powers it has conferred under the Code on the officer designated by it as District Magistrate. I therefore hold that this contention of petioner must fail.'

The next point taken is that no reasons have been stated for granting the sanction. The only authority in point quoted before me is *Queen-Empress* v. *Samavier* (1) which does not lay down that the officer must state his reasons, but only that the

1. (1893) 16 Mad. 468=3M. L. J. 227.

sanction order must refer to some definite offence and not be so vague that it is obvious that the sanctioning officer has not come to a decision of his own that reasonable grounds existed for the prosecution. The analogy of S. 195 will not be in point, for in the cases under that section, a species of appeal lies, and thus something in the nature of a judgment has to be written by the Original Court. In cases under S. 196 no reasons are necessary, and the order to prosecute is sufficient. Action taken under S. 197 is more of the nature of executive than judicial action ; see *In the matter of Kalagava Bapiah* (2). I am not prepared to hold that the lower Court acted with any irregularity in not recording reasons.

The next point is that the sanction has been granted after and not before the complaint. For the decision of this point sufficient facts have not been put before me. If this sanction is going to be used to validate a trial on a complaint already laid without sanction, then petitioner's point would be good though it would be a point more properly taken before the trying Court. But if a complaint is going to be laid in consequence of this sanction, then petitioner has no valid objection to it.

As to petitioner having received no notice before sanction was granted, that is unnecessary, see *In the matter of Kalagava Bapiah* (2).

I therefore see no reason to interfere in this case and dismiss this petition.

Petition dismissed.

2. (1904) 27 Mad. 54.

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* **1923 Madras. 339.**

OLDFIELD AND RAMESAM, JJ.

Kuppusami and others ... Petitioners.

Petition No. 728 of 1922, dated 20th December 1922, under Ss. 435 and 439 of the Code of Civil Procedure, 1898, praying the High Court to revise the order of the Court of the 3rd Class Magistrate of Cheyyhr Taluk in C. C. No. 240 of 1922.

Criminal P. C. S. 5 (2)—Offence under Abkari Act.

The police have no right to file a charge sheet or otherwise to proceed under chapter 14 of the Criminal Procedure Code in respect of an offence under the Abkari Act, Chapter 14 is controlled by S. 5 (2) of the Criminal Procedure Code and this is an offence under a special law, which can be investigated and tried only according to the provisions of the law.

V. N. Kuppu Rao—For Petitioners.

The Public Prosecutor on behalf of the Crown.

ORDER.—In this case we are asked to exercise our powers of revision and to set aside what is referred to as an order by the 3rd Class Magistrate of Cheyyur Taluq, holding that he has no jurisdiction to go on with a case and rejecting the petition from the accused, petitioners here, for discontinuance of the proceedings on a complaint pending against them. We are not clear what section of the Criminal Procedure Code authorized the passing of a formal order at the stage in question or that it was necessary or advisable that such an order should be passed. If the Magistrate proceeded without jurisdiction, that would be a ground for appeal, which could be dealt with by the Appellate Court in case the proceedings ended in conviction. As however the matter is before us, we deal with it on the merits.

The case against the accused was instituted on a charge sheet alleging that they had committed offences punishable under S. 55 of the Abkari Act I of 1866. It is sufficient for our purpose that all the accused before the Court were arrested by Police after investigation by the police into the case. The charge sheet had been filed with reference to Ch. 14 of the Criminal Procedure Code. The ground, on which the Magistrate was asked to discontinue the proceedings, was that the police had no right to file a charge sheet or otherwise to proceed under Ch. 14 of the Criminal Procedure Code in respect of an offence under the Abkari Act, because Ch. 14 is controlled by S. 5 (2) of the Criminal Procedure Code and this is an offence under a special law, which can be investigated and tried only according to the provisions of that law. We assume for the purpose of the present case that the offence defined in S. 55, Abkari Act, is a cognisable offence. We have been shown no authority directly in point. But we think that on general grounds, if S. 5 (2) is to be given effect, the decision must in the present proceedings be in favour of the petitioners. If the question were merely of a charge of an offence under a special

Act, made after an investigation carried on in the ordinary way and not differing in material particulars from the investigation, after which offences under the Penal Code are charged, our conclusion might be different. But in fact under the Abkari Act the accused person has the right to a special procedure regulating the course of the investigation; and in the absence of any statement that this right has been respected by the police, we must hold that he has been obliged to forego it owing to the police holding the investigation instead of the Abkari Officers, who would, it is to be presumed, proceed in accordance with the Abkari Act.

The proceedings preliminary to the filing of a charge under the Abkari Act begin with the steps provided in S. 40 for securing the production of the suspected person before the Abkari Officer, who had jurisdiction to enquire into the case, by whomsover the arrest has been made, whether by the Abkari Officer or Police Officer or any of the other persons specified in S. 31. From that point the Act contemplates that only the Abkari Department shall have the conduct of the proceedings and in the succeeding Ss. 41 to 47 there is provision for a much more formal enquiry than any contemplated in Ch. 14, Criminal Procedure Code. There is no doubt no explicit statement, so far as we can see, in those sections that the accused is to be present at that enquiry or is entitled to cross-examine the witnesses or submit his contentions. But we are told that in fact the practice is to allow him to do so, and in any case these sections direct a much more elaborate enquiry than is provided for in the Criminal Procedure Code, giving much more definite powers to the Abkari Officer, who holds that enquiry, and in some sections, for instance Ss. 42 and 43, making the intervention of an Officer of a certain status in the department obligatory. In these circumstances the submission of the charge sheet by the Police Officers instead of the Abkari Officers, presumably in accordance with the Police instead of the Abkari procedure, has in our opinion placed a considerable disability on the accused, depriving them of the procedure, to which they would ordinarily be entitled.

That being so we cannot hold that the offence here has been investigated according to the provisions of the special Law, the Abkari Act. The case it seems to us is similar to *Lakshminarasayya* v. *Narasimmachari* (1) although there is no distinct reference in the judgment to S. 5 (2) Criminal Procedure Code. Taking this view we decide that the lower Court's order and the submission to it by the Police of the charge sheet offend against S. 5 (2), which for the present purpose must be regarded as controlling Ch. 14. We must therefore set aside the lower Court's order on the ground that there are no proceedings properly instituted by means of any legal complaint or charge sheet before it. It will be for the Magistrate in communication with the Abkari Department to consider whether the proceedings can be revived on the latter presenting a proper charge sheet.

Order set aside.

1. (1913) M. W. N. 1000=25 M. L. J. 577=14 Cr. L. J. 637=21 I. C. 685.

* **1923 Madras. 340.**

SPENCER AND VENKATASUBBA RAO, JJ.

(*Jekkannu*) *Sami Iyer* ... Appellant.

v.

Mutukumara Ramaswami Chettiar, Major and others ... Respondents.

Appeal No. 7 of 1922, dated 24th October 1922, against the Appellate Order of the Court of the Sub. J. of Tanjore in A. S. No. 57 of 1921.

(*a*) *Contract Act, S.* 134—*Creditor taking over estate of debtor destroys debt.*

There is the liability of a surety when his principal's debt has been extinguished by an act which causes the merger of the estates of the debtor and the creditor. Ordinarily the liability of a surety is co-extensive with that of the principal debtor, unless it is otherwise provided for. The legal consequence of the creditor's act in taking over the debtor's estate is to discharge the principal debtor.

[P. 341, Col. 2.]

(*b*) *T. P. Act, S.* 101—*Merger.*

The principle of merger exists independantly of statute.

[P. 341, Col. 2.]

(*c*) *Civil P. C. S.* 145—*Surety can plead all deferences open to him as defendant in a suit,*

S. 145 has been enacted for the purpose of expeditious enforcement of liabilities against sureties, in order to avoid the cumbrous procedure of assigning the bond to a decree-holder and his instituting a separate suit upon it. The surety can put forward in those proceedings any defence that is open to him. Though the security

bond may be executed in favour of the Court, the Court holds it for the benefit of the decree-holder. [P. 342. Col. 2.]

M. S. Venkatarama Iyer—for the Appellant.

A. C. Sampath Aiyangar—for the Respondent.

SPENCER, J :—This appeal raises a question as to the liability of a surety when his principal's debt has been extinguished by an act which causes the merger of the estates of the debtor and the creditor. As the facts have been set out in my learned brother's judgment, I will not recapitulate them. Ordinarily the liability of a surety is co-extensive with that of the principal debtor, unless it is otherwise provided for. There is no provision to the contrary in the security bond executed on January 16th, 1917 by the appellant and his mother. Therein they declared that they would *stand as sureties* and make themselves responsible for the amount of Rs. 225 *that might be found due* to the plaintiffs (from the defendants). An illustration of the effect of S. 128 of the Contract Act occurs in *Sheik Suleman* v. *Shivzam Bhikaji* (1) where it was observed that if an amount recoverable by a plaintiff from a defendant debtor is diminished in appeal, the surety's engagement, being one of indemnity, would diminish in like proportion. So if the sum recoverable became zero owing to the decree being reversed, the surety's liability would also be reduced to nothing. The present is not a case of a continuing guarantee, or of time being given to the principal debtor, or of the terms of any contract between the creditor and the debtor being varied. Therefore the references by the respondent's vakil to Ss. 129, 130, 133 and 135 of the Contract Act and to *Subroya Chetty* v. *Ragammal* (2) are not to the point. Nor is there any question of the remedy against the principal debtor becoming barred by limitation or being kept alive by payment, as to which it was held in *Brajendra Kishore* v. *Hindustan Co-operative Insurance Society* (3) that S. 128, Contract Act, would not prevent the liabilities of the principal and the debtor being distinct in matters of limitation and in *Jambu Ramasawmy* v. *Sundararaja Chetty* (4) that S. 134, Contract Act would not help the surety.

The main question to be decided in this case is whether the 1st defendant's debt became extinguished in consequence of the merger of his estate with the estate of the plaintiffs (respondents). If that question is answered in the affirmative it will follow from Ss. 128 and 134 of the Indian Contract Act that the respondents cannot proceed to recover anything on account of mesne profits from the appellant who stood as surety for the 1st defendant. In other words the question is whether the legal consequence of the creditor's act in taking over the 1st defendant's estate was to discharge the principal debtor. The principle of merger has been described in *Banarsi Das* v. *Maharani Kuar* (5) as a union in the same persons of the character of debtor and creditor and its origin has been traced to the *confusio* of Roman Law. In *Kudhai* v. *Sheo Dayal* (6) it has been further explained by Mahmood, J. who observes at page 575 that a man cannot be his own creditor or the mortgagee of his own rights. Lord Halsbury in Vol. 13 of his Laws of England, p. 146 states : —" At law, when a less estate was vested in the same person as a greater estate without any intermediate estate between them, the less estate merged in the greater and was extinguished, without regard to the intention of the parties concerned. But equity is not guided by the rules of law as to merger " and so the question whether merger takes place " depends upon the intention, actual or presumed, of the person in whom the interests became united." So, as I observed in my judgment in C. R. P. No. 980 of 1917, the question of merger is one of intention, and in the case of a limited owner the presumption is against a merger. S. 101 of the Transfer of Property Act which creates a statutory merger has no application to the present case of a personal decree obtained against the 1st defendant for future mesne profits at the rate of Rs. 75 per annum. But the principle of merger exists independently of statute, and the Transfer of Property Act has been treated as codifying the law that already existed prior to its enactment. In *Kudhai* v. *Sheo Dayal* (6) the principle is stated to apply whenever rights devolve

1. (1887) 12 Bom. 71.
2. (1904) 28 Mad. 161=14 M. L. J. 482.
3. (1917) 44 Cal. 978=21 C. W. N. 482=25 C. L. J. 238=39 I. C. 705.
4. (1903) 26 Mad. 239=12 M. L. J. 267.
5. (1883) 5 All. 27=2 A. W. N. 140.
6. (1888) 10 All. 570=8 A. W. N. 213.

either by inheritance or are acquired under a valid transfer, if the result of such devolution or acquisition is that the estates of the judgment-creditor and the judgment-debtor or of the mortgagee and the mortgagor become united in whole or in part in the person of a single individual. From the intention of the parties in the present case it might be held that there was no merger when the 2nd defendant Nagammal succeeded to the estate of her deceased son 1st defendant, as the former was a limited owner and the decree remained executable against the 1st defendant's estate under S. 50, C. P. C. But when she surrendered the whole estate to the plaintiffs as being the nearest reversioners, reserving for herself nothing but a right of maintenance under Ex. II, it cannot be supposed that these reversioners intended to keep alive a debt owed by the estate to themselves, a debt of which no mention is made in Ex. II. They took over among others the properties which were pledged by the 1st defendant's guardian as security for reimbursement of the sureties in the event of their having to pay the 1st defendant's decree debt for mesne profits. What they must be deemed to have got in succession by 1st defendant's untimely death and his mother's release deed was the balance of his estate after wiping out his debt to them.

Respondent's vakil attempted to support the lower appellate Court's judgment by several other arguments. He contended that the rules as to creditors and debtors would not apply to this case, as the bond was executed under S. 145, C. P. C. in favour of the Court in the form given in Appendix H. No. 13. He maintained that this procedure made the Court the creditor and prevented the surety from pleading discharge under S. 133 or 135 of the Contract Act on account of any variance of the terms or any composition between the creditor and the debtor. It is impossible to conceive how the execution of the surety bond in favour of the District Munsiff converted that officer into a creditor in respect of the decree debt. S. 145 has been enacted for the purpose of expeditious enforcement of liabilities against sureties, in order to avoid the cumbrous procedure of assigning the bond to a decree-holder and his instituting a separate suit upon it. The surety can put forward in those proceedings any defence that is open to him, and for the purpose of appealing against any order that is made against him he is expressly declared to be deemed to be a party within the meaning of S. 47. Though the security bond may be executed in favour of the Court, the Court holds it for the benefit of the decree-holder. No doubt it was held in *Ramanathan Pillai* v. *Doraiswami Aiyangar* (7) that if the surety wants to get the bond cancelled, he must proceed by regular suit, but it was admitted that he might become a party to execution proceedings when an application was made for an order against him. This case is not an authority for the startling proposition now advanced that in proceedings under S. 145 a surety is precluded from raising any defence.

Then it was argued that the incidents connected with the merger of estates would not attach where the decree-holders obtain the 1st defendant's estate long after delivery of their share of property and some time after the estate vested in 1st defendant under a release deed of conveyance, and not by the mere operation of Hindu Law. But it is the surrender by the widow of her life estate by means of a deed that brings the Hindu Law into operation and it is immaterial when the surrender took place. Lastly stress was laid on the fact that the arrears accrued during the life time of 1st defendant and gave rise to a personal liability against him which had not been extinguished. On the death of a judgment-debtor however, execution can only under S. 50, C. P. C. be taken out against his property in the hands of his legal representative. This judgment-debtor's property is now in the hands of the decree-holders. When it is apparent that they can now do nothing but take out execution against themselves, the argument ends in a *reductio ad absurdum*.

The appeal is allowed with costs here and in the lower Appellate Court, and the District Munsiff's order dismissing the 1st and 2nd respondents' petition is restored.

VENKATASUBBA RAO, J.:— This appeal raises the question whether the plaintiffs are entitled to execute the decree under S. 145, C. P. C. against the surety who is the appellant before us. The District Munsif held that the plaintiffs were not

7. (1919) 43 Mad. 325=38 M. L. J. 65=11 L. W. 45=1920 M. W. N. 114=55 I. C. 363.

entitled but the Sub-Judge reversed the decision of the District Munsif.

The facts may be briefly stated: The plaintiffs brought the action for partition of certain properties and for possession of their share. A decree was passed which *inter alia* directed the 1st defendant to pay the plaintiffs mesne profits at the rate of Rs. 75 per annum from the date of the plaint. An appeal was filed to the District Court, and it was dismissed. A second appeal was preferred to the High Court and stay of execution was ordered of the decree on the condition that security was furnished in respect of the mesne profits decreed. A security bond was then executed by the surety-appellant who undertook to be liable to the extent of Rs. 225 on account of the said profits. The Second Appeal was also ultimately dismissed. It is alleged by the plaintiffs that a sum of Rs. 203-12-0 is due to them on account of mesne profits from the date of the plaint till the date of the delivery of the immoveable property decreed to them. The execution petition is in respect of that sum. The 1st defendant died after the sum now claimed by the plaintiffs accrued due and the 2nd defendant, the mother of the 1st defendant took possession of all the properties of the latter claiming to be his heir under the Hindu Law. The plaintiffs asserted a title to the said properties against the 2nd defendant on the ground that their father and the 1st defendant who were step-brothers divided their properties under a partition award and that according to the terms of that award the plaintiffs were entitled to succeed to the 1st defendant's properties. It may be noted that apart from any question of any special rule of succession, the 2nd defendant the mother of the 1st defendant would under the Hindu Law inherit his properties. It is said that this special rule of succession was recognised and given effect to in the Second Appeal to which reference has been made, though I must confess this point is by no means clear to my mind and it is unnecessary to pursue this further, for, as a matter of fact the 2nd defendant as stated above took possession of all the properties of the 1st defendant without at first recognising the title of the plaintiffs but she subsequently surrendered the entire estate to the plaintiffs, who, on the date of the execution application, were in possession of it. It is not denied that the plaintiffs alone have come into possession of all the properties of the deceased 1st defendant and that the said properties far exceeded in value the sum now claimed in the execution petition. The District Munsif as well as the Sub-Judge assumes that the plaintiffs succeeded to the properties of the 1st defendant as his heir, but the correct view would seem to be that the plaintiffs acquired the said properties by transfer from the 2nd defendant who is the heir of the 1st defendant. The plaintiffs seek to recover the amount from the surety and the District Munsif dismissed the application on the ground that the debt was extinguished by reason of the fact that the qualities of debtor and creditor became united in the same person *viz.*, the plaintiffs and that the extinction of the principal obligation put an end to that of the surety. The Sub-Judge disagreeing with the District Munsif held that the plaintiffs were entitled to recover the amount.

It seems to me that the Sub-Judge was clearly wrong. It is not denied that the plaintiffs became the legal representatives of the 1st defendant. Nor is it denied that the properties taken possession of by the plaintiffs were worth considerably more than the amount claimed by the plaintiffs in execution. Under S. 50, C.P.C., where a judgment-debtor dies befor the decree has been fully satisfied, the holder of the decree may apply to execute it against the legal representatives of deceased judgment-debtor. The section further provides that where the decree is executed against such legal representative he shall be liable only to the extent of the property of the deceased which has come to his hands and has not been duly disposed of. Now what has happened? The plaintiffs became the legal representatives of their debtor, and they were therefore entitled to execute the decree against themselves to the extent of his property which had come to their hands and the plaintiffs must accordingly be deemed to have obtained satisfaction of their decree. The circumstance that the plaintiffs did not actually take out execution against themselves and recover the sum in execution is immaterial and I am therefore satisfied that the principal obligation was in this case extinguished.

The debt due by the judgment-debtor having become extinguished, are the plaintiffs entitled to proceed against the surety? They are not. To my mind the question does not admit of any doubt. Cunningham and Shephard in their Indian Contract Act quote the following passage from Pothier when dealing with S. 134. "It results from the definition of a surety's engagement, as being accessory to a principal obligation, that the extinction of the principal obligation necessarily induces that of the surety, it being the nature of an accessory obligation that it cannot exist without its principal." The learned commentators and "The rule may also be put upon the less technical ground that, if the release of the surety did not follow from that of the debtor, the latter's release would be purely illusory, because the consequence would be that the surety on being compelled to pay, would immediately turn round on the debtor."

I find it impossible to hold that the creditor can proceed against the surety although the debt has been recovered. It has been argued on behalf of the plaintiffs that this rule which accords with common sense is not applicable to surety bonds executed as in this case in favour of the Court. Though this extraordinray contention was repeatedly urged by the plaintiff's Vakil, no authority was cited in support of it and I have no hesitation in rejecting it as utterly untenable. It may be remarked that there is an additional circumstance which renders this argument palpably unsound. In consideration of his having executed the bond in question, the surety obtained from the 1st defendant a mortgage in respect of a property belonging to the latter, with a view to recoup himself out of that property in the event of his being compelled to pay the decree amount on the judgment-debtor making default. That property has passed to the plaintiffs and is in their possession along with the other properties of the judgment-debtor. If the surety is compelled to pay the amount he can immediately claim it from the principal debtor. In this instance the surety's position is even stronger. He can, on paying the amount, proceed against the property in the hands of the plaintiffs themselves and get a refund of the sum, in virtue of the express contract between him and the judgment-debtor.

Another argument which has been advanced on behalf of the plaintiffs is this :—That when an application is made against a surety under S. 145, he is precluded from rising a defence on the score of the decree having become satisfied and that he must pay up the amount and then sue the plaintiffs again for the recovery of it. There is no warrant for this position and the argument must be rejected.

It has been further urged on behalf of the plaintiffs that the properties having been originally taken by the 2nd defendant from whom only the plaintiffs obtained them, the principal obligation was not extinguished. I have dealt with this point above and I cannot accept the argument. The appeal must therefore be allowed with costs in this and in the lower Appellate Court.

Appeal allowed.

1923 Madras. 344

SCHWABE, C. J., AND WALLACE, J.

Govindachariar (V.S.) *and others* ... Appellants—Defendants.

v.

Nattu Kesva Mudaliar ... Respondent—Plaintiff.

O. S. A. No. 57 of 1921, dated 4th September 1922, from the decree of Phillips, J., dated 18th February 1921.

Contract—Construction—Implied condition.

The Court ought not to imply terms in a contract, unless there arise from the language of the contract itself and the circumstances under which it is entered into, such an inference that the parties must have intended the stipulation in question and the Court is necessarily driven to the conclusion that it must be implied.

T. R. Venkatarama Sastri and D. Ramaswami Aiyangar—for the Appellants.

R. Kuppuswami Aiyar and K. Krishnaswami Aiyangar—for the Respondents.

SCHWABE, C. J. :—I regret to be called upon to give a decision in this case which would, in my opinion, have been much better disposed of if the parties had brought to a successful issue the negotiations for a settlement which, we were informed, were taking place. As these negotiations have failed, the parties are entitled to our judgment.

The facts of the case so far as they are relevant are that the plaintiff represented a temple of the deity Vishnu of very old standing indeed. Throughout the arguments the plaintiff's temple has been referred to as the "Y" temple. The defendant's temple is said to be a temple founded somewhere about 1832 and the principal deity installed in that temple is known as Vedantha Desikar, himself at one time a worshipper of Vishnu. The followers and worshippers of that temple have been referred to in this case as those of the temple "U". The two sets of worshippers belonging to the two great divisions of the Vaishnavite religion, the northern and southern, may be referred to as U and Y owing to the shape of their Namams. The U temple is practically adjacent to the Y temple and there is no doubt that it was at times exceedingly inconvenient to the Y temple to have the U temple there, because it had processions in streets and music and other things which might interfere and probably did interfere with the reverent and decent worship observed at the Y temple. At that time the Sudder Court had decided and it was then accepted as law, that no new procession and no procession for any newly installed deity could be lawfully carried on in the streets, and that anyone objecting to such things could, by applying to the Court, get an injunction restraining them. In fact the Sudder Court had established the principle that as far as the legality was concerned only the old established procession could be allowed or permitted. The parties very naturally tried to find a *modus vivendi* and they entered into an agreement Ex. A and another agreement of about the same date, 26th January 1846, which is not produced before us but is recited in Ex. A. The terms of the document are quite clear. It recites that there had been disputes ever since the institution of the Vedantha Desikar temple about the processions through the streets and other disputes relating to some complaint of the U temple against some action of the Y temple. The contract then recites the agreement entered into by the Y temple in favour of the U temple, and it recites an agreement to the effect that the U temple should be at liberty to hold processions of its deity through the streets on 23 specified days and that, on 17 other days, if, in bringing the God out of the temple for short distances through the street on the way to the hall, that short procession clashed with some procession of the Y temple, then the U temple's procession should be fixed for some other convenient time. No doubt this latter part would necessarily imply an agreement by the Y temple not to interfere with the conduct on those 17 days of this short ceremony and the entrance into the street for that purpose and not to interfere by way of attempting to stop it, but would confine its claims in respect of that to a right to have it postponed to a more convenient time. Then follows, beginning at line 28, a statement of what the U temple undertakes to do. It first of all gives complete liberty, so far as the U temple is concerned, to the Y temple to conduct processions and festivals of any kind at any time in favour of any deity throughout the year. In other words, the trustee of the U temple for himself and his successors undertakes not to interfere with whatever the Y temple may choose to do, whereas the trustees of the Y temple had by their agreement undertaken not to interfere by applications for injunction or otherwise, with whatever the U temple may choose to do in respect of the specified days. Then follows the term providing what is to happen in the event of the processions of the two temples clashing and in effect U gives a right of precedence to Y.

It is argued that you must imply into that contract a term that the U temple will not hold any procession for its then installed deity or any other deity installed thereafter, on any days except the 23; by procession, I mean long procession, through the street and I presume also that except on the 17 days it will not hold its short processions though the latter point has not been argued. Now, the law on the subject of the implication of terms in a contract has frequently been misunderstood and frequently misapplied; but it was definitely laid down in a case called *The Moorcook* (1), by Bowen, L. J., and the words used by him in that case were again cited with approval and the principle rather more clearly enunciated in *Hamlyn & Co.* v. *Wood & Co.* (2) and the passage which is usually quoted on this point is from the judgment of Kay, L. J.:

1. (1889) 14 Pro. Div. 65.
2. (1891) 2 Q. B. 488.

"The Court ought not to imply a term in a contract, unless there arises from the language of the contract itself and the circumstances under which it is entered into, such an inference that the parties must have intended the stipulation in question, that the Court is necessarily driven to the conclusion that it must be implied."

In this case there is no express term limiting the U temple to 23 days for its processions, and the question for consideration is whether Court is necessarily driven to the conclusion that the parties must have intended that stipulation. In my judgment the Court is not so driven, because it seems to me that there was at the time of the contract no necessity for the existence of such a stipulation. It was thought that, at that time, the contract provided for all that the Y temple required and they gave the U temple license for the 23 days, and the law could be taken to provide for the rest. When we find the parties contracting on the basis of what was then supposed to be the law, there could be no necessity for implying a term which, if put in, would merely be stating what it was then supposed the law was. In my judgment there is ample consideration for this contract without any such term. No doubt it would have been a sensible arrangement if the contract had said: "If you do not interfere with my 23 days and short processions, I will not interfere with you at all," and that in my judgment is what the contract did, and was intended to do. I do not think it is open to the Court, when the law has been differently interpreted or possibly altered, to imply as a term what the parties would have stipulated for at that time if they had thought about it, or if the law had then been otherwise.

On these grounds, I think, that this judgment is wrong. When I say that, I do not mean that I am to be taken to have approved of the rest of the judgment, because the other points have not been argued. But the learned Judge throughout his judgment assumed that what the contract meant was that the processions were to take place only on 23 days, and it appears that he did not consider the question whether or not that was the true meaning of the contract and I rather gather that it was not his fault that he did not so consider it because the point was not taken or, at any rate, brought particularly to his notice in the Court below, and, indeed, in the grounds of appeal the point finds no place until a late date when the amended grounds of appeal were put in. On this ground, I think that the injunction granted must be dissolved and that this appeal must be allowed with costs throughout. The memorandum of objections must be dismissed with costs.

I should add that I find nothing in the agreement to limit the U temple in installing new idols or taking them in procession. Nothing that I have said must be taken in any way to express a view as to whether the contract is or is not a binding contract. I appreciate that this judgment must leave open many matters between the two temples, because it seems to me that unless some arrangement is come to between them, there are bound to be difficulties and I urge upon the parties, in the light of this judgment, to see if they cannot arrive at some suitable way of carrying on their respective rites in future without interfering with each other.

WALLACE, J.—I agree that the decision in this case must rest on the interpretation of the contract Ex. A. The first part recites what the Y temple allowed the U temple to do, *i.e.*, the Y temple agreed to refrain from objecting to the U's processions on 23 specific days, and the second part of Ex. A recites what the U temple agreed to do, *i.e.*, it would refrain from objecting to Y's procession on any day, and particularly, it would give precedence to the Y temple on the 23 specified days, and also at any time when their Vasanatha Ootsavam or Vadaithi processions clashed with those of the Y temple. Beyond that the contract does not go. It is a contract as regards what was to be permitted by each side, *i.e.*, what each side agreed to allow the other to do as regards definite festivals which were then taking place or which might take place in the future: and it was not a contract as regards what was to be prohibited to each side for the future. While admitting that the Y trustees came to the making of the contract claiming that all processions of the U temple were contrary to the then law, I agree that a prohibition, to be fastened on the U temple by the Y temple, of all future processions by the former not mentioned by the contract was not in contemplation of the parties as part of that contract, because the Sudder Court law as then in force, would deal with that

and it was not therefore necessary for the parties themselves to provide for it. I agree that this Court cannot hold that the parties must have intended the contract to imply such a prohibition, or that this Court, is, therefore, driven to imply it. The contract is perfectly consistent and intelligible without implying that. In my interpretation the obligations undertaken by the U trustees, under Ex. A were (1) to refrain from interfering with any of Y's processions and (2) to give precedence to its processions on the occasions specifically laid down in the contract. It is not Y's case that, on this interpretation of the contract, there has been any breach thereof. Issue 2 in this case, which is 'whether the defendants committed any breach of the said agreement' must therefore be decided against the plaintiffs. The plaintiffs' suit as framed cannot therefore stand and they are not entitled to an injunction in the terms prayed for. It is not necessary for the purpose of deciding this suit to record a finding on issue I, which is "whether the agreement is true, valid and binding on the defendants" or to say how far Ex. A itself as I interpret it, in reference to obligations which it imposed on the then trustees, was a valid and legal contract, or whether it is now binding on the present defendants, the successors of those trustees. I agree in the order proposed by the learned Chief Justice.

Appeal allowed.

1923 Madras 347.

SCHWABE, C. J., AND WALLACE, J.

Kunhi Kuttiali (T.T.P.) ... Appellants—Defendants.

v.

Tharayil Peelikayil Kunhammad and another ... Respondents—Plaintiffs.

S. A. No. 1632 of 1920, dated 15th November 1922, against the decree of the Temporary S. J., of Tellicherry in A. S. No. 392 of 1918.

(a) *Limitation Act, Sec.* 14—*What is a* bona fide *claim.*

In a suit by some trustees of a mosque for removal of its manager and for the appointment of a Receiver, the manager (defendant) claimed that the suit was not maintainable and that the mosque owed him considerable sums of money which he had spent out of his pocket. An issue was raised as to the amount payable to or by, the manager and the trial Court found on evidence that the manager was entitled to be paid a sum of Rs. 3,302 from the mosque and directed the Receiver appointed in the suit to pay up the said sum. The manager thereupon brought a suit for recovery of the amount found to be due to him deducting the amounts actually paid by the Receiver appointed in the previous suit. The trustees pleaded that the suit was barred by limitation. *Held* that the manager was entitled to exclusion of the time spent in the prior suit and in appeal therefrom under S. 14.

(b) *Limitation Act, S.* 14—*Interpretation.*

The interpretation to be put upon the section must be a wide one. "Limitation would without doubt remain in suspense whilst the plaintiffs were *bona fide* litigating for their rights in a Court of Justice."

[P. 348, Col. 2.]

Madhavan Nair (The Government Pleader)—for the Appellants.

S. Swaminathan, K. P. M. Menon, K. P. Abdulla Kutti and B. Pocker—for the Respondents.

SCHWABE, C. J. :—This case raises a rather difficult point under the Limitation Act. The facts are these: The plaintiff was the Manager of a mosque. The defendants are the trustees of that mosque. Some years ago, disputes arose among the trustees *inter ss* and between some at any rate of the trustees and the plaintiff. Those disputes culminated in a suit, O. S. No. 579 of 1910, before the District Munsif of Cannanore. The suit was by some of the trustees for the appointment of a Receiver to the property of the mosque and for the removal of the present plaintiff, who, they alleged, was indebted in a sum of Rs. 1,000 to them. The present plaintiff, then the 1st defendant in that suit, put in a written statement in which he disputed the right of the then plaintiffs to bring the action, objected strongly to a Receiver being appointed and incidentally alleged that, so far from his being indebted to the mosque, the mosque was heavily indebted to him. Issues were framed and one of the issues (No. 3) was, "Is the 1st defendant indebted to the mosque or *vice versa*? In how much?" Another issue (No. 5) was "if the mosque is found indebted to the 1st defendant, has the 1st defendant not to be paid the amount due to him before his removal? What arrangement may be made for his removal, if at all, in that case?" That issue apparently put upon the record upon the invitation of the present appellants, though presumably

assented to by the present 1st respondent (plaintiff) was very fully inquired into by the District Munsif and at his direction commissioners were appointed specially to investigate that matter with the result that it was found by the District Munsif that there was a sum of Rs. 3,302 due and owing by the mosque to the present plaintiff. He appointed a Receiver and removed the present plaintiff from his position although he held that he had not been guilty of any misconduct and that the trustees were not unanimous in desiring his removal, and he directed that the Receiver should take steps to have all claims of the present plaintiff settled as soon as may be possible. After that decree the Receiver took possession and in pursuance of the decree, paid to the present plaintiff a considerable part of the amount which had been found to be due to him. An appeal was taken from the District Munsif's decree to the Subordinate Judge and before him the points argued were, first, whether the suit by some of the trustees alone was maintainable and, secondly, whether, on the finding that the mosque was the debtor to the present plaintiff for more than Rs. 2,500 the lower Court should have dismissed the plaintiff's suit for money or have returned the plaint for presentation to the proper Court. He held that the suit was in the proper Court as far as the money claimed was concerned but held that in the circumstances some only of the trustees were not competent to sue and therefore reversed the judgment and dismissed the whole suit. The present plaintiff, not getting the balance of the amount that had been found due to him, then brought this action and he is met by the defence that not having sued for three years his suit is barred by the Limitation Act. He answers that by saying that the time occupied in the previous suit should be deducted from the three years period.

The principle to be applied turns upon the proper interpretation of S. 14 of the Limitation Act, 1908, which runs thus: "In computing the period of limitation prescribed for any suit, the time during which the plaintiff has been prosecuting with due diligence another Civil proceeding whether in a Court of first instance or in a Court of appeal, against the defendant, shall be excluded, where the proceeding is founded upon the same cause of action and is prosecuted in good faith in a Court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it." The interpretation to be put upon that section has been a matter of much discussion but this at least may be said that the interpretation must be a wide one and the principle applicable is stated in a few words by their Lordships of the Privy Council in *Nrityamony Dassi* v. *Lakhon Chunder* (1); "limitation would without doubt remain in suspense whilst the plaintiffs *were bona fide* litigating for their rights in a Court of Justice." In that case the then plaintiffs had been defendants in the previous litigation and had got a decree for possession of certain property. The Privy Council said that it would have been better if in those proceedings they had been turned from defendants into plaintiffs, but they still held that although they remained defendants, they were *bona fide* litigating their rights in Court of justice. I think the question for consideration by us is whether this plaintiff was in the previous litigation *bona fide* litigating his rights to be paid this money by the mosque represented by the present defendants. Once it is admitted that there was an issue—and it must be admitted in this case—before the Court, as to whether he was entitled to that money or not and the results of that issue might be either an order that he should recover the amount or even a declaratory order that he would be entitled to the amount, such declaratory order being a step towards getting payment, for instance, by exercising a lien that he might have over property or by proving the amount in a claim against either an insolvent estate or estate in the possession of the Court through its Receiver, in my judgment, it is impossible to say that he was not *bona fide* litigating his rights. In this case the fact is that he actually got an order that an officer of the Court was to pay him the amount due and, in pursuit of that order, he had received a large sum on account from that officer of the Court, the person then in possession of the assets out of which that payment should be made. Under these circumstances, in my judgment, during the whole period of that litigation he was *bona fide* litigating his rights and that period must

1. (1916) 43 Cal. 660=20 C. W. N. 522=30 M. L. J. 529=(1916) M.W.N. 332=3 L. W. 471=18 Bom. L. R. 418=24 C. L. J. 1=20 M. L. T. 10=33 I. C. 452 (P. C.)

be excluded from the period of limitation prescribed for this suit.

This appeal must accordingly be dismissed with costs of the 1st respondent.

WALLACE, J.—I agree. That the plaintiff was prosecuting his claim for money due to him by the mosque seems to be clear from the issues in O. S. No. 579 of 1910 and from the fact that under the decree in that suit he was paid by the Receiver under the directions of the Court a part of the sums due to him, and he might legitimately expect in the same manner to be paid the rest. Had the decision of the District Munsif in O. S. No. 579/1910 been what that of the Appellate Court upon his decision was, then on the issues in that case it could not have been held that the present claim was not being tried; and, on the other hand, had the Appellate Court upheld the Original Court's decision and had the Receiver proceeded to carry out the orders of the Original Court, there would have been no cause of action left for the present plaintiff to sue. It appears to me clear therefore that he was prosecuting his claim with due diligence and in good faith in another civil proceeding. Then as to whether the proceeding was founded upon the same cause of action, I do not think there can be any doubt, although the form in which the plaintiff got his relief in the District Munsif's Court was framed in a declaratory form with a declaration that he had a charge for his money over the mosque property and with the direction already mentioned to the Receiver appointed by the Court to pay the amount found due to him. The only other point is whether he was prosecuting his claim in a Court which could not try it because of defect of jurisdiction, or other cause of a like nature. I think here again it is clear from the final decision in O.S. No. 579/1910 that the District Munsif's Court and the Appellate Court from it were prevented from deciding upon the lawfulness of the present plaintiff's claim, because the plaintiffs in O. S. No. 579 of 1910 had not properly framed their action. That is a cause of a like nature with defect of jurisdiction. This is clearly a case in which the plaintiff has been honestly trying his best to get his case tried on the merits but has failed owing to the Court being unable to give him such a trial.

I therefore, agree that S. 14 of Limitation Act applies.

Appeal dismissed.

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* **1923 Madras 349.**

OLDFIELD, AND RAMESAM, JJ.

(Gujuluva) Nagayyar ... Appellant (Plaintiff).

v.

Thudukuchi Govindayyar and others ... (Respondents) Defendants.

S. A. No. 678 of 1920, dated 7th Sep. 1922, against the decree of the Dt. Court of Madura, in A. S. No. 228 of 1919.

T. P. Act, S. 101—Merger—Contrary intention.

When a mortgagee discharged a mortgage decree passed on two mortgages one of which was prior and the other subsequent to his own mortgage and the decree itself was passed in a suit to which he was a party but on a compromise arrived at between the other parties to the suit. *Held*, that under the circumstances the discharging mortgagee must be taken to have paid the decree-amount not intending to extinguish the mortgage-debts thereunder but so as to keep them alive and to enable him to recover them from the mortgagor.

[P. 350, Col. 2.]

T. P. Act, S. 74—Scope,

No question as to whether the payment is for the benefit of the mortgagor or mortgagee arises in a case where S. 74 has to be applied. All that one has to see in applying S. 74 is whether the person claiming its benefit was a mortgagee at the time of his payment. Even when mortgagee has agreed to purchase the mortgaged property, the payments made by mortgagee to pay off prior mortgages can be availed of under S. 74.

[P. 350, Col. 1.]

T. R. Venkatarama Sastri and V. Sundaram Iyer—for Appellant.

K. Rajah Iyer and P. V. Krishnaswami Iyer—for the Respondents.

AYLING AND RAMESAM, JJ :—The appellant before us is the plaintiff. He sues to recover sums due on two mortgages Exhibits A and B executed by the 1st defendant in favour of himself and sums paid by him in discharge of prior mortgages (Exs. C and D and III). The defendants pleaded that there was a contract for the sale of the mortgaged lands and that the plaintiff made the payments towards Exs. C and D by reason of that contract and his only remedy is to obtain specific performance of the contract and is not entitled to recover in this suit. The Courts below held that Exs. A and B are not discharged by the oral contract of sale but

upheld the defendant's plea as to the sums paid in discharge of Exs. C and D. We think the view taken by the Courts below is opposed to S. 74 of the Transfer of Property Act. Assuming that the contract pleaded by the defendants is true and its terms can be ascertained with definiteness, it does not follow that plaintiff ceased to be a mortgagee. If he has not ceased to be a mortgagee, S. 74 of the Act applies. The case in *Baijnath* v. *Murlidhar* (1) is a case where the plaintiff was not a mortgagee and therefore could not rely on S. 74 and where the plaintiff purchased the property. The case in *Dalip Rai* v. *Birnaik Rai* (2) is a case of a completed mortgage under the terms of which the mortgagee undertook to pay off two prior mortgages. Neither of these two cases has therefore any bearing on the present case. The decision in *Surjiram Marwari* v. *Barhamdeo Persad* (3) is not a case of the application of S. 74. No question as to whether the payment is for the benefit of the mortgagor or mortgagee arises in a case where S. 74 has to be applied. All that one has to see in applying S. 74 is whether the person claiming its benefit was a mortgagee at the time of his payment. This test is satisfied in this case. The plaintiff's appeal has therefore to be allowed. Before a decree can be drawn up, the amounts due to plaintiff with reference to his payments towards Exs. C and D have to be ascertained and we therefore call for a finding on the question—what amounts are due to plaintiff on Ex. C and Ex. D up to this date ? Finding will be submitted within six weeks from the date of the receipt of the records, and seven days will be allowed for filing objections. [On return of the finding the following judgment was delivered.]

OLDFIELD AND RAMESAM, JJ. :—We accept the finding as to the rate of interest in respect of Exs. C and D. It is now pointed out that Ex. D was a decree on two mortgages, one of which was prior to plaintiff's mortgages Exs. A and B and the other was subsequent to them and that S. 74 cannot help the plaintiff to recover the amount which he paid with reference to the latter. It is true that S. 74 does not help the plaintiff but under S. 91 he was entitled to redeem both the mortgages. He was impleaded in the suit on which Ex. D was passed as 7th defendant with the allegation that he was a subsequent mortgagee. Ex. D was passed on a compromise between plaintiff and defendants 1 to 6. The decree is silent as to 7th defendant (the present plaintiff). Under these circumstances the present plaintiff must be taken to have paid the decree amount under Ex. D. (including the amount due on the later mortgage) not intending to extinguish the mortgage debts under Ex. D but so as to keep them alive and to enable him to recover them from the mortgagor (S. 101 of the Transfer of Property Act). The plaintiff will therefore be entitled to recover all the amounts paid under Ex. D. It is also found that a mortgage of 6th defendant (Ex. IV) is prior to the second mortgage in Ex. D. There will therefore be a decree for plaintiff for all the sums found due on Exs. A, C and the first mortgage in Ex. D to be recovered by sale and in respect of Ex. B and the second mortgage in Ex. D, there will be decree for sale subject to 6th defendant's claim under Ex. IV. The plaintiff will have his costs throughout. A preliminary decree will be drawn up accordingly. Time for payment will be six months.

Appeal allowed.

1. (1907) 4 A. L. J. 349=(1907) A. W. N. 85.
2. (1901) 6 A. L. J. 549=2 I. C. 207.
3. (1905) 2 C. L. J. 288.

1923 Madras. 350.

SPENCER AND VENKATASUBBA RAO, JJ.

Ramabadra Chetty ... Appellant (2nd Respondent)

v.

V. Ramaswami Chetty and others ... Respondents (Petitioners—Creditors)

Appeal No. 341 of 1921, dated 9th November 1922, against the order of the Dt. Court of Trichinopoly, dated 21st Feb. 1921.

Receiver—Irregularity.

Where proper reasons are given by a Court for holding that the action of the Receiver was irregular and has prejudiced the general interests of the creditors, it should set aside the order passed by the Receiver.

[P. 351, Col. 1.]

S. Dorswami Iyer and *T. D. Ramiah*—for Appellant.

S. T. Srinivasagopalachari—for Respondent.

JUDGMENT:—It is contended that the Court's power to interfere with a sale held by an Official Receiver is limited to cases where there has been some *mala fides* on the part of the Receiver or of the purchaser.

Reliance is placed on the case of *Ex parte Lloyd : Re Peters* (1) where the Master of the Rolls observed that the Court would not interfere unless the trustee did that which was so utterly unreasonable and absurd that no reasonable man would so act. The same objection was taken in *Thiruvenktachariar* v. *Thangaya Ammal* (2) and overruled. It was then observed "It (the case of *Ex parte Lloyd : Re Peters* (1)) is not an authority for the proposition that where proper reasons are given by a Court for holding that the action of the Receiver was irregular and has prejudiced the general interests of the creditors, it should not set aside the order passed by Receiver." We adopt these observations in dealing with the present case where the Receiver's act was certainly irregular and prejudicial to the creditors in accepting a far lower bid at the second sale.

The suggestion that the appellant had no opportunity to file a counter affidavit in the District Court is not acceptable in view of the entries in the B diary which show that arguments were heard on three different days. The appeal is dismissed with costs. The costs in the District Court after the remand by the High Court will be borne by the Official Receiver whose act occasioned the Court's interference. The costs of the appeal on the previous occasion are provided for in the lower Court's order and we allow that order to stand in that respect.

Appeal dismissed.

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1. (1882) 47 L. T. 64.
2. (1916) 39 Mad. 479=29 M. L. J. 755=17 M. L. T. 429=29 I. C. 294.

1923 Madras. 351.

KRISHNAN, J.

Uthuman Ammal and another ... Petitioners.

v.

Naina Mahomed Rowther... Respondent—(Counter-Petitioner)

C. R. P. No. 876 of 1921, dated 5th December 1922, under S. 115 of Act V of 1908, praying the High Court to revise the order of the Dt. Court of Madura, dated 6th Sep. 1921.

Civil P. C., O. 41, R. 23—Court to which case is remanded only can try.

Where the High Court remanded the case for trial by theMunsif's Court of Madura Town. *Held*, the Court of Madura Taluk which is a different Court altogether has no jurisdiction to deal with it or pass any orders in it ; and consequently the orders passed by that Court must all be set aside and the Town Court directed to dispose of the case. The jurisdiction of the Court trying a remanded case depends entirely on the order of the High Court when remanding the case. It is not a matter of doubt or difficulty ; nor is it a matter for the parties to make up their minds about.

[P. 352, Col. 1.]

T. L. Venkatarama Iyer—for Petitioners.
M. Patanjali Sastri—for Respondent.

JUDGMENT:—In this case the main point taken before me is that the High Court having remanded the case for trial by the Munsif's Court of Madura Town, the Court of Madura Taluk which is a different Court altogether has no jurisdiction to deal with it or pass any orders in it; and consequently the orders passed by that Court must all be set aside and the Town Court directed to dispose of the case.

This argument seems to me to be sound. Though the judgment of the High Court indicated "the Court of first instance" as the Court to try the remanded case that Court had been abolished and the decree therefore specified the Town Court as the Court to try the case in quite unambiguous language. So long as that direction stands I must hold that the Town Court alone can deal with the case.

The learned Vakil for the Respondent attempted to contend that I should apply the principle underlying S. 21, C. P. C. to this case and refuse to give effect to the objection as it was not taken at the earliest stage in the Taluk Munsif's Court which actually was dealing with the case. It is conceded S. 21 will not in terms apply. I

am unable to accept the argument that any principle underlying it applies to this case. The jurisdiction of the Court trying a remanded case like the present one depends entirely on the order of the High Court when remanding the case. It is not a matter of doubt or difficulty; nor is it a matter for the parties to make up their minds about. The ruling in *Venkatrama Vathiar* v. *Sambasiva Aiyar* (1) is not applicable to the present case at all. There the objection was taken to the High Court's jurisdiction in a subsequent suit by a party to the High Court suit in which it had been alleged that he was resident in Madras to give jurisdiction to the High Court. The party had not disputed this averment but actually submitted to the trial. He could not afterwards be permitted to assert that he was not so resident and object to the Court's jurisdiction. If he had raised the objection in the High Court suit itself, it would have been a matter for that Court to decide and its decision could not have been attacked collaterally in another suit. That case is thus entirely different from the present one.

The objection as to jurisdiction was taken at a fairly early stage in the first Court itself in this case. But even otherwise the objection is now taken in the same proceedings and I see no ground for refusing to give effect to it. I must therefore set aside all the orders of the Taluk Munsif of Madura and direct him to forward the records to the Town Munsif's Court for disposal of the case. It is to be regretted that more care was not taken in reading the High Court's decree before the Taluk Munsif began to deal with it.

In the circumstances there will be no order as to costs for either side in this Civil Revision Petition or in the lower Courts after the remand.

Order set aside.

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1. (1919) 37 M. L. J. 349=26 M. L. T. 186=10 L. W. 293=(1919) M. W. N. 636=53 I. C. 463.

1923 Madras. 352.

RAMESAM, J.

(*Chintamaneni*) *Venkatappayya*
Petitioner (Counter-Petitioner—Plaintiff).

(*Chintamaneni*) *Venkatappayya*
Respondent (Petitioner—2nd Defendant.)

Civ. Revn. Case No. 423 of 1921, dated 10th November 1922, under S. 115 of Act V of 1908 and S. 107 of the Government of India Act, praying the High Court to revise the decree of Court of the Sub-Judge of Bezwada in C. M. A. No. 11 of 1920.

Civil P. C., S. 95—Ground for compensation.

It is doubtful whether an award of compensation can be made in a case where the order of injunction was passed after hearing both the parties and after it was found that there were sufficient grounds and the plaintiff has not ultimately failed in his suit. To allow a petition for compensation immediately after the main petition for injunction was disposed of and without fresh materials as for a review or such as may appear at the trial of the suit, will be generally to permit a Court to come to a conclusion inconsistent with and opposed to its prior order. Such an anomaly is not intended by S. 95.

[P. 353, Col. 1.]

G. Lakshmanna and A. Satyanarayana—for the Petitioner.

V. Suryanarayana—for the Respondent.

JUDGMENT:—In this case the petitioner filed a suit (O. S. No. 852 of 1919) in the District Munsif's Court of Nuzvid at Bezwada. On 27th November, 1919, he applied under O. 39, R. 1, Civil Procedure Code for an order of temporary injunction. On the same day an *ad interim* injunction was issued and notice to the defendant was also ordered. The defendant appeared on 5th December, 1919, and opposed the plaintiff's application. The District Munsif passed an order directing that, if the defendant furnished security or deposited an amount representing the value of the crop, "the temporary injunction will be dissolved and till then, the temporary injunction shall stand." On 7th December, 1919, the defendant furnished security and the temporary injunction was dissolved. As I read the District Munsif's order of 5th December, 1919, the District Munsif was of opinion that there were sufficient grounds for the plaintiff's application. On 19th December 1919, *i.e.*, within 12 days after the order, the defendant filed an application for compensation

from the plaintiff on the ground that his application for temporary injunction was made on insufficient grounds. (The suit was actually tried in March, 1921). The District Munsif dismissed the application holding that there were sufficient grounds for the plaintiff's application. But on appeal the Subordinate Judge on reading the affidavit filed in support of the original application, held that it was based on insufficient grounds and awarded compensation. The present revision petition is against the order of the Subordinate Judge.

In my opinion the petition of the respondent does not lie. It is not pretended that the application was based on anything that appeared in the trial of the suit (which actually took place in March 1921). It is doubtful whether an award of compensation can be made in a case where the order of injunction was passed after hearing both the parties and it was found that there were sufficient grounds and the plaintiff has not ultimately failed in his suit, [see *Roulet* v. *Fetterle* (1)]. But assuming that even where after an order was made on hearing both parties and the plaintiff has ultimately succeeded, a petition lies under S. 95 for compensation—such cases must be very rare indeed—the stage for such an application would be only when the suit is heard. Up to then, such a petition would be premature [see *Sokkalingam Chetty* v. *Krishnaswami Ayyar* (2)]. I am not saying that when the order was refused, compensation cannot be asked immediately without waiting for the suit.

In my opinion to allow a petition of this kind, immediately after the main petition was disposed of and without fresh materials as for a review or such as may appear at the trial of the suit, will be generally to permit a Court to come to a conclusion inconsistent with and opposed to its prior order. I do not think such an anomaly is intended by S. 95.

The proceedings in the Courts below are without jurisdiction. I therefore reverse the order of the Subordinate Judge. The respondent will pay petitioner's costs throughout.

Petition allowed.

1 (1894) 18 Bom. 717.
2 (1920) 11 L.W. 479=38 M.L. J. 324=(1920) M. W. N. 192=27M. L. T. 259=55 I. C. 786.

1923 Madras. 353.

SPENCER AND VENKATASUBBA RAO, JJ.

(*K. M. Sheik*) *Muhammad Rowther* ... Appellant (Respondent—Counter-petitioner—Plaintiff and decree-holder.)

v.

Subba Naicker ... Respondent (Petitioner-Defendant and judgment-debtor).

Appeal No. 357 of 1921, dated 14th November 1922, against the order, dated 21st March 1921, of the Court of the Sub. J. of Dindigul.

Limitation Act (IX of 1908), S. 18—Fraud—Judgment-debtor kept in ignorance of a Court sale by fraud for more than 2 years.

Where a decree-holder not merely failed to serve the judgment-debtor with notice of the intended sale but even after sale actively concealed from him the knowledge of his right to object to the sale. *Held*, that S. 18 of the Indian Limitation Act, 1908, applied.

B. Sitarama Rao and S. R. Muthusami Iyer—for the Appellant.

K. V. Krishnaswami Iyer and A. Ramaswami Iyer—for the Respondent.

JUDGMENT :—We have considered the evidence and find no reason to disturb the learned Subordinate Judge's finding that the petitioner was kept in ignorance of the sale of his property which took place on 25th October, 1917, till application was made by the counter-petitioner for possession to be delivered to him in December, 1919.

The want of resemblance between the signatures on Exs. 1 (a) and 1 (b) and the petitioner's admitted signatures and the counter-petitioner's failure to explain how the figures of Rs. 2,500 in Ex. A was arrived at and how certain words came to be struck out and others put in confirms the conclusion which the rest of the evidence leads to on the question of fraud. This finding does not necessarily involve a finding that the processervers were parties to the fraud in serving notices on the petitioner.

It is argued that fraud anterior or subsequent to the act complained of will not save limitation. In the present case there was a continuing fraud which commenced with the counter-petitioner's failure to serve the judgment-debtor with notice of the intended sale and was kept up after the sale by the execution of Ex.

A. This justifies the application of S. 18 of the Limitation Act, the active concealment from petitioner of the knowledge of his right to object to the sale having continued till the fraud first became known to him when an application was made for delivery of the property that was the subject of the sale.

The application was thus in time and the circumstances of *Payidanna* v. *Lakshminarasamma* (1) and *Beeju Bee* v. *Moorthuja Sahib* (2) are distinguishable.

The Civil Miscellaneous Appeal fails and is dismissed with costs.

Appeal dismissed.

1. (1915) 38 Mad. 1076=28 M. L. J. 525=29 I. C. 314.
2. (1920) 43 Mad., 214=11 L. W. 150=37 M. L. J. 627=26 M.L.T. 419=53 I. C. 905 (F. B.)

1923 Madras. 354 (1).

PHILLIPS AND DEVADOSS, JJ.

Nagathal and others ... Appellants—(Defendants).

v.

V. Arumugam Pillai and others ... Respondents (Plaintiffs and Defendants.)

S. A. Nos. 1396 and 1397 of 1921, dated 13th November 1922 against the decrees of the Court of the Sub. J. of Dindigul in A. S. Nos. 42 and 43 of 1921.

T. P. Act, S. 83—Deposit—Mesne profits.

Owing to quarrels among the heirs of the mortgagee the amount was not drawn, but the amount was allowed by plaintiff to remain in deposit until his suit for redemption was decreed. He had thus done all he could to enable the mortgagee to draw the amount as the money was not withdrawn by him before the heirs could settle their disputes. *Held*, interest ceased to run from the date of the deposit and mortgagor was thence entitled to mesne profits.

K. S. Ganapathy Iyer and M. S. Venkatarama Iyer—for the Appellants.

K. S. Jayarama Iyer—for the Respondents.

JUDGMENT.—In this case the mortgage money was deposited by plaintiff in Court under S. 83, Transfer of Property Act, to the credit of the mortgagee's heirs. Owing to quarrels among the heirs, the amount was not drawn, but the amount was allowed by plaintiff to remain in deposit until his suit for redemption was decreed. He had thus done all he could to enable the mortgagee to draw the amount as the money was not withdrawn by him before the heirs could settle their disputes, as was the case in *Thevaraya Reddy* v. *Venkatachalam Pandithar* (1) In this case, therefore interest ceased to run from the date of the deposit and the Subordinate Judge was right in allowing mesne profits to plaintiff. This being so his order as to costs must also stand.

Second Appeal No. 1396 of 1921 is dismissed with costs of the plaintiff.

Second Appeal No. 1397 of 1921 is dismissed for the same reasons but without costs.

Appeals dismissed.

1. (1916) 40 Mad. 804=4 L. W. 433=31 M. L. J. 548=(1916) 2 M. W. N. 321=20 M. L. T. 403=37 I. C. 444.

1923 Madras. 354 (2)

RAMESAM, J.

Koilpillai Samban ... Petitioner (Defendant).

v.

Sappanimuthu Samban and another ... Respondents (Plaintiffs).

Civ. Rev. Petn. No. 870 of 1921, dated 9th November 1922, under S. 25 of Act IX of 1887, praying the High Court to revise the order of the Court of the Dt. Munsif of Tuticorin in C.M.P. No. 385 of 1921.

Provincial Small Cause Court Act (9 of 1897) S. 17—Delay in chalan due to officers of Court.

When the party has applied for a chalan and the delay in issuing the chalan is the delay of the officers of the Court, the maxim *nunc pro tunc* applies. Not mentioning to the office that the chalan is wanted urgently cannot be regarded as negligence and Court should excuse delay in such a case.

A. Swaminatha Iyer—for the Petitioner.

L. Krishnaswami Iyer—for *V. K. Mahadeva Sastri*—for the Respondent.

JUDGMENT.—Following the decision in *Mahomed Akbar Zaman Khan* v. *Sukhdeo Pande* (1) and *Munna Lal* v. *Radha Kishan* (2) (the latter of which was cited before the District Munsif but not distinguished or otherwise dealt with by him), I hold that when the party has applied for a chalan and the delay in issuing the chalan is the delay of the officers of the Court and after the issue of the chalan, he deposited the amount immediately, the

1. (1911) 13 C. L. J. 467=10 I. C. 51.
2. (1915) 37 All. 591=13 A. L. J. 793=30 I. C. 186.

maxim *nunc pro tunc* applies and the application for chalan (in such circumstances) is equivalent to the deposit.

Even if excusing delay is necessary, the view of the District Munsif that the High Court by its rules cannot' affect S. 17 of Provincial Small Cause Courts Act is clearly opposed to *Sudalaimuthu Kudumban* v. *Andi Reddiar* (3). The statement of the District Munsif that the deposit was not made in time on account of the negligence of the petitioner is opposed to all the facts that appear on the record. Not mentioning to the office that the chalan is wanted urgently cannot be regarded as negligence. Therefore, even if it were necessary to excuse the delay, I hold this is a case in which the delay ought to be excused. I reverse the order of the District Munsif and direct him to dispose of the petition according to law. The petitioner will have the costs of the Revision Petition. Costs in the lower Court will abide the result.

Petition allowed.

3. (1922) Mad. 186=45 Mad. 628=42 M. L. J. 484=15 L. W. 494=(1922) M. W. N. 266=30 M. L. T. 342=66 I. C. 104.

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* **1923 Madras. 355.**

SPENCER AND VENKATASUBBA RAO, JJ.

The Official Receiver, Tanjore
v. ... Appellant.

B. S. Nataraja Sastrigal and others ... Respondents.

Appeal Nos. 307 and 308 of 1922, dated 22nd December 1922, against the order, dated 27th July 1922 of the District Court of East Tanjore at Negapatam in Insolvency Petition No. 3 of 1921 and appeal against the order, dated 15th August 1922.

(*a*) *Prov. Ins. Act* (*V of* 1920) *Sec.* 75—*Receiver can appeal.*

It is clear from S. 75 that the Official Receiver is one of the persons who has a right of appeal if he is aggrieved by order of la Court acting in its insolvency jurisdiction.

[P. 356, Col. 1.]

(*b*) *Prov. Ins. Act* (*V of* 1920) *S.* 5—*Review.*

S 5 provides that the Court "shall have the same powers and shall follow the same procedure as it has and follows in the exercise of its original civil jurisdiction." Therefore the District Judge does not act illegally in altering his order after it had been passed.

[P. 356, Col. 1.]

(*c*) *Prov. Ins. Act, S.* 57—*R.* 11—*Removal of Receiver.*

The words "otherwise direct" refer not only to the point of time when the appointment of a Receiver under S. 56 is made, but also the period subsequent to the appointment. That is to say, the court may not only at the initial stage appoint a special Receiver for valid reasons but it may, if good grounds are shown, remove the Official Receiver appointed originally at any time whatsoever. All insolvencies should be kept within the control of the Official Receiver, unless very exceptional reasons, such as reasons connected with the personality of the Receiver, are put forward to deprive him of that control.

[P. 357, Col. 2.]

T. M. Krishnaswami Iyer—for Appellant.

T. V. Muthukrishna Iyer, A. V. Visvanatha Sastri and T. V. Ramanatha Iyer.—for the Respondents.

SPENCER, J:—The appellant is the Official Receiver of the Tanjore District. He appeals against the orders of the District Judge of East Tanjore appointing a Special Receiver in I. P. No. 3 of 1921 instead of the Official Receiver, in whom the insolvent's property would ordinarily vest under S. 57 of Act V of 1920. It appears that when the adjudication of insolvency was made, the District Judge vested the property in the Official Receiver on the 26th July, 1922. The next day at the instance of the vakil for some of the insolvents the District Judge reconsidered his order and substituted "Special Receiver" for "the Official Receiver" in his order. S. 57, Cl. 2 permits the Court to make such an order for special reasons. The Official Receiver moved the Court to reconsider this second order, but the District Judge declined to do so on the 15th August, 1922.

In these appeals a number of points have been raised on either side. It is contended that the Official Receiver is not entitled to appeal under S. 75 and that, even if he is so entitled, the Court has given good reasons for appointing a special Receiver in the present case and that we should not interfere with the District Judge's discretion. On the other hand the appellant contends that the Court having passed a final order on the 26th of July had no power under the Provincial Insolvency Act to review that order; secondly that the rules framed under the Provincial Insolvency Act, which have the effect of law by virtue of S. 79 Cl. 3, give no power to a Court to remove an Official Receiver once appointed (*vide* Rule 12); and lastly that the reasons given by the District Judge for appointing a Special Receiver are not sufficient reasons

for making an exception to the general rule.

On the first point it is clear from S. 75 that the Official Receiver is one of the persons who has a right of appeal if he is aggrieved by the order of a Court acting in its insolvency jurisdiction. *Official Assignee of Madras* v. *Ramachandra Iyer* (1) affords an instance where the Official Assignee, who stands in a similar position to the Official Receivers in the mofussil, was regarded as a person 'aggrieved' and was permitted to appeal. That case proceeded largely on the authority of an English case *Ex parte Sidebotham : In re Sidebotham* (2). It appears from the notes at page 459 that the question of the removal of the Trustee was one of the matters that came up for consideration, and the learned Judges declared that a Trustee in Bankruptcy would be entitled to appeal from an order of the Court if he thought it unjust and that he would be a person 'aggrieved' if a decision had been pronounced which had wrongfully refused him something to which he was entitled. I hold therefore that the appellant has a right of appeal.

Although the Provincial Insolvency Act does not contain any provision for reviewing orders already passed, S. 5 provides that the Court "shall have the same powers and shall follow the same procedure as it has and follows in the exercise of its original civil jurisdiction." I am therefore not prepared to hold that the District Judge acted illegally in altering his order after it had been passed.

Next the provision in R. 12 that "the Court may remove or discharge any Receiver or Interim Receiver other than an Official Receiver" appears to have been so worded in consideration of the fact that under S. 57 of the Act the power of appointing Official Receivers is vested in the Local Government and, therefore, no Court has the power to remove an Official Receiver from his office. Where the appointment of an Official Receiver to take charge of a particular insolvency is concerned, the proviso to R. 11 allows the party to apply to the Court to set aside the appointment of the Official Receiver and to ask that a special Receiver may be appointed in his place. Even if that proviso was intended to apply to cases where orders of adjudication have been made by the Official Receiver himself, unless the contrary appears we may assume that Courts have power to make such orders from time to time as are necessary for dealing with the insolvent's estate. Under S. 16 of the General Clauses Act whenever a power to make an appointment is conferred, the authority having such power must be deemed to have power also to remove any person appointed by it in exercise of that power. I therefore hold that the District Judge was legally empowered to set aside his own order appointing the Official Receiver, if there were special reasons for doing so.

The reasons given in the District Judge's order are that it was better in the interests of all parties concerned that a Special Receiver residing in Negapatam should be appointed to deal with the insolvent's property. The Official Receiver was an Interim Receiver before the ajudication, and there is nothing to show that any personal reason existed for his being superseded. The property of the insolvents is not situate at Negapatam, where the special Receiver lives, but in a village, which is accessible from Tanjore as well as from Negapatam; and during the management of the Interim Receiver, he was leasing out the lands and doing such other necessary acts for the management of the insolvent's estate. The remuneration of Official Receivers, who are paid a fixed salary by Government, depends partly upon the receipts obtained by them in administering various estates in their district; and those receipts will be diminished if special Receivers are appointed superseding the authority of the Official Receiver. The reasons given by the District Judge and those appearing in the affidavits of the creditors are not sufficient in my opinion to outweigh the general importance of keeping all insolvencies within the control of the Official Receiver, unless very exceptional reasons, such as reasons connected with the personality of the Receiver, are put forward to deprive him of that control.

The District Judge's order must be vacated and in lieu thereof the Official Receiver will be directed to take charge of the insolvent's estate. The appellant's costs in C. M. A. 307 in this Court will be defrayed out of the insolvent's estate. There will be no order as to costs in

1. (1908) 33 Mad. 134=7 M. L. T. 214=5 I. C. 974.

2. (1880) 14 Ch. D. 458=49 L. J. B. K. 41=42 L.T. 783=28 W. R. 7115.

C. M. A. No. 308. The 1st respondent will bear his own costs in C. M. A. No. 307 in this Court.

VENKATASUBBA RAO, J:—The first question to be decided is whether the Official Receiver is entitled to appeal against the orders passed. Is he a person aggrieved under S. 75 of the Act? On the 26th July, 1922 an order of ajdudication was made and the Official Receiver was appointed Receiver of the property of the insolvents. On the following day the District Judge varied his order of the 26th and appointed a special Receiver. The latter applied for the setting aside of the order made on the 27th of July, and on the 15th of August, the District Judge passed an order refusing to reconsider his decision. The Official Receiver has filed two appeals, one against the order of the 27th of July and the other against that of the 15th of August.

Various cases were cited in the argument bearing on the interpretation of the words "a person aggrieved." But I think it is sufficient to refer to two of them. In *Ex parte Sidebotham* (2), James, L. J. observed that if the Court acted on a report by the Comptroller in Bankruptcy that the trustee had been guilty of a misfeasance, or neglect, by which the estate had sustained a loss which the trustee ought to make good, the trustee would be entitled to appeal from the order of the Court, if he thought it unjust. This obeservation is no doubt *obiter* but is entitled to great weight. The Lord Justice said" 'A person aggrieved' must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something or wrongfully refused him something, or wrongfully affected his title to something." Lord Esher, M. R. in *Re Reed Bowen & Co.* (3), referring to the definition given by James, L. J. observed that the words used were "legal grievance" and not "pecuniary grievance or grievance to person or property" and further added that "a person aggrieved" must be a man against whom a decision has been pronounced which has wrongfully refused him something which he had a right to demand.

I think the Official Receiver suffered a legal grievance and he was "wrongfully deprived of something" He was removed from office and his application to reconsider the order was refused. He was entitled to say that his appointment should not have been set aside; he had a right to ask that he should be restored to office. He was aggrieved by the orders made against him.

This leads me to the consideration of the second question, Can the Court remove an Official Receiver who has been appointed Receiver of an insolvent's estate from his office of such Receiver of that estate? The answer would depend upon the construction of S. 57, Cl. (2).

S. 56, Cl. (1) and Cls. (1) and (2) of S. 57 run thus:—

S. 56, Cl. (1):—The Court may, at the time of the order of adjudication, or at any time afterwards, appoint a Receiver for the property of the insolvent, and such property shall thereupon vest in such a Receiver.

S. 57, Cl. (1):—The Local Government may appoint such persons as it thinks fit to be called Official Receivers under this Act within such local limits as it may prescribe."

S. 57, Cl. (2):—"Where any Official Receiver has been so appointed for the local limits of the jurisdiction under this Act, he shall be the Receiver for the purpose of every order appointing a Receiver or an *interim* Receiver issued by any such Court, unless the Court for special reasons otherwise directs."

It will be seen that an Official Receiver becomes in virtue of his holding that office, a Receiver of the property of the insolvent, if a Receiver for the property is appointed. The Court however for special reasons may otherwise direct. In my opinion the words "otherwise direct" refer not only to the point of time when the appointment of a Receiver under S. 56 is made, but also the period subsequent to the appointment. That is to say, the Court may not only at the initial stage appoint a special Receiver for valid reasons but it may, if good grounds are shown, remove the Official Receiver appointed originally at any time whatsoever. This construction will avoid an absurdity *viz.*, that the Official Receiver once appointed can never be removed by the Court even though he may be guilty of misappropri-

3. (1885) 19 Q. B. D 174.

ation or fraud or is shown to have an interest adverse to that of the creditors of the insolvent. I am therefore of the opinion that under S. 57, Cl. 2, the Court has the power to remove the Official Receiver from his office of Receiver for the property of an insolvent.

It has been argued that R. 12 of the Insolvency Rules negatives this power. I must say that there is considerable force in this argument. If this be the effect of R. 12, I am prepared to hold that it is *ultra vires*.

It has next been pointed out that R. 11 specifically provides for the setting aside of the appointment of the Official Receiver and for the appointment of a special Receiver. If this be the right construction, R. 11 would be inconsistent with R. 12. I am inclined to think that the proviso refers only to the cases specified in Cls. 4 and 5 *i.e.*, to the Official Receiver appointed for the property of the insolvent "in cases where the Official Receiver is empowered to make orders of adjudication." The decision of the question however does not depend on a construction of these rules but I would take this opportunity to suggest that a revision of Rr. 11 and 12 may be made.

The third point relates to the merits of the appeal. The Official Receiver was removed on the ground that his head-quarters was at Tanjore, that there was a single Receiver appointed by the Government for the two districts, the East and West Tanjore and that therefore a person in the locality should be perferred. The Government has appointed one Official Receiver for the area comprised within the two districts, and if the reason given by the District Judge should be held sufficient to appoint a special Receiver, the reason would exist in every case and the Official Receiver could never be appointed Receiver for any property within the jurisdiction of the District Judge of East Tanjore. I am utterly unable to regard this a special reason under S. 57 of the Act.

I therefore agree with the order proposed by my learned brother.

Appeals allowed.

1923 Madras. 358.

OLDFIELD AND DEVADOSS, JJ.

(*Jambapuram*) *Subbiah and others* ... Appellants (Defendants)

v.

Gundalapudi alias Mittameedi Venkataramayya ... Respondent (plff).

S. A. No, 816 of 1921, dated 26th October 1922, against the decree of the Court of the Temporary Sub. J. of Cuddapah in A. S. No. 16 of 1910.

Co-sharer—Improvement.

One tenant-in-common, who makes improvements on the property of the co-tenancy, cannot ordinarily be entitled to compensation for doing so, except when he had expended necessarily or with the concurrence of the other co-tenant.

S. Varadachariar—for the Appellants

P. Narayanamurthi and K. Kamanna—for the Respondent.

JUDGMENT, J.:—Some argument was addressed to us on behalf of the defendants, appellants, with reference to the calculations, on which the lower Court's judgment is based. We have not, however, been shown how any question of law is raised in connection with their correctness and we, therefore, decline to interfere with the conclusions, in which those calculations result.

The remaining ground, on which the appeal is argued, is against the lower appellate Court's refusal to make any provision in its decree for an award to the defendants on account of the improvments they alleged they have made on the suit property. The suit property is part of a larger area in common ownership of the plaintiff and the defendants. The plaintiff let his unascertained share to the defendants, and the present suit is brought for the eviction of the defendants from that share, the form of the decree being of course a decree for partition by metes and bounds of the plaintiff's share and delivery to him of possession thereof. It cannot therefore at present be said that the improvements are on the portion of which the plaintiff will be entitled to delivery. But in any case we cannot see how one tenant-in-common, who makes improvements on the property of the co-tenancy, can ordinarily be entitled to compensation for doing so. The defendant's argument has been based on the dictum of Mookerjee

in *Upendra Nath* v. *Umes Chunder* (1) that :

"If one joint owner has in good faith effected valuable improvements upon the common property at his own expense, equity will take this fact into consideration upon a partition and in some way will make an allowance to him therefor, in addition to his rateable share of the property."

The learned Judge has proceeded to explain the nature and the grounds of this equity but we prefer to decide whether any such principle as that relied on by him is really recognised by authority. Certainly it is not recognised in the unqualified form, in which he stated it, in the cases referred to in his judgment. In *Swan* v. *Swan* (2) the Court ordered a reference for an account to be taken of what had been expended by a co-tenant necessarily or with the concurrence of the other co-tenant ; and these qualifications were fully recognised in *In re Jones, Forrington* v. *Forrestor* (3). No doubt the reference in that case to the observations of Cotton, L.J., in *Leigh* v. *Dickson* (4) is at first sight in favour of the existence of a general right in one co-tenant to compensation for improvements made by him against another. But the judgment of Brett, L.R., and of the other learned Judge in *Leigh* v. *Dickson* (4) amply sustain the right, as subject to proof of the necessity for repairs or improvements or of the co-tenant's concurrence, express or implied, in their execution. The portion of the judgment of Cotton, L. J., to which reference has been made, appears, on a perusal of his judgment as a whole, to be concerned solely with procedure, that is with the existence of a remedy in equity by a partition suit, which the common law, could not afford. In the present case the defendants have never in their written statement or elsewhere alleged the plaintiff's concurrence, expressed or implied, in what they did ; and no issue on the point was framed or even asked for. In these circumstances this objection to the lower Appellate Court's decree must fail.

The Second Appeal is therefore dismissed with costs, including costs of C.M.P., No. 2483 of 1922.

Appeal dismissed.

1. (1910) 12 C. L. J. 25 = 15 C. W. N. 375= 6 I. C. 346.
2. (1820) 8 Price 571.
3. (1893) 2 Ch. 461.
4. 15 Q.B D. 60.

1923 Madras. 359.

SPENCER AND VENKATASUBBA RAO, JJ.

M. Narasayya and others... Appellants — (Counter-petitioners.)

v.

A. Venkatappa ... Respondent — (Petitioner).

Appeal No. 59 of 1922, dated 25th October 1922, against the order of the Dt. Court of Anantapur in O. P. No. 41 of 1920, dated 29th November 1921.

Guardian and Wards Act, S. 17(1)—Presumptive heir—Minor's welfare.

In case of claims of distant relations there is no question of preference other than what arises from a consideration of the minor's welfare which is made the paramount consideration under S. 17 (1) and (2). The presumptive heir to the property of a minor is not a suitable person to be appointed guardian of his person, as such a person stands to gain by the minor's death.

K. G. Babu Rau—for the Appellants.

S. Ranganadha Iyyar—for the Respondents.

JUDGMENT.—The learned District Judge appears to have selected the petitioner to be the guardian of the minor's person chiefly on the ground that as he says he would under Hindu Law be the preferable guardian.

But in fact 1st counter-petitioner who is his mother's brother is more nearly related to the minor, and when the claims of distant relations like petitioner and 2nd, 3rd and 6th counter-petitioners have to be compared there is no question of preference other than what arises from a consideration of the minor's welfare which is made the paramount consideration under S. 17 (1) and (2) of the Guardian and Wards Act.

It has been often laid down that the presumptive heir to the property of a minor is not a suitable person to be appointed guardian of his person, as such a person stands to gain by the minor's death (see *Sami Row* v. *Elivatha Row* (1); *Kristo Kissor Neoghy* v. *Kadermoye Dossee* (2); and *Krishnaswami Chetti* v. *Cottah Mangammah* (3). The petitioner as the nearest agnate is in this case the person who should succeed to the minor's property if anything happened to the minor.

The 1st counter petitioner is unmarried and in a dependant position. The minor

1. (1906) 16 M. L. J. 357.
2. 2 C. L. R. 583.
3. (1911) 11 M. W. N 365=10 I. C. 283.

is of tender age and will need maternal care for some years to come. Such care is not to be looked for from 1st counter-petitioner or from the minor's step-sister, a girl of 16 who lives half the year with petitioner's witness 4 who is himself not a near relation and she further is of marriageable age and likely not to remain long in petitioner's house.

The 2nd and 6th counter-petitioners are not shown to have any particular qualification and they are very near heirs though not the next presumptive heirs.

Under these circumstances we think that the 5th counter-petitioner whose brother has married the 3rd counter-petitioner's daughter is the person who is likely to be the most disinterested protector of the minor's person.

The District Judge's order appointing the petitioner guardian of the minor's property will stand upon the conditions set out at the end of the order, but in reversal of his order we appoint the 5th counter-petitioner guardian of the minor's person. The order allowing Rs. 10 per mensem for the maintenance of the minor and his step-sister will be altered by providing Rs. 5 for the minor and Rs. 5 for Narasamma. This will be an ample sum in our opinion for the minor's maintenance in view of the 5th counter-petitioner's offer to maintain the minor at his own cost. Each party to bear their own costs in this and in the lower Court.

Order modified.

1923 Madras. 360.

SPENCER AND VENKATASUBBA RAO, JJ.

K. S. Venkatarama Iyer ... Petitioner—(Respondent).

v.

V. Hamid Sultan Maracayar Sahib Bahadur ... Respondent (Petitioner).

Petition No. 759 of 1922, dated 5th December 1922, under S. 115 of Act V of 1908 and S. 107 of the Govt. of India Act praying the High Court to revise the order of the Court of the Sub. J. of Negapatam.

(a) *Civil P. C., S. 115 — Order on Election Petition.*

The High Court could revise an order of a Sub-J. on an election petition, if he had acted with material irregularity or illegality.

[P. 360, Col. 2.]

(b) *Corporation—Essentials of legality.—Taluk Board.*

It is not the appointment of members that constitutes the Taluk Board, its constitution is created by the Act and the notifications. The eventuality occurring at some time or another of all the seats not being filled is contemplated by the Act The act of a Taluk Board would not be illegal, even if a vacancy, occurring after its formation, remained unfilled. Every seat need not be filled even at the first constitution of the board in order to make it a legally constituted body. A corporation may exist by common law, by Royal Charter, by authority of Parliament, by prescription, or by custom, and not otherwise. "A corporation is not invalid merely because at the moment of its creation it does not in fact exist, so long as it is capable of coming into existence". "Where the corporation consists of a head and members, they may be appointed after the foundation".

T. M. Krishnaswami Iyer—for Appellant.

S. Swaminathan—for the Respondent.

JUDGMENTS:—SPENCER, J.—This Civil Revision Petition is connected with an order made by the Subordinate Judge at Negapatam in reference to an election to the Taluk Board of Negapatam under the powers possessed by him as an enquiring authority under the rules in Appendix D to the Madras Local Boards Act.

An objection has been taken that we have no power to revise the order of the Subordinate Judge, which by R. 12, Cl. 3, of the rules for the conduct of inquiries and the decision of disputes relating to elections is declared to be final, after he has decided whether an election is void for non-compliance with the provisions of the Act or the rules made thereunder. This question has been fully considered by a Bench of this Court, on which my learned brother was one of the Judges, when it was decided that the High Court could revise an order of a Subordinate Judge on an election petition, if he had acted with material irregularity or illegality (see *Ramaswami Goundan* v. *Muthu Velappa Goundan* (1). I agree with that decision in preference to the decision of Devadoss, J. sitting as a single Judge in *Daivanayagam Pillai* v. *Mohideen Rowther* (2) and I do not think that anything useful can be added to the reasons given therein.

As to the merits of this petition, it appears that originally there was one Taluk Board at Negapatam, which comprised the revenue taluks of Negapatam and Nannilam. When the revised Local Boards

1. (1923) Mad. 192=16 M. L. W. 848=44 M. L. J. 1=1923 M. W. N. 133.

2. (1923) Mad. 169=44 M. L. J. 39=16 M. L. W. 827=1922 M. W. N. 818.

Act of 1920 came into force, the Government decided to bifurcate the existing Taluk Board and to provide a Taluk Board for each revenue taluk under S. 6 of the Act, which requires that there shall be a Taluk board constituted for each taluk, the Government having the power under S. 4 to declare by notification any part of a district to be a taluk. In order to effect this bifurcation, the necessary notifications were published in the *Fort St. George Gazette*. In the Gazette of the 3rd January, 1922, the Government fixed under R. 9 of Sch. 10 of the Act the 1st of April, 1922 as the date for the first reconstituted Taluk Boards in the Tanjore district to come into existence. R. 9 of Schedule 10 requires that the date fixed by notification should be not later than one year from the commencement of this Act, power being given to extend the period by six months for special reasons. The Act came into force on the 4th January, 1921 and the date fixed for the Taluk Board coming into existence was the 1st April, 1922. Thus this notification was quite in order.

Next by notification, No. 581, published in the *Fort St. George Gazette* of the 15th August, 1922, the Government acting under the powers, already referred to, of declaring by notification any part of a district to be a taluk and cancelling notifications previously issued, notified that the notification constituting the existing local fund taluk should be cancelled with effect from the 15th of August and that from that date the taluks of Negapatam and Nannilam should be taluks for the purpose of the Act, and that the properties vested in the old Baluk Board of Negapatam should vest in the new Taluk Boards of Negapatam and Nannilam, so far as they were situate within their respective jurisdictions.

Under S. 10 of Act XIV of 1920 the District Board is empowered to fix the total number of the members of the Taluk Boards within its jurisdiction subject to the maximum of 24 and the minimum of 12 laid down in S. 7. In the present case, the District Board of Tanjore resolved that the number of members of the Negapatam Taluk Board should be twenty. Under the extraordinary powers vested in Government by S. 240 of appointing all the members of new Taluk Boards for a period not exceeding one year from their constitution, the Government by notification, No. 577 of the 15th August, 1922 appointed 19 gentlemen to be members of the Taluk Board of Negapatam (*N. B.*—A twentieth member was not appointed till November 21st, 1922, see *Fort St. George Gazette* No. 47 dated 21-11-22). As soon as the notification of the 15th August, No. 581, was published, a meeting was fixed for electing a President of the new taluk board on the 21st August, 1922, and the petitioner in this Court was elected. It is his election that the Subordinate Judge has held to be invalid for the reason that there were only nineteen members in the reconstituted Taluk Board of Negapatam at the time of the election.

The Subordinate Judge has expressed an opinion that there was no legally reconstituted Taluk Board in existence on the date of the election. His reasons for coming to this extraordinary conclusion are rather difficult to understand. He seems to think that because under S. 10 of Act XIV of 1920 the district Board should declare what should be the total number of members of a Taluk Board, it is a *sine qua non* for the effective constitution of the Board that the full number should be appointed or elected. He points out that 'the total number' does not mean 'the maximum number,' and that the words are, 'what shall be the' total number,' not 'what may the total number.' One short answer to this argument would be to observe that 'the total number' does not mean 'the minimum number.' If his opinion is that a corporation is incompetent to do business so long as there is a vacancy among its members, I can only say that he has given no reason for his supposition. He seems to think that it is the appointment of members that constitutes the Board, and to forget that its constitution is created by the Act and the notifications. R. 6 of Sch. II states that 'no business shall be transacted at a meeting of any Local Board unless there be present at least one-third of the number of members then on the Local Board.' This shows that the eventuality occurring at some time or another of all the seats not being filled is contemplated by the Act. Dr. Swaminathan for the Respondents was not prepared to argue that the Act of a Taluk Board would be illegal, if a vacancy, occurring after its formation, remained unfilled ; but, he contended that every seat should be filled at the

first constitution of the Board in order to make it a legally constituted body. Even this theory is not maintainable. Lord Halsbury in his Laws of England, Vol. VIII at page 313 says : " A corporation may exist by common law, by Royal Charter, by authority of Parliament, by prescription, or by custom, and not otherwise." 705. " A corporation is not invalid merely because at the moment of its creation it does not in fact exist, so long as it is capable of coming into existence." Where the corporation consists of a head and members, they may be appointed after the foundation". 708. So, *In the case of Sutton's Hospital* (3), it was made clear that a corporation is created by Letters Patent immediately upon the issue of the Letters Patent. It is then a corporation in abstract and becomes a corporation in concrete when the master is named. In *Lal Singh* v. *Ghansham Singh* (4) the instance is cited of the Calcutta High Court, in which a Letters Patent ordained that it should consist of a Chief Justice and 13 Judges, but only a Chief Justice and 12 judges were appointed. The argument that Court was not properly constituted until a 13th Judge was appointed was proved to be unsound and ridiculous. (See the Judgment of Mr. Justice Brodhurst at pages 633 to 635). In *Santhalva* v. *Manjanna* (5) it was held by Abdur Rahim, J. that a committee appointed under Act XX of 1863 could not exercise its powers unless the original number of members continued to belong to it. This view was discredited in *Sitharama Chetty* v. *Subramania Aiyar* (6) and in *Raghunandan Ramanuja* v. *Bibhuti Bhushan* (7) where it was held that the powers of a committee were not suspended by the occurrence of a vacancy among themselves.

As it is the Charter Act and the Letters Patent that constitute a High Court and not the appointment of the Judges who compose the Court, so it is the Local Boards Act and the notifications of Government that constitute a Taluk Board and not the appointment of members. This is the point which the Subordinate Judge has failed to appreciate with the consequence that he has fallen into the error of supposing that there was never any legally constituted Taluk Board of Negapatam under the new Act. His decision upon this point must be overruled, and he will be directed to take the petition again on his file and to dispose of the other objections to the election referred to in paragraph 8 of his order, and to make the necessary declaration and order under rule 12 of Appendix D to the Act. Costs in this Court will abide and follow the result. Vakil's fees in this Court are fixed at Rs. 100.

VENKATASUBBA RAO, J.—I agree.

Petition allowed.

3. (1612) 10 Coke's Reports 31 (*a*).
4. (1887) 9 All. 625=7 A. W. N. 154 (F.B.).
5. (1910) 34 Mad. 1=8 M. L. T. 213=(1910) M. W. N. 608=20 M. L. J. 814=7 I. C. 754.
6. (1915) 39 M. 700=30 M. L. J. 29=19 M. L. T. 25=3 L. W. 43=32 I. C. 211.
7. (1912) 39 Cal. 804=12 I. C. 147.

1923, Madras. 362

SCHWABE, C. J.

Perumal Chetty ... Appellant.

v.

W. Kandasamy Chetty ... Respondent.

O. S. A. No. 8201 of 1922, dated 4th December 1922, sought to be preferred against the order and judgment dated 31st March 1922 passed in the exercise of the Oridinary Original Testamentary Jurisdiction.

Madras High Court Original Side Rules Appendix II, No. 35 & 36—Contensious probate suit.

A contentious probate suit is a final judgment, so that a memorandum of appeal from it comes under serial No. 35 of Appendix II "of the Original Side Rules as being from a " final judgment. To constitute an order a final judgment nothing more is necessary then that there should be a proper *litis conestatio* and a final adjudication between the parties to it on the merits. A judgment is a decision obtained in action and every other decision is an order.

G. Krishnaswami Iyer—for Appellant.

JUDGMENT :—This is a matter which, acting under S. 5 of the Court Fees Act, VII of 1870, I have referred to myself to decide, the difference having arisen between the officer whose duty it is to see that any fee is paid and the suitor as to the necessity of payment of the fee.

The question is whether the decision of a Judge sitting on the Original Side in a contentious probate suit is a final judgment, so that a memorandum of appeal from it comes under serial No. 35 of Appendix II of the Original Side Rules as being from a " final judgment " or under serial No. 36 as being from " any other judgment or order." The nature of the proceedings in contested probate suit is

clear from an examination of rules on the Original Side. By R. 474, where a caveat had been entered, the petition which had been previously issued by those claiming to be the legal personal representatives to obtain the probate, and the caveat, shall be numbered and registered as a suit, in which the petitioner shall be the plaintiff and the caveator shall be the defendant. Later sections provide that the petition and the caveat are to be taken as the plaint and the written statement of the defendant respectively, and there are provisions made for the hearing of the matter, and for the payment of costs. It is argued that the decision arrived at by the learned Judge who tried the matter as a suit is not a final judgment, and this argument is based on a passage in *Ex parte Chinery* (1), in the judgment of Cotton, L. J. In that case he had to consider the meaning of the words, "final judgment" in S. 4 of the Bankruptcy Act, 1883, which ran "if a creditor has obtained a final judgment against him for any amount, execution whereon has not been stayed, and if a bankruptcy notice has been issued, the Court may make a receiving order." Cotton, L. J., observed: "I think we ought to give to the words 'final judgment' in this sub-section their strict and proper meaning, *i.e.*, a judgment obtained in an action by which a previously existing liability of the defendant to the plaintiff is ascertained or established unless there is something to show an intention to use the words in a more extended sense." But these words have been explained by Lord Selborne, L. C. in *Ex parte Moore : In re Faithfull* (2) as being expressions to be "taken in connection with the particular facts of the case in relation to which they are used," and he gave another definition of "final judgment" to this effect: "to constitute an order a final judgment nothing more is necessary than that there should be a proper *litis conestatio* and a final adjudication between the parties to it on the merits.' That was followed in *In re Alexander : Ex Parte Alexander* (3) and in *Onslow* v. *Commissioners of Inland Revenue* (4), where Lord Esher, M. R. states the same thing more concisely. He says, "A 'judgment' is a decision obtained in action and every other decision is an order." In my judgment, the definitions of Lord Selborne and of Lord Esher are those that apply in the proper interpretation of the words in the Appendix to the Original Side Rules. There must be a final decision between the parties to a suit. Here by the rule there was a suit. The petition and the caveat were numbered and registered as a suit. The petitioner was the plaintiff and the caveator was the defendant. It follows, in my judgment, that the decision between those parties was a judgment. That it was final I have not the least doubt.

It is worth observing that the appeal from that decision must be under Cl. 15 of the Letters Patent, because it is only there that one finds a right of appeal from the Original Side, and that right to appeal is limited to judgments. From this it follows that, if this decision is not a judgment, there is no appeal, and it would indeed be a remarkable thing if no appeal lay from such a decision. Indeed in this case the appellant is driven to contend, that for the purpose of paying court-fees that it is not a judgment at all, but for the purpose of any appeal, it is a judgment.

I wish to say one word about the decision of my brother, Coutts-Trotter, J., in *Mahomed Ishack Sahib* v. *Mahomed Moideen* (5). In that case there was an appeal against an order on an application under the Guardians and Wards Act. The learned Judge said "If any one were asked whether this was a judgment or an order, he would certainly say it was an order and hold that it was an order and a final order." Applying his language I should say, if any one were asked whether this was a judgment or an order he would certainly say it was a judgment, it being quite different from an order on an application to a Court under the Guardians and Wards Act.

It was argued in that case that serial No. 35 in Appendix II was intended to include final orders in the word "Judgment," and the learned Judge held that it did not. The AdvocateGeneral in this case wishes it to be understood that he reserves the right to raise that point again hereafter. In

1. (1884) 12 Q. B. D. 342.
2. (1885) 14 Q. B. D. 627.
3. (1892) 1 Q. B. 216.
4. (1890) 25 Q. B. D. 465.
5. (1922) Mad. 421=43 M. L. J. 436=(1922) M. W. N. 511=16 M. L. W 210.

the view that I take, it is unnecessary for me to decide it. I only wish to say that I express no opinion on the subject whatever.

For these reasons the direction must be that the court fee payable on this Memorandum of Appeal is Rs. 150.

1923, Madras 364 (1).

KRISHNAN. J.

N. Dwaraka Doss ... Petitioner—(Accused).

v.

G. Narasimhalu Naidu ... Respondent—(Complainant).

Cr. Rev. No. 553 of 1922, dated 13—11—1922, petition No. 475 under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Presidency Magistrate, Madras in C. C. No. 3523 of 1922.

Penal Code S. 403—Dishonest intention.

Where the accused kept the buffalo tied up in the verandah of his house which was open to the gaze of the public going about in the street, and the buffalo itself apparently strayed into his house and it is not denied that he himself had a month previously lost a buffalo, and where in appearance this buffalo was very much like that buffalo, and where the accused claimed it as his own as against complainant's assertions. *Held* in these circumstances the finding of the Magistrate that there was dishonest intention cannot be accepted.

K. Ramanatha Shenai—for the Petitioner.

K. Doraisami Iyengar—for the Respondent.

ORDER :—This is an application to revise the judgment of the Second Presidency Magistrate, (George Town), Madras, in Calendar Case No. 3523 of 1922 on his file, in which he convicted the accused of an offence under S. 403, Indian Penal Code for having criminally misappropriated a buffalo belonging to the complainant.

The finding of the Magistrate that the buffalo really belongs to the complainant is not now controverted, and must be accepted as a finding of fact in revision.

But, as regards the plea of the accused that he acted *bona fide* in keeping the buffalo, it does not seem to have been properly disposed of by the Magistrate. The Magistrate observes in his judgment as follows: "The defence vakil says that he (the accused) honestly believed it (the buffalo) to be his own and that therefore there was no dishonest misappropriation; it may be that, in the first instance, he honestly believed it to be his own and took it home; but he had no excuse to keep it when prosecution witness 1 went to his house, saw it, and claimed it to be his property; as a matter of fact he refused to return it to its owner; this clearly shows he wanted to misppropriate it and he was dishonest." It is not very easy to follow this line of argument, for, if the man had honestly believed the buffalo to be his own, and if there was any strength in that belief, he would certainly have stuck to that belief even when told that the buffalo was not his; the fact that he refused to give up the buffalo rather supports his contention that he really believed that the buffalo was his. He seems to have kept the buffalo tied up in the verandah of his house which was open to the gaze of the public going about in the street. That is also a point greatly in his favour. The buffalo itself apparently strayed into his house. It is not denied that he himself had a month previously lost a buffalo. He says that in appearance this buffalo was very much like that buffalo. It is not at all unlikely that he might have mistaken this buffalo for his own. In these circumstances the finding of the Magistrate that there was dishonest intention cannot be accepted, and without a finding of dishonesty the offence is not made out. The conviction is, therefore, set aside, and the fine, if levied, will be refunded to the accused. The order as regards the disposal of the buffalo will not be interfered with, as the Magistrate accepted the evidence that the buffalo belongs to the complainant.

Conviction set aside.

1923 Madras 364 (2).

KRISHNAN, J.

(The) Crown Prosecutor ... Appellant.

v.

A. Duraiswami ... Accused.

Crl. App. No. 1196 of 1922 dated 8th December 1922, under S. 417 of the Code of Criminal Procedure, 1898 against the acquittal of the aforesaid accused by the

Court of the Honorary Presidency Magistrate, Egmore in C.C. No. 9,555 of 1922.

Madras City Police Act, S. 78—Rule about cycling.

The word "ride" does not necessarily imply that the person riding should propel the bicycle himself. It may be that the rule as worded covers the case of a single person riding a bicycle.

The Crown Prosecutor for Appellant.

JUDGMENT.—The interpretation put by the Honorary Magistrates on the rule referred to by them and published in the Fort. St. George Gazette of 10th February, 1922 No. 189* seems to be erroneous. The first part of the rule applies to 'the person who pedals the bicycle and takes with him another on the same cycle; and the latter part of the rule clearly applies to the person who allows himself to be so carried, for he rides the bicycle but not on the saddle. The word "ride" does not necessarily imply that the person riding should propel the bicycle himself. It may be that the rule as worded covers the case of a single person riding a bicycle in the manner the 2nd accused did. He pleaded guilty and therefore he should have been convicted but as the Crown Prosecutor does not ask for a sentence it is not necessary to inflict one now. But his acquittal is set aside.

Appeal allowed.

* Under S. 78 of the Madras City Police Act the following by-law was made by Government:

"No person riding a bicycle in any street or public place shall be permitted to carry any other person on the same bicycle either on the handle-bar or on the back step or on the cross-bar and no person shall ride a bicycle in any street or public place in any other manner than on the saddle."

1923 Madras. 365.

KRISHNAN, J.

Ramudu Iyer ... Appellant (1st Accused).

Cr. A. No. 1326 of 1922, Dated 4th December 1922, against the judgment of the Chief Presidency Magistrate Madras in C. C. No. 10,116 of 1922.

Penal Code S. 411—Essentials.

It is of the essence of an offence under S. 411, I. P. C. to show that the person was in possession of the stolen property. Where the stolen property was traced to the accused's possession after nearly two months at least. *Held*, the presumption under S. 114 of the Evidence Act could hardly be applied. If cannot be assumed without evidence that the accused's statement is false. It is one thing to find the entry sought to be proved by the accused suspicious and to refuse to act upon it and another thing to find the falsehood of what is sought to be proved.

(a) *Criminal Trial—Evidence.*

Because the defence evidence is all untrue, it cannot be assumed that the accused is a dishonest person, and therefore he had dishonest intention in receiving stolen property. It is the duty of the prosecution to establish by its own evidence that the accused is guilty. The weakness of the defence evidence is no ground for finding the accused guilty.

Nugent Grant with K. U. Shama Rao and S. Chinnaswami—for the Appellant.

The Crown Prosecutor—for the Crown.

JUDGMENT:—This is an appeal against the conviction, of the Chief Presidency Magistrate, of the accused under S. 411, I. P. C. The accused was sentenced to one year's rigorous imprisonment. The stolen property is said to be a particular kind of gold thread which has never been sold before in the Madras market and which is easily identifiable. It would seem that about Rs. 40,000 worth of gold thread including this special kind of thread was stolen from the Port Trust premises sometime in April 1922 from certain boxes which had been imported from Europe and kept there. The theft was discovered in April but the stolen property was not traced till the beginning of June. On some clues which the police obtained they found that this particular kind of gold thread which is the subject matter of this case was purchased by certain Salem merchants from the accused's brother and his gumasta, and in consequence the accused was arrested and charged with receiving stolen property with reference to this gold thread.

Mr. Grant appearing for the accused does not dispute that the gold thread in question was really stolen property. The only question which is argued is whether the accused received this stolen property "knowing or having reason to believe the same to be stolen property". It is of the essence of an offence under S. 411, I. P. C. to show that the person who was in possession of the stolen property knew or had reason to believe that it was stolen property. The stolen property was traced to the accused's possession after nearly two months at least, so that the presumption under S. 114 of the Evidence Act can hardly be applied

in this case. Then the question is whether there is evidence in this case sufficient to bring home to the accused the fact that he knew or had reason to believe the property to be stolen property. After hearing the evidence discussed before me, I have come to the conclusion that that evidence is not sufficient to establish the guilty knowledge of the accused, though it throws a very great deal of suspicion upon him. The accused says that he obtained the gold thread which he had from one Guruvappa Chetti, and no attempt has been made to prove that this is false. Guruvappa Chetti was a co-accused with the accused in this case to start with, but subsequently his case was treated as a separate one and the accused was tried only along with his brother who has been discharged. The Magistrate uses the statement made by Guruvappa Chetti as 3rd accused when he was co-accused with the present accused for saying that Guruvappa Chetti never gave these goods to the 1st accused. I do not think this was a proper use of his statement at all. As he was taken out of the dock he should have been examined as a witness if the Magistrate intended to rely upon his statement as evidence against the 1st accused. Even if that had been done, it would be very difficult to say that his evidence would have carried much weight, being himself accused of having been the thief. However as the rceord stands there is no evidence whatever to show that the accused's statement that he bought the goods from Guruvappa Chetti and that he paid Rs. 4,980 for 83 marcs of this gold thread is not true. We cannot assume without evidence that the accused's statement is false. Therefore it is the duty of the prosecution to prove it is false if they propose to rely on its falsehood as against the accused. It is true that the accused's attempt to prove that he did actually give Rs. 4,980-0-0 by producing his account book has not been very successful. I am not prepared to rely upon what appears in his account in his favour. The entry in his book is, as the Magistrate observes, very suspicious for the reasons he has stated. But it is one thing to find the entry supicious and to refuse to act upon it and another thing to find the falsehood of what is sought to be proved. Assuming that it has not been proved that his statement that he to the goods from Guruvappa Chetti and that he paid Rs. 4,980 for the goods is not true, the question is whether there is evidence to show that he had reason to believe that Guruvappa Chetti could not have come by the goods honestly or that he should have suspected the *bona fides* of Guruvappa Chetti in being in possession of these goods and selling them to him. Now the price he has paid, the Crown Prosecutor contends, is such a low price that an adverse inference can be drawn against the accused from that fact alone. I am quite unable to agree with that argument, because the price works out at Rs. 60-0-0 a marc and the evidence of the prosecution second witness seems to show that that was not at all an unfair price for the goods in the market. No doubt he says that at the time the goods were imported the price including the duty for importation to British India was Rs. 71-0-0, but he admits that subsequently the price fell. Apparently at the time of the purchase by the accused it was not more than Rs. 45-0-0 without the duty and including the duty which is 30 per cent. it was somewhere about Rs. 60. No adverse inference therefore can be drawn from the amount of the purchase money said to have been paid. It is also argued by the Crown Prosecutor that the two circumstances, namely, that the accused himself was not a dealer in gold thread and that he purchased this gold thread from a person who was not a dealer in gold therad, are very strong evidence against the accused. I certainly agree that those circumstances are grounds of great suspicion against the accused but I am not prepared to hold on those circumstances alone that the accused had any suspicion or guilty knowledge of the goods being stolen property. Many people in Madras do sometimes speculate in goods in which they do not trade, and to take that as evidence of guilty knowledge would be quite unreasonable. There is no proof in this case that the accused knew that Guruvappa Chetti himself was, as the Crown Prosecutor contends, a firewood seller. He seems to have been a firewood seller a long time prior to this transaction and latterly according to the evidence he had become a seller of gems, and it is not impossible that such a man may on an occasion trade in gold lace. However the circumstances though no doubt carrying great suspicion with them

are not in my opinion sufficient to convict the accused.

Another point made is that this gold lace was sold in Salem. Each side contends this fact to be in its own favour. Mr. Grant says that the fact that it was sold in Salem in the open market hawking it from shop to shop is a circumstance in his client's favour showing that he did not know the goods to be stolen goods as otherwise he would not have attempted to sell the goods in such an open manner. On the other hand the Crown Prosecutor contends that the facts that the accused did not sell the gold lace in Madras but sent it up country to Salem to have it sold is an indication that he knew there was something wrong with the purchase of the goods. I do not think that either inference can reasonably be drawn. Any merchant in Madras may send goods honestly to Salem, and possibily also if a man has stolen goods he might take it away up country to some station to have them sold there rather than sell them in Madras. I think the circumstance is insufficient to draw a definite inference from. The Crown Prosecutor also contended that because the defence evidence is all untrue, I must take it that the accused is a dishonest person and I should import this dishonesty into his conduct in purchasing gold thread. I am quite unable to do this. It is the duty of the prosecution to establish by its own evidence that the accused is guilty. The weakness of the defence evidence is no ground for finding the accused guilty.

On the whole of the evidence I have come to the conclusion that the prosecution has failed to establish satisfactorily that the accused when he bought this gold thread knew or had reason to believe the same to be stolen property. The newspapers and handbills produced are of no value whatever in this case, for it is not shown that any of them got any where near the accused. The conviction and sentence of the accused will be set aside and his bail bond cancelled.

Conviction set aside.

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* **1923 Madras. 367.**

KRISHNAN AND RAMESAM, JJ.

(Palchur) Mahalakshmamma (dead) and another ... Appellants.

v.

Vemi Reddi Babu Reddi ... Respondent—(Defendant.)

Appeal No. 233 of 1918, dated 12th October 1922, against the decree of the Court of the Temporary Sub. Judge, Nellore, dated 16th January 1918.

Civil P. C., O. 22, R. 1—Wrong Representative.

Where a wrong representative of deceased appellant was added at his instance without notice to respondent. *Held*, he could not prosecute the appeal if respondent objected.

T. V. Ramanatha Iyer—for the Appellant.

A. Krishnasami Iyer—for the Respondent.

KRISHNAN, J.—In this appeal, the appellant died early in 1921. One Jetti Balarami Reddi has been added at his own instance as the legal representative of the appellant, and his vakil is proposing to argue the appeal. He was added as a party without notice to the respondent. A preliminary objection has been taken by the respondent to the hearing of the appeal at the instance of Jetti Balarami Reddi on the ground that he is in no sense the legal representative of the deceased lady, the appellant, Mahalakshmamma. There cannot be any doubt that this objection is a valid one. His own claim is that he got some properties under a will left by the deceased Mahalakshmamma, and, as such, he was entitled to represent her in this appeal. He does not claim to be a reversioner to the lady. Mahalakshmamma herself claimed first under a will left by her husband, but subsequently she repudiated that will and pleaded in this case that the will was not genuine. In a litigation which went up to the High Court in which she was one of the plaintiffs along with the defendant here, it was decided that the will was genuine ; but whether this decision is binding as between her and the defendant or not need not be decided for the purpose of this objection, for assuming for a moment that the will is not genuine and that Mahalakshmamma was entitled to claim as she did in this case as the heir-at-law of her deceased husband, she would have no right whatever to dispose of any portion of her hus-

band's property by will, and therefore any claim of Jetti Balarami Reddi as a legatee under Mahalakshmamma's will comes to nothing. And, admittedly, as already stated, he was in no sense a reversioner and therefore it is clear that he was in no sense entitled to come on record as the legal representative of the deceased lady.

Now, it is contended that, under the authority of *Mallapragadu* v. *Veeraraghava Row* (1), that having managed to come on record some how as appellant's legal representative even if Balarami Reddi is not the proper legal representative, he is entitled to continue the appeal unless the proper legal representative comes on record himself and that it is not open to the defendant to object to the appeal being heard at the instance of Balarami Reddi. We do not think that the case cited lays down anything of the kind. The question there was really whether there was an abatement of the appeal because only wrong representatives had been added within the time allowed by law the right representative only coming on the record after such time. It was held by the Court that the rule of limitation was satisfied by some legal representatives, even if they were wrong persons, coming on record in time, and if the right legal representatives were afterwards brought on record, it did not matter. The report does not show the exact state of affairs in the case, but we have sent for the original records from the office, and they show that, by the time the appeal was argued, the right legal representative was on record, and it was at her instance that the appeal was heard and not at the instance of the wrong legal representatives. This case is therefore no authority for saying that any person who manages to bring himself on record as a legal representative without notice to the other party can insist upon continuing as such, even after objection is taken to him at the time of the hearing. We do not think that any such a proposition can possibly be suported.

The result is that Balarami Reddi, not being in any sense the legal representative of the deceased lady, his name must be struck off the record. It follows then that at present no legal representative of the deceased lady has come on the record. As she died more than a year ago and that the period allowed for brining in the legal representative is long past, the appeal must be treated as having abated.

The costs of the appeal will come out of the estate of the deceased Mahalakshmamma.

1. 7 M. L. T. 43.

1923 Madras. 368.

KRISHNAN AND RAMESAM, JJ.

Sri Rajah Inuganti Rajah Gopala Rao Bahadur Garu, Proprietor of Siripuram, etc., Estates and another ... Appellants.

v.

Chelikani Venkatasurya Rao Garu and others ... (Respondents) —Defendants.

Appeal No. 266 of 1920, dated 28th October 1922, against the decree of the Court of the Temporary Sub. Judge of Vizagapatam in O. S. No. 21 of 1919.

Madras Land Revenue Assessment Act (I of 1876) Ss. 2 and 6.

Full ownership of the person whose name is to be registered is all that is necessary for registration.

P. Narayanamurthi, R. Narasimham and V. Suryanarayna—for the Appellants.

The Government Pleader (C. Madhavan Nair) and B. Satyanarayana—for the Respondents.

KRISHNAN, J.:—This is an appeal from a suit brought under Act I of 1876 for separate registration of a portion of a permanently settled estate by the Zemindar as against the defendants who according to him are the owners of that separate portion. The Zemindar applied to the Collector for separate registration, but as the parties did not agree before him, the Collector refused to act under S. 2, as the result of which the Zemindar brought this suit under S. 6 of the Act.

The lower Court has found in its judgment that defendants 1 to 4 are the owners of the suit lands, but it declined to pass a decree declaring that the suit land should be separately registered and assessed, because it thinks that by apportionment a new burden will be imposed upon the land which was not contemplated by the original grantor. That however, is not a consideration for us, to refuse the prayer of the plaintiff. All that we have to decide is, who is the owner of the land now. The way in which the land was dealt with is

this. The land was given by the Zamindar, of Bobbili to one Varahalu, his Serishtadar, on a kattubadi of Rs. 15 a year. The result of that transaction was, no doubt, to make Varahalu only a permanent lessee. But very soon thereafter the Zamindar at the request of the grantee passed an order remitting the entire kattubadi once for all, so that the land passed into the hands of Varahalu free from any kattubadi in favour of the Zamindar. The result of these two transactions taken together was, we think, in effect to make Varahalu the owner of the lands in question as if they had been gifted to him; for subsequently the Zamindar had no control or interest in them. That being so, the present defendants who are the assignees of that right should also be treated as owners of the lands. The necessary result of that finding is that the declaration sought for by the plaintiff should be given. If there was any understanding of which, however, there is no evidence in this case, that the grantor should himself pay the assessment imposed on the lands after separate registration, that would be a matter of contract between the grantor and the grantee, and by paying the assessment the grantee will in such a case be able to recover the amount from the grantor. Such a case does not arise here, and we are not expressing any opinion about it.

In the result, the appeal must be allowed, the decree of the lower Court, set aside, and a decree given under S. 6 of Act I of 1876 declaring that separate registration should be made of the lands in question.

As regards costs, respondents 1 to 4 must pay the appellants' costs in this Court and in the lower Court, and also the costs of the 5th respondent in appeal.

Appeal allowed.

*** 1923 Madras. 369 (1).**

OLDFIELD AND DEVADOSS, JJ.

Golla Chakrapani ... Appellant (Plaintiff).

v.

Kateneni Lakshmaperumallu and others ... Respondents.

S. A. No. 1423 of 1920, dated 3rd November 1922, against the decree of the Court of the Temporary Sub. Judge of Ellore in A. S. Nos. 187, 188, 190, 191 of 1919.

Hindu Law — Religious Endowment — Idol — Right of worshipper.

A worshipper has not as such, a right to remove an old idol in the temple and put in a new one even though the old one is broken. Such an act cannot be regarded as an act of worship.

A. Krishnaswami Iyer and A. Venkatachalam—for the Appellant.

B. Satyanarayana and Raghava Rao—for the Respondent.

JUDGMENT.—In this case the question is whether the plaintiff can sue to establish his right to remove an idol from the temple of his village, that idol being alleged to be cracked and to replace it by a new idol made by himself. The temple, it is not disputed, has no trustees and no property. It is referred to as the temple of the villagers, who are the worshippers in it.

The plaintiff first supports his right to remove the idol and to replace it by a new one on the ground that it would be an act of worship, which like any other villager he is entitled to perform. We cannot see how in any ordinary sense the removal of an idol from a temple and the substitution of a new one is an act of worship.

Next the plaintiff argues that such removal and substitution would be an act of management. The difficulty, however, is that he has not shown that he has any right to manage. He, no doubt, presented an application in the Court of Frist Instance for leave to sue as representing the villagers as a body. But that application was dismissed and, as he has no ground of appeal against the dismissal as improper, we are not prepared to allow him to argue the point. In these circumstances the appeal fails and is dismissed with costs payable by the plaintiff (appellant) to defendants 1 to 9, 12, 13, 15 and 16 (respondents 1 to 9, 11, 12, 14 and 15). There was no necessity for the 14th defendant (13th respondent) to appear here and he will bear his own costs.

Appeal dismissed.

*** 1923 Madras. 369 (2)**

WALLACE, J.

Ganapathi Sarma and others...Petitioners.

Cr. Rev. No. 390 of 1922 and Cr. Rev. Pet. No. 339 of 1922, dated 15th November 1922, under Ss. 435 and 439, Cr. P. C. from Court of Session of the Trichinopoly

Division in Criminal Appeal No. 2 of 1922.

Penal Code, Ss. 34, 149—*Essentials of constructive criminal responsibility.*

Where the actions of the mob were united and concerted and continuous, *Held* for whatever criminal offences it committed or was likely to commit in furtherance of its common object during that period, each member of the assembly would in law be responsible. As to the renewal of activities after one hour, before individual members of the original mob could be held in law responsible for those acts, it would have to be clearly shown either that they were present during second riot or that the second riot was a continuation of, and a likely result of the first. In cases where there is no direct evidence of the actual participation of the accused in a specific act of violence, if persons proved at particular points of time to be members of the mob but not shown to have taken part in the specific act, are to be found guilty of that act by force of S. 34, it must be clearly found that that act was in furtherance of the common intention of the mob while these accused were in it, or if S. 149 is used, it must be clearly found that that act was also in prosecution of the common object or such as these accused knew to be likely to be committed in prosecution of their common object. A Court is not to presume that any and every person who is proved to have been present in a riotous mob at any time or to have joined it at any stage during its activities is in law guilty of every act committed by it from the beginning to the end, or that each member of such a crowd must from the beginning have anticipated and contemplated resistance to the organised forces of order, that is the Police, or have made up his mind before the riot began to oppose such resistance and overcome such forces as stood in the way of the mob accomplishing its common object. Because a person is an "important personage among the rioters", therefore he cannot be held responsible for all that his comrades did in the course of the riot.

[P. 370, Col. 2, P. 371, Cols. 1, 2.]

S. Swaminathan—for the Petitioners.

F. S. Vaz—for the Public Prosecutor for the Crown.

ORDER :—Petitioners have been convicted of having taken part in a riot and committed various offences in the course of the riot. The riot took place at Karur on the night of 24th August, 1921, and the early morning of 25th August, 1921, and was occasioned as found by the lower Courts, by an attempt on the part of the Congress and Khilafat committees there to compel the manager of a theatrical troupe performing at the theatre at Karur to hand over the funds of these committees, his takings for one night's performance. Annoyed at this refusal, the crowd who had accompanied the secretaries of these Committees attacked the theatre while the performance was going on, stampeded the audience and committed various acts of violence to the persons in the audience and the property of the troupes. The trying Court has written a careful and discriminating judgment, in which the main facts of the riot are very clearly set out.

2. The chief incidents of the night are detailed in order in paragraph 83 and following paragraphs of the trying Court's judgment. The particular offences of which the crowd generally has been found guilty are endangering human life by throwing stones (S. 336, Indian Penal Code), causing hurt by the same (S. 337), causing hurt to Police Officers (S. 332), wrongful restraint (S. 341), mischief (S. 426) and criminal trespass (S. 447). The lower Courts have found the petitioners guilty of all these offences either directly or constructively by force of Ss. 34 and 149, Indian Penal Code.

3. The riot began at about 8-30 p. m., and went on spasmodically till 9-30 the next morning. Between 11-30 p. m., when the Police fired and one of the mob was killed, until 6-30 a. m., there appears to have been a decided lull in the activities of the mob. Prior to 11-30 p. m., however all the offences of which the mob has been as a whole found guilty of, had been perpetrated, although again at 6-30 a. m., there was a renewal of the offences under Ss. 426 and 447, and further offences under S. 435 by isolated members of the crowd. That the actions of the mob between 8-30 and 11-30 p. m., were united and concerted and continuous admits of no doubt; and for whatever criminal offences it committed or was likely to commit in furtherance of its common object during that period, each member of the assembly would in law be responsible. As to the renewal of activities at 6-30 a. m., before individual members of the original mob could be held in law responsible for those acts, it would have to be clearly shown either that they were present during second riot or that the second riot was a continuation of, and a likely result of the first.

4. It is also found that one of the petitioners, the first accused, although present at the beginning of the riot at 8-30 p. m., left the place almost at once.

5. It is contended generally for petitioners, and cannot, I think, be denied, that both the lower Courts have used

Ss. 34 and 149 of the Indian Penal Code in too loose and uncritical a manner, and have not clearly in all cases found as facts the ingredients necessary for convictions by force of these sections. In cases where there is no direct evidence of the actual participation of the accused in a specific act of violence, if persons proved at particular points of time to be members of the mob but not shown to have taken part in the specific act are to be found guilty of that act by force of S. 34, it must be clearly found that that act was in furtherance of the common intention of the mob while these accused were in it, or if S. 149 is used, it must be clearly found that that act was also in prosecution of the common object or such as these accused knew to be likely to be committed in prosecution of their common object. The common object of the rioters for the purposes of S. 149, which may be taken to be much the same as the common intention for the purposes of S. 34, is set out in the charge, as taking vengeance on P. W. 2 the proprietor of the Dramatic Company because of his refusal to give the collections of the night to the Congress and Khilafat funds, and "later on" to take vengeance also on the Deputy Superintendent of Police and his constables.

Now the trial Court makes it clear, (paragraph 114) that the attempt to take vengeance on the Deputy Superintendent of Police only arose after one of the rioters had been shot dead that is about 11-30 p. m., and only materialised in any overt act in the attack in the early morning. In my view it cannot be held that persons who were in the mob at the first attack, up to, say, 11-30 p. m., must necessarily be held, in the absence of evidence, to have been present in the second attack at 6-30 a. m., and conversely and much more obviously those only proved to be present at the second attack cannot possibly, in the absence of some evidence, be held to have been present at the first. Obviously also, the common object of a crowd, comparatively innocent at first may develop by degrees into something very much more heinous and culpable; and these developments may, on the one hand, be such as were naturally inherent in its original common object or may on the other hand be ebullitions of spasmodic fury in a direction which no one who was at first in the crowd could have contemplated. In the latter case, I do not see how members originally present but absent at the time could be liable for these latter acts.

7. The lower Courts should have therefore considered first, what was the *original* intention of the mob and which of its offences naturally were inherent or likely to have occurred in the prosecution of that intention and which were not; secondly, at what stages of the riot were these petitioners present, and what was the temper, the intention and the common object of the mob while they were present and what acts was it likely to go on to commit in furtherance of that common object; and thirdly, whether, if they had left the mob at any stage, they could nevertheless be held guilty of any of the acts committed by the mob after they had left. The lower Courts should have paid more attention to the provisions of S. 142, Indian Penal Code, which lays down that no one is a member of an unlawful assembly unless he is aware of the facts that render that assembly an unlawful one and intentionaly joins or continues in it. It may be difficult to decide these points clearly, but it has to be done. I am not therefore prepared to accede to the contention of Mr. Vaz, who appeared for the Public Prosecutor, and I am sure it is not the law, that a Court is to presume that any and every person who is proved to have been present in a riotous mob at any time or to have joined it at any stage during its activities is in law guilty of *every* act committed by it from the beginning to the end, or that each member of such a crowd must from the beginning have anticipated and contemplated resistance to the organised forces of order, that is the Police, or have made up his mind before the riot began to oppose such resistance and overcome such forces as stood in the way of the mob accomplishing its common object. That appears to me to be a fundamentally wrong view in law, though of course such a combination of common objects might be proved by evidence to have existed. It is entirely a question of fact on which findings, as I have indicated above, must be recorded by the trying Court before it can apportion the legal responsibility of the various members of the unlawful assembly. In order to find what was the

common object of the crowd at the beginning, it is not a legitimate method merely to take all the actual offences committed by it in the course of the riot, and to infer that all these were originally part of its common object. Such common object must be determined as a point of fact, and must normally be based on more evidence than the mere acts themselves. I am not prepared therefore to infer as a matter of law that persons whose common object say from 8-30 to 11-30 p. m. was to wreak vengeance on P. W. 2 must necessarily have been those or joined with those whose common object between 6-30 and 9-30 a. m., was to wreak vengeance on the Deputy Superintendent of Police and *vice versa*. It is a matter of definite evidence and proof. This is a point to which neither of the lower Court has paid any attention and it is a matter of great importance in the cases of several of these petitioners with whom I shall now deal.

8. The facts leading up to the riot as found are that about 5 p.m. the first accused, the local Secretary of the Congress Committee went to P. W. 2 at his house and demanded that P. W. 2 give the collections of the night to the Congress and Khilafat Committees, and then threatened that there would be a disturbance and riot (P. W. 2 uses both words) if the money was not paid, and that again at 8-30 p. m. a crowd of about 200 people headed by the first accused and three or four others assembled outside the theatre to repeat and enforce that demand. This latter demand was in the nature of an ultimatum, P. W. 2 having already several times refused previous requests of this nature, some throwing of stones by the crowd on the theatre was going on. Then the first accused and three or four others went inside the compound, evidently as leaders and representatives of the crowd, and the first accused renewed theirdemands for the collections from P. W. 2. P. W. 2 put him off, promising to pay something in the morning. The first accused and his companions went after ten minutes purely in an angry mood, the first accused saying definitely that P. W. 2's promise was unsatisfactory and that it was impossible to prevent a disturbance, as the crowd would not listen to him. When the first accused reached the crowd and went into it, stones began to fall and the riot definitely began, the crowd being "furious" as P. W. 2 puts it because he would not give any money. The evidence is that the first accused raised his hand to the crowd. P. W. 3 thought he was trying to pacify it, P. W. 4 that he was encouraging it to riot. D. W. 22 the only defence witness of any use on this part of the case, says that the first accused was trying to disperse the crowd, but he did not go near the crowd and evidently cannot say at what stage of the proceedings he saw the first accused do so. It is clear that the first accused cleared off the scene at an early stage of the riot and was not seen after about 8-30 or 9 p.m.

9. Now no witness speaks to the first accused having committed any of the specific acts of violence by the mob. His conviction is based purely on the application of Ss. 34 and 149, Indian Penal Code to his case, on the ground as both Courts have held, that he as leader and spokesman of the mob was legally responsible for all that the mob subsequently did in furtherance of its common object although he himself left it at the beginning. The findings of fact in his case, so far as they are relevant, appear to be as follows:—That at 5 p.m., he threatened P. W. 2 with a riot if his demands were not complied with: that at 8-20 p. m., he was at the head of the mob of two hundred people to support his demands and acted as spokesman; that when his demand was refused, he again hinted at a riot, and that when he again reached the crowd, stone-throwing began. There is no evidence of any cries of the mob which would go to show what its intention then was: but it appears to me to have been simply to bring further intimidation to bear on P. W. 2 to grant it's demands. Its action was confined to stone-throwing until about 10-25 p. m., when the Police arrived with arms, and the play was not stopped until twenty minutes later when the attack of the mob appeared imminent and the police outposts, who were on the road, were withdrawn inside the compound. Thus, for at least two hours after the first accused left, nothing more than stone-throwing went on, although the crowd was in number easily sufficient to force its way in and break down any resistance. In these circumstances I am not prepared to find that the crowd at 8-30 p. m., had any common intention of breaking into the theatre, stampeding the

audience, wrecking the performance and damaging the properties. Nor am I prepared to find that at that time it was obvious to the members of it that such results were likely to happen. A person leaving the crowd then would be justified in inferring that its temper was such that it would, as it did, do nothing more serious than throwing stones indefinitely, until something unforeseen and which could not be reasonably anticipated roused them to more criminal actions. Any member therefore who left it at 8-30 can at the most only be held guilty by force of Ss. 34 and 149 of offences under Ss. 336 and 337 of the Indian Penal Code.

10. It is urged on behalf of the first accused that the evidence does not show that he was a member of the unlawful assembly at all, and that on the contrary he was trying to prevent the assembly using violence; but in this contention I cannot concur. His whole conduct indicates to my mind that he intended to use show of force and intimidation to P. W. 2 to get his illegal demand enforced and that he headed the crowd for that purpose; and I agree with the lower Courts in holding that the stone throwing was inherent in his plan, if not actively directed by him. It was going on when he left the crowd to confer with P. W. 2 and began again when he returned from the conference. But I must disagree with the trying Court when it seeks to fasten on him the responsibility for the further actions of the crowd, merely because he "did not use his power of control over the crowd" to prevent further offences or because he did not beforehand communicate the intention of the mob to the authorities (see paragraph 117 of the lower Court's judgment) and with the lower Appellate Court's even more unsatisfactory inference that because he was an "important personage among the rioters", therefore he must be held responsible for all that his comrades did in the course of the riot. (See paragraph 4 of the Sessions Court's judgment). I therefore hold that the first accused's conviction under S. 147 and Ss. 336 and 337 by force of Ss. 34 and 149 is legal and that his conviction under other sections is not legal and must be set aside.

11. The next set of petitioners with whom I have to deal are those proved to have been in the assembly between 8-30 p. m., and midnight, accused 9, 12, 13, 15, 21, 29, 31 and 33. I would here remark that I accept only the evidence believed by the trying Court. The question, whether, in any particular case, a witness, who has retracted in cross-examination what he stated in chief-examination should be believed has to be decided on the facts of that case, and I would demur to attempting to lay down, as the lower Appellate Court has done, any general principle in such cases. In the present case I consider that the trying Court has probably appreciated better than the lower Appellate Court the extent of credibility to be attached to such witnesses and prefer, with the trial Court, to reject such witnesses altogether. The common intention of the mob between 8-30 and 11-30 p. m., has been found to be and obviously was to stone the premises, the patrons of the show and the police, break open the compound gates, trespass into the compound, commit mischief there, drive off the audience and close the performance. The 9th accused is only identified as having in the beginning dissuaded people from buying tickets, and having thrown stones. His case is similar to that of the first accused and his conviction has to be similarly modified.

12. So far as the 12th accused is concerned the evidence is that he threw stones during the riot and assaulted constables at about midnight. No one says that he was present after that. He was therefore in my opinion guilty of the acts of the mob up to midnight as he was still taking part in the attacks at midnight and his conviction by force of Ss. 34 and 149, Indian Penal Code for the acts committed up to that time by the mob, *i.e.*, under Ss. 147, 336 and 337, 426 and 447 appears to me correct, but his conviction under S. 341, as I shall indicate later, cannot be upheld.

13. As to the 13th accused there is evidence against him similar to that against the 12th accused and his case must be similarly dealt with.

14. As to the 15th accused he is proved to have held P. W. 9 one of the spectators as he was running away from the shed. He is said to have recognised P.W. 9 and let him go. There is nothing to show that his action was in concert with the mob or that his action was not wholly innocent, and it is not said that any crowd was with him at the time. I do not see

how it can be inferred from that act alone that the 15th accused was one of the mob who took part in its common object. There is no other evidence than an offence under S. 341 was part of the common intention of the mob at any time. I find therefore no evidence on which the 15th accused can be convicted and his conviction must be set aside. It also follows that S. 341 must be struck out in the case of all accused since this act of the 15th accused is the only evidence that any wrongful restraint of ordinary spectators by the mob occurred.

15. As to accused No. 21 there is the strong evidence of his taking part in the initial stone-throwing and that he was present also when the mob burst open the gate at 11-30 p.m. His case is therefore the same as that of accused No. 12.

16. As to accused No. 29 there is evidence that he took part in the throwing of stones before the advance into the compound was made. His case is the same as that of accused No. 9.

17. As to accused No. 31, there is evidence that he was inside the compound after the first entry by the mob, burning Police men's clothes about 11 p.m., or midnight and that later on he took part at 8-30 a.m., in burning the doors. That evidence was sufficient for the trying Court to conclude that he was present throughout, and his conviction directly or constructively for all acts of the mob, except the offence under S. 341, is therefore correct.

18. As to accused No. 33, his case appears to me to be the same as that of accused No. 9.

19. The next batch of accused is Nos. 3,27 and 48. All three appear only in the later attack in the early morning. Accused No. 3 is identified as a member of the mob by P. W. 15. I am asked to interfere in his case as he is an old man and was shot during the riot. He was evidently the man at whom P. W. 1 fired because he saw him aiming a stone at him, although P. W. 1 was not able to identify him. (P. W. 1 in the list in paragraph 113 of the trying Court's judgment is a mistake for P. W. 15). The evidence shows clearly that he was inside the compound and therefore there was enough evidence for the lower Courts to find that he was guilty of being a member of the unlawful assembly.

20. As to accused Nos. 27 and 48 they were seen by many witnesses committing mischief by fire to the property in the compound. The acts committed by the mob in this second attack were obviously criminal trespass, mischief and mischief by fire and the mob's intention then was not only to get at P. W. 2 but also at P. W. 1 the Deputy Superintendent of Police. I think that the evidence as to the acts of the later mob is, in the absence of other evidence, sufficient to clearly identify it with the original mob and its actions. It is found that the mob had remained all night at the spot between 11-30 p. m. and 6-30 a. m., and that at 6-30, it continued the efforts to break down the resistance and was still, as is evident from the case of accused No. 3, throwing stones. I hold that these three accused were, in the absence of reliable evidence to the contrary, fairly proved to have been members of the mob and in the riot throughout, and were therefore guilty in law of all the acts of the mob, from which I exclude the offence under S. 341, Indian Penal Code.

21. The net result is that all the accused are acquitted of the offence under S. 341, Indian Penal Code, and that the convictions of accused 3, 12, 13, 21, 27, 31 and 48 are otherwise confirmed; that the convictions of accused 1, 9, 29 and 33 under Ss. 426 and 447 are set aside and otherwise confirmed; and that the 15th accused is acquitted altogether. In the case of accused 12, 13, 21, 27, 31 and 48 I reduce the sentence of imprisonment by two weeks, and in the case of 3rd accused who has already been two weeks in jail, I think that is sufficient and reduce the sentence of imprisonment to the period already undergone.

In the case of the 1st accused I reduce the fine to Rs. 200 and in default to undergo rigorous imprisonment for 6 weeks and in the case of the 9th accused the period of imprisonment not undergone will be remitted, but the fine of Rs. 500 will stand. In the case of accused Nos. 29 and 33 I cancel the fine and the sentence will otherwise stand. Accused Nos. 12, 13, 21, 27, 29, 31, 33 and 48 will go back to jail to serve out their sentences.

Sentences varied.

1923, Madras. 375. (1)

KRISHNAN, J.

(*Garine*) *Satyanarayana* ... Petitioner (Accused).

Cr. Rev. No. 720 of 1922 and Cr. Rev. Pet. No. 603 of 1922, dated 18th December 1922, under Ss. 435 and 439 of the Cr. P. C., 1898, praying the High Court to revise the Judgment, dated 30th May 1922.

Madras District Municipalities Act, S. 250—Construct or establish any factory, meaning of.

S. 250 only applies where a person intends for the first time to construct or establish any factory, workshop or work place in which it is proposed to employ steam-power, water-power or other mechanical power or electric power. But, it does not apply to a case where the machinery has not been interfered with and only the shed in which the machinery was kept has been altered by changing the original room into a new room of brick and mortar.

G. Lakshmanna—for the Petitioner.

S. Venkatachala Sastri for *The Public Prosecutor*—for the Crown.

ORDER :—The accused is the proprietor of a rice mill in Bezwada. He was convicted under the Municipal Act, Madras Act 5 of 1920 under Ss. 199, 216 and 250 read with S. 317 and sentenced to fines of various amounts for the offences.

On appeal, the appellate Magistrate holding that it was unnecessary to punish him for an offence under S. 199 of the Act, he being liable to be punished under S. 250 of the Act, as the two offences really overlapped, acquitted him of the offence under S. 199 and remitted his fine on that charge, but confirmed his conviction under the other two Ss. 216 and 250. It is argued in revision that no offence under S. 250 has been made out and that he ought to be acquitted under that section.

As I understand the findings of the lower Court, part of accused's rice mill where the Sheller machinery was installed was burnt down sometime ago and what he did was to put up a brick building to instal the old Sheller machinery in it and he did so without obtaining the permission of the Municipal Chairman under S. 199, and further in spite of a notice sent to him by the Chairman he carried on this work and completed it. The machinery that was installed in the new room was, as I undertand, the old Sheller machinery that was in the factory itself.

S. 250 of the Act, it seems to me, cannot well be applied to this case. For, the accused cannot be said to have established any factory or installed any new machinery in any factory ; he was not bound to apply in writing to the Council for permission to put in the old Sheller machinery which was already in the factory, in the room newly built. S. 250 only applies where a person intends for the first time to construct or establish any factory, workshop or work place in which it is proposed to employ steam-power, water-power or other mechanical power or electric power. But, it does not apply to a case like this where the machinery has not been interfered with and only the shed in which the machinery was kept has been altered by changing the original room into a new room of brick and mortar. The accused therefore must, I think, be acquitted on the charge under S. 250. S. 250 itself expressly exempts the application of S. 197 in Cl. 5 and accused was therefore clearly punishable for having put up the brick building that he did without the sanction of the Municipal Chairman. He has, however, been acquitted of this offence and as no steps have been taken to have that acquittal set aside, I regret I cannot interfere with the acquittal in revision. That acquittal must therefore stand. There can be no doubt whatever of his guilt under S. 216 read with S. 317, for he clearly disobeyed the Chairman's notice by constructing this new building without his permission. That being so, the conviction under Ss. 216 and 317 must be confirmed. In the result the fine that has been imposed upon him under S.s 250 and 317 must be remitted but the fine under Ss. 216 and 317 *viz.*, Rs. 25 or simple imprisonment for 5 days in default, must be confirmed.

Sentence varied.

1923 Madras 375 (2).

SCHWABE, C. J., COUTTS-TROTTER AND RAMESAM, JJ.

Arulanandan ... Petitioner.

v.

Arul Pakkiam and another ... Respondents.

Case No. 8 of 1922, dated 6th Nov. 1922, referred by the Dt. J. of Madura in his etter No. 2096 dated 5th April 1922.

Divorce—Proof.—

It is an absolutely fixed rule of practice in the Divorce Courts in England that the evidence of the husband or the wife alone is never accepted without some corroboration either by a witness or at least by strong surrounding circumstances.

Parties are not represented.

SCHWABE, C.J.—This is a petition for divorce which comes before us under S.17 of Act IV of 1869, asking us to confirm the decree of the District Judge of Madura to dissolve the marriage between the petitioner and the respondent. Under S. 7 of that Act, subject to the other provisions of that Act, the High Court and the District Court shall in all suits and proceedings thereunder act and give relief on principles and rules which in the opinion of the said Courts are, as nearly as may be, conformable to the principles and rules on which the Court of Divorce and Matrimonial causes of England for the time being acts and gives relief. The evidence and the only evidence before the Court in this case was that of the petitioner himself. He swears that he went to his house one day and on gaining admission into his house, he found his wife there with the co-respondent. He also swears that she left him that evening and has been living with the co-respondent and that a child has been born to her which is not his child. It is an absolutely fixed rule of practice in the Divorce Court in England that the evidence of the husband or the wife alone is never accepted without some corroboration either by a witness or at least by strong surrounding circumstances. The reason for that rule of practice is that divorce is a matter which lends itself very easily to collusion, for a petitioner may come and say; "my wife or my husband is unfaithful or my husband has been cruel" and the other party desiring the divorce may take the simple course of not attending and letting the matter go by default, and so a divorce may be obtained. It is therefore the established practice that there must in these cases be corroboration for the Court to act. In this case there was none, and therefore it is necessary that the case should be referred back to the District Judge so that he may hear such evidence as the petitioner may be advised to call before him in corroboration of his own evidence. It would seem in this case a simple matter to obtain corroboration of these facts, if they are facts. That his wife has left him and is living with somebody else is a matter which can easily be proved, and probably evidence can easily be given of the registration of the birth of the illegitimate child.

Case sent back.

1923, Madras 376.

SPENCER, AND DEVADOSS, JJ.

(Sri Gadicherla) Venkatanarasimha Rao Garu ... Appellant (Defendant).

v.

Nyapathy Subba Rao Pantulu Garu and others ... Respondents (Plaintiffs).

Appeal No. 301 of 1921, dated 5th October 1922, against the decree of the Court of the Addl. Sub. J. of Rajamundry in O. S. No. 31 of 1920.

(a) *Civil P. C., S. 92—Scope of suit.*

If a trust has been "created for public purposes of a charitable or religious nature" a suit will lie for settling a scheme "where the direction of the Court is deemed necessary for the administration of such trust" and the person who is the heir-at-law and in possession of the property which is impressed with the character of trust property has an interest in and is a proper party to such a suit. A suit against a person in possession of trust property does lie though defendant may not be a trustee either by appointment or *de son tort.*

[P. 377, Col. 2.]

(b) *Will—Construction.*

If it is possible to ascertain with any degree of certainty the intentions of the testator, the Court will give effect to them. If, however, the trust fails on account of uncertainty of the objects, the trustee cannot repudiate it but holds it for the benefit of the testator's heir as a resulting trust. If the testator's meaning is so extremely vague that the execution of his purposes practically amounts to some else making a will for him, then the Court will not lend its assistance or recognise the trust as one capable of execution. Where one object is void for uncertainty the whole gift is void, where owing to the use of the disjunctive 'or' there is no indication as to what proportion is to be devoted to each. Trust for the spread of Hinduism is too vague but that for spread of the Sanskrit language is valid.

[P. 377, Col. 2.]

(c) *Civil P. C. S. 92—Applicability.*

S. 92 speaks of "any express or constructive trust created for public purposesof a charitable or religious nature." It does not signify whether it is of a charitable nature or of a religious nature provided that it is one of these two and also that it is a public purpose.

[P. 378, Col. 1.]

(d) *Practice—Inconsistent pleas.*

The adopted son cannot, while approbating the provisions of the will under which his adoption was made, reprobate other provisions of the same will.

P. R. Ganapathi Iyer and A. Venkatachallam—for the Appellant.

D. Appa Rao, S. Gopalaswami Iyengar, G. Lakshmana, N. Rama Rao and P. Panini—for the Respondents.

SPENCER, J. :—This suit was instituted by three plaintiffs styling themselves members and trustees of the Godavari Hindu Samaj, with the sanction of the Advocate-General under S. 92 of the Civil Procedure Code, for the purpose of getting a scheme framed by the Court for carrying out the trust contained in Cls. 11 and 12 of the will of the late Rajah Gadicherla Seethayya of Rajahmundry who executed it on 4th April and died on 15th April, 1909. By the same will the testator gave authority to his widow to adopt a son which she did on 4th June, 1911 by adopting the present appellant.

Cls. 11 & 12 of the will run as follows:—

"11. A sum of Rs. 400 should be spent every year out of my estate, either for the spread, (Abivrithi) of the Sanskrit language or for the spread of the Hindu religion or for both. The said sum must be a charge on my estate. The executors must make the arrangements necessary therefor to have the same conducted as the then existing trustees of the Rajahmundry Hindu Samaj may deem fit."

"12. Further it is my desire that the Vedas relating to my Sakha (branch) should be encouraged. And for that purpose, it is my desire that chiefly a general Sanskrit or Vedic or Oriental Library should be established at Rajahmundry, in my name. The executors must make the arrangements necessary therefor."

The will names three executors, one of whom is the 1st plaintiff. They all declined office and the appellant who came of age on 1st November, 1917, has taken over the estate from the hands of his adoptive mother.

The first objection argued at the hearing of the appeal related to the maintainability of the suit. It was urged that the defendant, not being a trustee either by appointment or *de son tort*, could not be sued under S. 92 merely because he was in possession of the estate, that for every suit under that section there must necessarily be a trustee [see observations in *Ashraf Ali* v. *Mohammad Nurojjoma* (1)] but here there was none, and that the proper course for the plaintiffs to adopt was to bring a suit for administration in order to get the terms of the will carried out. I do not consider that any of these are fatal objections to the present suit. If a trust has been "created for public purposes of a charitable or religious nature" a suit will lie for settling a scheme where the direction of the Court is deemed necessary for the administration of such trust" [vide *Neti Rama Jogiah* v. *Venkatacharulu* (2), and the person who is the heir-at-law and in possession of the property which is impressed with the character of trust property has an interest in and is a proper party to such a suit.

Mr. Ganapathi Aiyar then cited *Nacharamma* v. *Venkatappayya*, (3) and *Official Assignee* v. *Abdul Hussein* (4) in support of his argument that the present suit was premature as there was no definite fund for the trustee to administer and that the trust was thus incomplete. But the circumstances of those cases appear to be distinguishable. In the latter there was no fund ear-marked to be impressed with the trust, and in the former there was no appropriation of assets and the trust fund was yet to be ascertained. Here the will definitely assigns a sum of Rs. 400 to trust purposes to be spent every year out of the testator's estate and makes it a charge on the estate. Whatever may be thought of Cl. 12 there is a definite fund set apart for the purposes mentioned in Cl. 11. As noticed by the learned Subordinate Judge, when there is a will in existence S.6 of the Indian Trusts Act makes it unnecessary that there should be a transfer of the trust property to the trustees. The suit is in my opinion maintainable.

I pass now to a consideration of the more serious question whether the trust is void owing to uncertainty as to its objects.

If it is possible to ascertain with any degree of certainty the intentions of the testator, the Court will give effect to them. If, however, the trust fails on account of uncertainty of the objects, the trustee cannot repudiate it but holds it for the benefit of the testator's heir as a resulting trust, vide *Briggs* v. *Penny* (5). If the testator's meaning is so extremely vague that the execution of his purposes practically amounts to some one else making a will for him, then the Court will not lend its

1. (1918) 23 Cal. W. N. 115=49 I. C. 355.

2. (1903) 26 Mad. 450.
3. 16 L. W. 922=31 M. L. T. (H. C.) 63.
4. 28 I. C. 116.
5. (1851) 3 M. and G. 546 ; S. C. 21 L. J. Ch. 265.

assistance or recognise the trust as one capable of execution. See *Blair* v. *Duncan* (6) and *Grimond* v. *Grimond* (7). This principle is the principle followed by Seshagiri Aiyar, J., in *Muthukrishna Naicken* v. *Rama Chandra Naicken* (8) though the learned Judge does not refer to those English cases. He says at page 497:

"The primary rule is to ascertain whether the object aimed at by the testator could be carried out without making a new will for him."

The objects of the trust as disclosed by Cl. 11 of the will namely, the spread of the Sanskrit language or the spread of the Hindu religion appear to be partly for the benefit of one branch of human knowledge, *viz.*, the Sanskrit language and partly religious. In this country religious objects are not necessarily charitable objects, and learning is not quite synonymous with education. But it is unnecessary to embark on a disquisition upon the question whether a religious purpose is also a charitable purpose, which formed the main consideration in *Baker* v. *Sutton* (9), in *Townsend* v. *Carus* (10) and *In re White, White* v. *White* (11) as S. 92, Civil Procedure Code, speaks of "any express or constructive trust created for public purposes of a charitable or religious nature." It does not signify whether it is of a charitable nature or of a religious nature provided that it is one of these two and also that it is a public purpose.

In order to understand the real intentions of the testator I am willing to read Cl. 12 of his will along with Cl. 11 and not to treat Cl. 12 by itself as creating a precatory trust.

I think we should also take notice of the reference in Cl. 11 to the Rajahmundry Hindu Samaj as an aid to discovering what the testator meant. It was also material to take into consideration, as the learned Subordinate Judge has done in paragraph 10 of his judgment, the evidence of P. W. 1 that the testator was a member of the Rajahmundry Hindu Samaj almost from its inception and was keenly interested in the working of this society. In *Clode* v. *Andrews* (12) use was made of the knowledge that a certain Dr. Maclean was engaged for many years in the work of Christian Missions to interpret a reference to Missionary objects connected with his name in a will, and in the *Attorney-General* v. *Stepney* (13) the known objects of the Welch Circulating Charity Schools were referred to in order to understand the meaning of a will which had as its object, the improvement of Christian knowledge coupled with a mention of those schools. But I am unable to agree with the Subordinate Judge that the objects of the Hindu Samaj set out in Cl. 2 of their rules exhibited as Ex. C are almost exactly the same as the purposes indicated by the testator in his will. The teaching of Sanskrit is not one of the professed objects of the Association. A library is mentioned as one of the means of carrying out its objects but it is not clear what kind of library is intended. On this point the will, which speaks of a general Sanskrit, Vedic or Oriental Library is more specific. Again the Association aims at the diffusion of the principles of Hinduism, the study of Hindu civilization and the advancement of the Hindu Community. The testator desired to see the spread of the Hindu religion with special attention to the Vedas relating to his branch (sakha), he being a Yagnavalkya Brahmin. If the testator had absolute confidence in the Managing Committee of the Hindu Samaj, he might have made an outright bequest in their favour and left the spending of the money entirely in their hands without directing his executors to make arrangements to have the trust conducted according to the discretion of the trustees of the Hindu Samaj. In *Grimond* v. *Grimond* (7) Lord Monthiff whose judgment was adoped by the House of Lords, observes that the testator's own religious views do not affect the question when the trustees have been left with unlimited discretion as to what religious institutions are to be selected for being benefited. So here, if one of the objects of the trust is the spread of Hinduism generally, then in my opinion the object is too wide and indefinite to be carried into effect. The scheme framed in the lower Court provides for the submission to the Court by the trustees of a programme for the utilization of the annual grant of Rs. 400 and for the Court sanctioning the

6. (1902) A. C. 37.
7. (1905) A. C. 124.
8. 37 M. L. J. 489.=47 I. C. 611.
9. 48 E. R. 292.
10. 67 E. R. 378.
11. (1893) 2 Ch. D. 41.
12. 97 T. L. R. 130.
13. 32 E. R. 751.

same with such modifications as may be found necessary. How is any Christain, Hindu or Mahomedan Judge to decide whether the proposal so submitted will advance the Hindu religion in the manner contemplated by the testator? If on the other hand we hold that the scheme should be directed to the best means for inculcating the peculiar sectarian doctrines of the testator's own branch of the Hindu faith, then it may reasonably be doubted whether this purpose is such a public one as S. 92 of the Code was intended to cover. The learned Subordinate Judge, who was in favour of upholding the trust as a good one, has been driven after considering Cl. 12 to the conclusion in para. 19 of his judgment that the object is not clear enough and he has been obliged to treat this clause as merely recommendatory. To my mind the trust is even more vague and indefinite, if Cl. 12 is omitted from consideration. The words "for the spread of the Hindu religion" are no more definite than the words "for missionary purposes" which were held in *Scott* v. *Brownrigg* (14) to be too vague and uncertain to create an executable trust, or than the words "most conducive to the good of religion in this diocese" in *Dunne* v. *Byrne* (15). It is not enough that in those cases there could be no doubt that the settlor was thinking of the Christian religion when he spoke of missionary or religious purposes, or that in the present case the Hindu religion is designated by name. God is worshipped in many forms by Hindus. A general endowment for the worship of God without specifying the deity for whose benefit the endowment is to take effect is void for uncertainty. [Vide *Chandi Charan Mitra* v. *Haribola Das* (16).

On the other hand, I am inclined to regard the promotion of the knowledge of the Sanskrit language as a valid charitable bequest. In *Whicker* v. *Hume* (17), a fund given to be applied by trustees according to their discretion "for the advancement and propagation of education and learning all over the world" was held to be not too vague; and in *A. G.* v. *Flood* (18) gift for promoting education in the Irish language was upheld. *See also* Halsbury's Laws of England Vol. 4, Art. 174. Here the word "spread" denotes that the testator was thinking of education. The Sanskrit language could only be *spread* by teaching persons hitherto ignorant of it. It would not be *spread* by rewarding those who are already learned.

If the object is definite enough, the Court will find suitable modes for carrying out the wishes of the testator. See *Gordhan Das* v. *Chunni Lal* (19). Of course it is necessary that if a Sanskrit Library is to be founded, it should be one open to the public (unlike the Hindu Samaj's library which is limited to Hindus who pay a certain subscription and are grouped in two classes); if Sanskrit schools are to be formed, they must be schools which can be freely attended by the public. Otherwise this will not be a trust for public purposes falling under S. 92, Civil Procedure Code.

The trust for the spread of Hinduism being too vague, and that for the spread of the Sanskrit language being valid, we must next take note of the fact that the trustees of the Hindu Samaj have been given an absolute discretion to spend the whole sum of Rs. 400 on one or the other object, or on both. In such a case where one object is void for uncertainty the whole gift is void, since owing to the use of the disjunctive "or" there is no indication as to what proportion is to be devoted to the charitable purpose of advancing education [vide *In re Macduff*, *Macduff* v. *Macduff* (20), *Blair* v. *Duncan* (6), *Houston* v. *Burns* (21) and Theobald's Law of Will (7th Edition) P. 369]. So in the present case the testator having left the application of the fund entirely to the discretion of the trustees of the Rajahmundry Hindu Samaj, it would be open to that body to apply the whole amount to the vague purpose of spreading the Hindu religion, leaving nothing for the encouragement of Sanskrit learning.

But on the principle of the above English cases the whole bequest thus is bad and unexecutable. The trustees under the will in such a case cannot exercise their discretion and allot the whole to

14. L. R. Ireland Vol. 19 Ch. D. 246.
15. (1912) A. C. 407.
16. (1919) 46 Cal. 951=23 C. W. N. 645=29 C. L. J. 366=51 I. C. 215.
17. (1858) 7 H. L. 124.
18. (1816) H. J. A. 138.
19. (1908) 30 All. 111, (114)=5 A. L. J. 23=(1908) A. W. N. 34.
20. (1896) 2 Ch. 451.
21. (1913) A. C. 337.

charity. (In re *Jarman's Estate, Leavers* v. *Clayton* (22).

I am therefore of opinion on the 2nd and 3rd issues that no enforceable trust is created in Cl. 11 or 12 of the will, and I would allow the appeal and dismiss the plaintiffs' suit with costs throughout.

A third point which is the subject of the 5th issue has been raised, namely whether the adopted son who takes by survivorship can repudiate disposition of a portion of the ancestral property made by his adoptive father without its being proved that his natural father was aware of the contents of the will at the time of the adoption. Mr. Ganapatei Aiyar quotes *Balkrishna Motiram* v. *Shri Uttar Narayan Dev* (23) in support of his arguments that he can. In the present case the testator was childless when he made his will and was free to make an absolute gift. Following *Ganapati Ayyan* v. *Savithri Ammal* (24), I feel clear that the adopted son cannot, while approbating the provisions of the will under which his adoption was made, reprobate other provisions of the same will. It is unnecessary in view of my finding on issues 2 and 3 to pursue this point further. It has also become unnecessary to discuss the objections and the cross-objections to the scheme framed by the Court. The decree of the lower Court is set aside and the suit is dismissed with costs. The memorandum of objections is dismissed.

DEVADOSS, J. :—I have had the advantage of perusing the judgment prepared by my learned brother and I agree with his conclusions on the points argued before us. Inasmuch as this appeal was argued at great length very ably on both sides and as the points involved are of considerable importance, I wish to add in my own words the reasons for agreeing with my learned brother.

The plaintiffs are the members and trustees of the Godavari Hindu Samajam commonly known as the Hindu Samajam located at Rajahmundry ; and they have brought this suit for the settlement of a scheme for carrying out the intentions and directions contained in Cls. 11 and 12 of the will of Sri Gadicherla China Sitayya Garu who died on the 15th April 1909, possessed of Zamindari villages and other properties yielding an annual income of Rs. 4,000. The defendant is the adopted son of the said Sitayya Garu. The Additional Subordinate Judge of Rajahmundry has granted a decree in plaintiffs' favour and the defendant has preferred this appeal.

The main contentions raised on behalf of the appellant are :—

(1) The suit is not maintainable under S. 92 of the Civil Procedure Code inasmuch *as there is no* trustee in charge of the alleged trust estate ; (2) the terms of the will are so vague that the bequest must fail on account of uncertainty and (3) the defendant being the adopted son of the testator is entitled to repudiate the bequest made by the will as he succeeded to the whole of the testator's property by right of survivorship.

The first contention, that there is no trustee in charge of the trust estate and therefore a suit under S. 92 is incompetent, is an untenable one. S. 92 was enacted for the purpose of safeguarding public trusts of a charitable or religious nature. The Section says :—

"In the case of any alleged breach of any express or constructive trust created for public purposes of a charitable or religious nature or where the direction of the Court is deemed necessary for the administration of any such trust, two or more persons having an interest in the trust can sue after fulfilling certain formalities.

It is quite plain that the section is applicable to cases where the direction of a Court is deemed necessary for the administration of any trust, and it is nowhere said that the suit could only be against trustees *de facto* or *de jure*. When the Court is put in possession of facts from which it can infer that there is a public trust of a charitable or religious nature and that for its proper administration the direction of the Court is necessary, the Court has jurisdiction to frame a scheme for the proper administration of the trust. The appellant relies on a number of cases in which it was held that S. 92 did not apply to suits against trespassers. A trespasser claims adversely to the trust and in order to evict him or to claim damages from him no scheme is necessary and the intervention of the Court under S. 92 is uncalled for. It is the duty in such cases of a trustee or trustees to seek the proper remedy against the trespasser or against the person holding the property adversely to the trust

22. (1878) 8 Ch. D. 584.
23. (1919) 43 Bom. 542=21 Bom. L. R. 225=50 I. C. 912.
24. (1898) 21 Mad. 10.

In *Gholam Mowlah* v. *Ali Hafiz* (25) the suit was against the purchaser of the trust property. The Court held that, the defendant being an alienee of the trust property, S. 92 had no application.

In *Arunachella Chetti* v. *Muthu Chettiar* (26) the suit was by a trustee against a trespasser. This suit was decided under the Civil Procedure Code of 1877 in July 1880. It was held that S. 539 had no application to the case.

In *Budree Das Mukim* v. *Chooni Lall Johurry* (27) Woodroffe, J., held that suits brought not to establish a public right but to remedy a particular infringement of an individual right were not within the section and that, as against strangers, such as alienees from the trustee and mere trespassers holding adversely to the trust, that section did not apply.

In *Bapuji Jagannath* v. *Govindlal Kasandas* (28), it was held that S. 92 had no application where remedy asked for was not for the infringement of a public right but for a private right. In that case one executor sued another executor for accounts and for an injunction against further management. The Court held that the suit was not bad for want of sanction under S. 92, Civil Procedure Code.

In *Subbayya* v. *Krishna* (29) the Full Bench held that a trustee could be removed though S. 539 did not expressly give the power of the Court.

In *Ashraf Ali* v. *Mohammad Nurojjoma* (1) the Court held that to a suit against the lessee in which the trustee was a party, S. 92 had no application as no scheme was asked for, the suit being for, a declaration that the lease was invalid and that possession should be handed over to the plaintiffs.

Strong reliance was placed by the appellant on a decision of the Madras High Court reported in *Nacharamma* v. *Venkatappayya* (3). There the late Chief Justice and Kumaraswami Sastri, J., held that a suit under S. 92, Civil Procedure Code for enforcing the terms of a will which contained provisions for the administration of public trusts was not maintainable. On a careful reading of the judgment I think the decision does not support the appellant's contention. All that was decided in that case was that it was not competent for persons to invoke the provisions of S. 92 for the purpose of administering the estate of a deceased person with a view to compel the executors to give effect to charitable bequests. What was found on the evidence in that case was that there was no fund from which the charity could be maintained. The learned Judges held that, in the absence of a specific finding that a trust had been created, a suit of that nature would not lie. But the facts of this case are different. Here the amount to be spent on the charity is charged on the whole estate. The estate is worth Rs. 4,000 a year and the amount of the charitable bequest is only Rs. 400 a year. Funds for the trust have been provided by pointing out the source of the funds and by making the whole of the property bear the charge for the trust. Where it is quite clear that a trust has been properly constituted by will, it is not necessary that there should first be an administration suit before the trust could be the subject of a suit under S. 92. In the Moffussil, administration suits are almost unknown, and, if it is considered that an administration suit is essential preliminary to a suit under S. 92, the question would arise as to who should bring the administration suit. The heirs of the testator may be quite unwilling to bring the administration suit and anybody who would ordinarily be entitled to bring an administration suit might be found unwilling to do so. I do not think that the case supports any wide proposition as is contended for by the appellant. Where it is doubtful whether there would be funds for the purpose of satisfying the bequest for charity, there it might be necessary to have an administration suit in order to fix the amount that might be available for charitable purposes after meeting the legitimate demands of creditors and specific legatees.

The contention that there must be trustees in charge of the funds in order to entitle persons to sue under S. 92 is an obvious fallacy. One can conceive of cases where all the trustees die or refuse to act. It is in such cases the interference of the Court would be deemed most necessary and beneficial and it is to

25. (1918) 28 Cal. L. J. 4=17 I. C. 111.
26. (1912) 23 M. L. J. 347=17 I. C. 586.
27. (1906) 33 Cal. 789=10 C. W. N. 581.
28. (1916) 40 Bom. 439=18 Bom. L. R. 335 =34 I. C. 167.
29. (1891) 14 Mad. 186=1 M. L. J. 95.

prevent charities lapsing for want of proper management that S. 92, Civil Procedure Code was enacted on the lines of the Lord Romilly's Act.

In *Neti Rama Jogiah* v. *Venkatappayya* (2), the suit was brought under S. 539 of Civil Procedure Code for a declaration that the defendants were not Dharmakarthas of certain temples and to have trustees appointed for the due administration of those temples. The learned Judges observe at p. 452 as follows :—

"The substantial question therefore for determination in the case is whether the defendants are the lawful trustees of the temple as claimed by them. It they are so, there is an end of the suit, but, if they are not, then there is a vacancy in the office of one or both of the trusteeships."

and the plaintiffs, as persons interested in the institution, pray for an order of Court directing the appointment of new trustees for the due administration of trusts of the temple. In our opinion such a suit is comprised in the words of the Section namely, that "Whenever the direction of the Court is deemed necessary for the administration of such trust," and the suit therefore falls under S. 539 (a) of the Civil Procedure Code. In support of this view we may refer to the opinion of the Judicial Committee of the Privy Council in *Bishen Chand Esawat* v. *Syed Nadir Hussien* (30) in which Sir Barnes Peacock in delivering the judgment of the Committee stated :

"If there had been any objection that he *i.e.*, the plaintiff was illegally substituted as trustee, an application might have been made by any person interested in the performance of the trusts to have him removed and a new trustee appointed by the Court under the Code of 1877."

As pointed reference is made to the Code of 1877 in which for the first time S. 539 was introduced, there having been no section corresponding to it in the Code of 1859, it is quite clear that the provision referred to by the Privy Council is S. 539. In the cases where there are no trustees, or where all the trustees choose to claim adversely to the trust, the interference of the Court is necessary for the protection of the trust.

In *Raghubar Dial* v. *Kesho Ramanuj Das* (31), the four defendants between them by an endowment created a trust in respect of the temple of Janaki Ballabhji and of the idol contained therein, which endowment consisted of five biswas of land, the income of which was to be devoted to the expenses of the temple. The plaint alleged that, since November, 1894, the donors changed their minds and had stopped the payment for expenses, Straight, J., observes at page 22 :

"Now, it is not necessary, if I read that section aright, that there should have been any breach of trust ; but it is sufficient if there be a public religious trust, and the direction of the Court is considered necessary for the administration of such trust. This view has been adopted by the learned Judges of the Calcutta High Court in *Lutifunnissa Bibi* v. *Nazirun Bibi* (32). Therefore this may be fairly regarded as a suit, to put it in its narrowest form, in which the plaintiff asks to have the trust administered by the Court. That being so, it seems to me that the sanction of the Collector or such officer as the local Government might appoint was necessary, for the purpose of empowering the plaintiff to bring such a suit."

That the defendant need not be a trustee, nor need he admit the existence of a trust in order to enable the plaintiffs to sue under S. 92 is made clear by the judgment of the Calcutta High Court in *Budh Singh Dudhuria* v. *Niradbaram Roy* (33). Mukerjee, J., observes at page 437 :

"The case is no authority for the proposition that the Court is ousted of the jurisdiction it possesses under S. 539, Civil Procedure Code by the bare denial on the part of the defendant of the existence of the trust alleged by the plaintiffs. If the view urged by the appellants were well-founded, every case of a public charity might be excluded from the jurisdiction of the Court by reason of the most groundless allegation on the part of the defendant that there is no public trust. But, it is an elementary principle that when the jurisdiction of a Court to take cognizance of a suit instituted before it, is disputed, the Court must adjudicate upon the question..... ...I must hold accordingly that if in a suit instituted under S. 539, Civil Procedure Code, the defendant disputes the jurisdiction of the Court to make any decree under that section on the ground that the trust alleged by the plaintiffs does not exist, the Court is not ousted of its jurisdiction but must determine the question upon the evidence."

The same principle was laid down in *Jafarkhan* v. *Dandshah* (34) Batchelor, J., who delivered the judgment of the Court observes at p. 53 :

"We think that a difficulty is caused by the use of the words 'any alleged breach of any trust' occurring in S. 539, for we do not read those words as equivalent to any alleged breach of any admitted trust. The construction which we put upon the section in this respect has, so far as we

30. (1887) 15 I. A. 1=15 Cal. 329=5 Sar. 113.
31. (1888) 11 All. 18=(1888) A. W. N. 276.
32. (1885) 11 Cal. 33.
33. (1905) 2 C. L. J. 431.
34. (1911) 13 Bom. L. R. 49=9 I. C. 358.

are aware, been consistently followed in this Court and the case of *Chinchwad Savasthan, Chintaman Bajaji Dev* v. *Dhondo Ganesh Deo* (35), is an illustration of that. Reference being made to page 616 of the report, it will be seen that the defendants there pleaded that the Savasthan was not a public, religious or charitable institution and that they were not the trustees but the owners of the property in that suit."

It is quite apparent from these decisions that the jurisdiction of the Court is not ousted by the defendant pleading that he is not a trustee or that there is no trust for which a scheme could be framed. In this case the defendant claims to repudiate the provisions of the will as the adopted son of the testator. His interests are no doubt adverse to that of the plaintiffs, who want to maintain that there is a trust. But in the case of a suit under S. 92, it is not necessary that there should be any active contest as to any breach of trust by a trustee. If the circumstances are such that the intervention of the Court is deemed necessary for the purpose of framing a scheme for any trust which is proved to exist, the Court has jurisdiction to frame a scheme. No doubt the defendant in this suit could not be made to pay amounts due or to surrender the property, if any, belonging to the trust, he being a stranger to the trust. On the framing of a scheme and on the appointment of trustees, he should be proceeded against by the trustees, for such reliefs as they may deem fit. In that sense, no doubt, the suit against the defendant is unsustainable, but the suit is perfectly competent for the purpose of enabling the Court to frame a scheme in respect of the charitable bequest contained in the will, provided the bequest fulfils other conditions.

The second point is one of more difficulty. The contention that the bequest is void for uncertainty should be considered in the light of the provisions of the will relating to the bequest, Para. 11 of the will runs thus :—

" A sum of Rs. 400 should be spent every year out of my estate, either for the spread of the Sanskrit language or for the spread of the Hindu religion or for both. The said sum must be a charge on my estate. The executors must make the arrangements necessary therefor to have the same conducted as the then existing trustees of the Rajahmundry Hindu Samajam might deem fit."

The next clause runs thus :

" Further, it is my desire that the Vedas relating to my *sakha* should be encouraged ; and for that purpose, it is my desire chiefly a general Sanskrit or Vedic or Oriental library should be established at Rajahmundry., in my name. The executors must make the arrangement necessary therefor ".

Cl. 12 does not present much difficulty. It is what I may call a precatory trust. There is no definiteness about the trust. The amount to be spent for establishing the Sanskrit or Vedic or Oriental library is not mentioned and the direction to found a general Sanskrit or Vedic or Oriental library is very vague. What sort of Sanskrit books should be in the library or what sort of Vedic books should be collected or what sort of Oriental library it should be, there is no indication in the will. I do not think it is necessary to consider this matter further. I hold that, in the first place, it is precatory and, in the second place, that it is so vague that it cannot be given effect to. Cl. 11 contains a bequest of a sum of Rs. 400 to be spent annually for the spread of the Sanskrit language or the spread of Hindu religion or for both, and the executors should make the arrangements necessary therefor and should conduct as the then existing trustees of the Rajahmundry Hindu Samajam might deem fit. Here again the testator's directions are so vague that it will not be possible for any Court of law to decide what is necessary for the spread of Sanskrit language or for the spread of Hindu religion, and the executors are asked to make 'such arrangements as the trustees of the Rajahmundry Hindu Samajam might deem fit.' The trustees of the Samajam may change and the objects of the Samajam are as vague and as comprehensive as they can be. The objects of the Samajam are the diffusion of the principles of Hinduism, the study of Hindu civilisation and, in general, the advancement of the Hindu community. Some of the objects of association could not be considered charitable or religious under S. 92. The bequest may be a good one if it is to the Samajam ; but, where a trust is indicated and the Court is asked to frame a scheme under S. 92, the provisions of that section should be complied with before the Court can be induced to act. In the first place, the trust should be for a public purpose, and, in the second place, it should be of a charitable or religious nature. There are many public purposes which are neither charitable nor religious. There are many purposes which are charitable or religious, but not of a public nature. The discretion is given

35. (1891) 15 Bom. 612.

to the executors to make arrangements for the spread of the Sanskrit language. The expression spread of the Sanskrit language is not capable of any clear definition. It may be spread in the sense of intensive culture or of culture benefiting a large number of people. The expression 'for the spread of Hindu religion' is also vague. It is very difficult for people belonging to various sects to agreee as to what the 'Hindu religion is. Without in any way being disrespectful to the Hindu religion or in any way disparaging the religion, the words Hindu religion do not connote anything specific. It may be the vedantic religion or the religion of a particular sect, and it is not within the province of a Civil Court to say what the Hindu religion is and what should be done to spread it. The trustees of the Rajahmundry Hindu Samajam may all cease to promote the particular form of Hindu religion which for a time the same trustees were prepard to promote, and the Court will then be called upon to frame another scheme by which the trustees of this particular estate may be left to manage things without reference to the trustees of the Rajahmundry Hindu Samajam. These are some of the difficulties which will face any Court which is called upon to frame a scheme for the purpose of carrying out the intentions of the testator. It is a well established principle of law that, where the intention of the testator is so vague, the Court cannot give effect to it. The Court can only interpret the will of a testator, but it cannot be 'called upon to make a will for the testator. It is sometimes thought that a charitable bequest should not be allowed to lapse, and, therefore, some sort of scheme should be framed in respect of it. But, with all respect to that view, I think the Court is bound to follow certain principles which have guided the Courts of Chancery for a very long time. The idea of making charitable bequests by will is new to this country, and it would not be right to throw aside altogether the principles which have guided the Courts of Chancery in England in interpreting wills containing bequests for charitable and religious purposes.

I shall proceed to examine the English cases that have been cited to us, but before entering upon the mazes of the decisions of the Chancery Courts, it is but right that one should remember that the Law of Trusts in England is subject to certain peculiar restrictions. In the first place the Laws of Mortmain prevent bequests of lands being made to associations, and corporations and, in the second place, realty cannot be disposed of in perpetuity by will and only personalty can be disposed of for a charitable or religious purpose, and even in the case of personalty there is a difference between impure and pure personalty. It was by 51 and 52 Victoria Chap. 42 the law relating to Mortmain and the dispositions of land for charitable purposes was consolidated. By 43 Elizabeth, Chap. 4, Charitable Bequests were validated. It has been the attempt of Chancery lawyers to bring bequests within the purview of 43 Elizabeth, and that is the reason why we find, that in the earlier cases the Court of Chancery gave a wide interpretation to the word 'charity.'

I shall first deal with the cases relied upon for the respondent in support of the validity of the bequest.

The earliest case relied on is *The Attorney-General* v. *Stepney* (13). There a bequest of the residue of personal estate for the use of the Welch Circulating Charity Schools, as long as they should continue, and the increase and improvement of Christian knowledge and promoting religion, and to purchase bibles and other religious books, pamphlets, and tracts, as the trustees should think fit, to go to the same uses with those already bought, and to be kept in a house, devised for that purpose, was held good. The Lord Chancellor (Eldon), in the course of his judgment, after referring to the case of *Browne* v. *Yeall* (36) obeserves :—

"Lord Thurlow's opinion was that the testator, not having given this Court more of specific directions as to the nature of the books, to be purchased and circulated, than that they were to be such as may have a tendency to promote the interests of virtue and religion, and the happiness of mankind, had not given direction enough: and therefore Lord Thurlow held the next of kin entitled. If this was that very case, I should certainly feel myself bound to follow that decision. But this, independent of the peculiarities belonging to it, is very different; and if that will had specified Bibles and Testaments, the Court could not have refused to execute that purpose. If therefore there was nothing more in this will, I should be bound to say, that, whether

36. (1790) 7 Ves. 50.

there is more or less objection to the words 'other religious books and tracts,' there is a denotation of a religious purpose, to which the fund may be applied, with an option, how it should be applied; and I must execute one term of that option."

The next case is that of *Mitford* v. *Reynolds* (37). In this case the testator's will contained a bequest in the following terms:

"I will, devise, give and bequeath the remainder of my property to the Government of Bengal, for the express purpose of that Government applying the amount to charitable, beneficial and public works at and in the city of Dacca in Bengal, the intent of such bequest and donation being that the amount shall be applied exclusively to the benefit of the native inhabitants in the manner they and the Government may regard to be most conducive to that end."

The Lord Chancellor (Lyndhurst) construed it as valid and observed:

"According to the construction which I put upon the words of this bequest taken together it is a bequest of money to be applied in the, construction or establishment of some works for the general benefit of the native inhabitants of Dacca, for the poor as well as for the rich; and I think that comes within the principle of the cases I have stated and constitutes under the statute of Elizabeth, a good charitable bequest."

In *Whicker* v. *Hume* (38), a bequest to trustees of funds to be applied by them according to their discretion for the advance and propagation of education and learning all over the world was held to be a good charitable bequest and was not void for uncertainty. The discussion in that case turned mainly upon the meaning of the word 'learning.' If 'learning' had stood alone, the Court would have held the bequest bad for uncertainty, but inasmuch as the word 'education' was in front of the word 'learning' the Court upheld the bequest. Lord Chelmsford, in delivering the judgment, stated as follows:

"Now, the question is, in what sense did the testator use this expression? I apprehend that if there are two meanings of a word, one of which will effectuate and the other will defeat a testator's object, the Court is bound to select that meaning of the word which will carry out the intention and objects of the testator; and I think that your Lordships are not without aid in giving the particular limited interpretation (if I may use the expression) to the word 'learning' which is required for the purpose of establishing the validity of this bequest, because when you find that the testator associates with that word 'learning' the 'word education' I think, that from the society itself in which you find the word, your Lordships may gather the meaning which it is necessary to put upon it, and that he means the word 'learning' in the sense of imparting knowledge by instruction or teaching. Well if this construction be correct, then I apprehend there is no difficulty whatever, because it will range itself pretty much within the meaning of the word 'education' although not precisely synonymous with it, and it is admitted in the argument that if the word 'education' had stood alone, the bequest would have been valid."

Lord Wensleydale said:

"Learning," in this case, I consider as equivalent to teaching, learning, as part of education. No portion of the charitable fund could be devoted by the trustees for the purpose of rewarding learned men unconnected with education."

Now applying this case to the case before us, can it be said that the trustees are bound to spend the money in educating people in the Sanskrit language? If they choose to give the whole of the amount to a person well versed in Sanskrit so that he may improve his knowledge of the language or as a reward for his past labours, can it be said that they aid a public charitable purpose? This makes it quite clear that the bequest can be good only if education is the object.

The next case relied on by the respondent is a case under the Income-tax Act. In *Commissioners for Special Purposes of Income-tax* v. *Pemsel* (39), the House of Lords had to consider whether certain allowances in respect of the income-tax imposed by Sch. A are to be granted by the Commissioners for Special Purposes of the Income-tax. The words 'charitable purpose,' they held as used in the Income-tax-Act were not restricted to the meaning of relief from poverty, but must be construed according to the legal and technical meaning given to these words by English Law. Lord Macnaghten, in the course of his judgment (at p. 580), observes:

"That, according to the Law of England, a technical meaning is attached to the word 'charity' and to the word 'charitable' in such expressions as 'charitable uses' 'charitable trusts' or 'charitable purposes' cannot, I think, be denied. The Court of Chancery has always regarded with peculiar favour those trusts of a public nature which, according to the doctrine of the Court derived from the piety of early times, are considered to be charitable. Charitable uses or trusts form a distinct head of equity. Their distinctive position is made the more conspicuous by the circumstance that owing to their nature they are not obnoxious to the rule against

37. 41 E. R. 602.
38. 11 E. R. 50.
39. (1891) A. C. 531.

perpetuities, while a gift in perpetuity not being a charity is void."

This case does not throw any light on the question what are charitable bequests and what are not.

In *In re White : White* v. *White* (11) the Court of Appeal held that a bequest to a religious institution or for a religious purpose is *prima facie* a bequest for a 'charitable' purpose. The testator gave his property 'to the following religious societies to be divided in equal shares among them.' The testator did not give a list of the religious societies among whom he wished the property to be divided. Lord Lindley, in the course of his judgment, observes :

"The gift is for religious purposes ; and secondly, that being for religious purposes, it must be treated as a gift for 'charitable purposes' unless the contrary can be shown. If once this conclusion is arrived at, the rest is plain. A charitable bequest never fails for uncertainty : *Mills* v. *Farmer* (40) settles that point. Lord Eldon was clearly of opinion that the nomination of particular object is only the mode and not the substance of a gift to 'charity.'"

In England charity must be of a public nature, but in India it is not so. There can be bequests for charity for private purposes and there can be a bequest for a religious purpose of a private nature. There can be a good bequest in favour of an idol or for the performance of shradh. As I have stated above S. 92 is only concerned with trusts for public purposes of charitable or religious nature and so the reasoning of the learned Lord Justice cannot apply in its entirety to a bequest in a Hindu Will.

In *Baker* v. *Sutton* (41) a bequest of the residue of personal estate for such religious and charitable institutions and purposes within the Kingdom of England as in the opinion of the testator's trustees should be deemed fit and proper, was held to be a good charitable bequest. In the case before us the question is not whether the bequest is a good bequest, but whether the Court should be called upon to administer the funds given for a particular purpose. If the bequest was to the Hindu Samajam at Rajahmundry, it would be a good bequest. But the real difficulty is in finding out the intention of the testator and in controlling the discretion of the trustees who are to administer the trust. The case of *Mills* v. *Farmer* (40) is relied upon as showing that a charitable bequest never fails. Lord Eldon, in the course of his judgment, laid down the law thus.

"I am fully satisfied as to all the principles which have been laid down in the course of this argument, and accede to them all. There is no question, that the Court has not the power to make a will for the testator, but only to carry into execution that which he has made himself: and this it can do only by giving to it such a construction as former precedents have established to be the right construction in every particular instance. Neither is there any doubt that the same words in a will, when applied to the case of individuals, may require a very different rule of construction from that which would govern them if applied to the case of charity. If I give my property to such person as I shall hereafter name to be my executor, and afterwards appoint no executor ; or, if having appointed an executor, he dies in my lifetime and I appoint no other to supply his place, in either of these cases, as to individuals, the testator must be held intestate, and his next of kin will take the estate. But to give effect to a bequest in favour of charity, the Court will, in both instances, supply the place of an executor and carry into effect that which, in the case of individuals, must have failed altogether. This distinction has proceeded partly, perhaps, on principles in the Roman Law, which we do not at this time perfectly comprehend ; and partly, no doubt, on the religious notions which formerly obtained in this country, according to which it fell to the ordinary province to distribute, in case of intestacy. A third principle which it is now too late to call in question, is that in all cases in which the testator has expressed an intention to give to charitable purposes, if that intention is declared absolutely and nothing is left uncertain but the mode in which it is to be carried into effect, the intention will be carried into execution by this Court, which will then supply the mode which alone was left deficient."

In *Cocks* v. *Manners* (42) it was held by Sir John Wickens, V. C. that the bequest to the Dominican convent at C. was neither within the letter nor the spirit of 43 Eliz. C. 4. At p. 585, he observes.

"A voluntary association of women for the purpose of working out their own salvation by religious exercises and self-denial seems to me to have none of the requisites of a charitable institution, whether the word 'charitable' is used in its popular sense or in its legal sense. It is said, in some of the cases, that religious purposes are charitable but that can only be true as to religious services tending directly or indirectly towards the instruction or the edification of the public ; an annuity to an individual, so long as he spent his time in retirement and constant devotion, would not be charitable, nor would a gift to ten persons, so long as they lived together in retirement and performed acts of devotion, be charitable. Therefore the gift to the Dominican con-

40. (1815) 1 Mer. 55.
41. (1836) 1 Kean 224 p. at 292.
42. (1871) 12 Eq. 574.

vent is not, in my opinion, a gift on a charitable trust."

In this case it has been very vehemently urged that inasmuch as the trustees have the choice of spreading the Hindu religion, therefore the bequest is for a religious purpose and could not fail for uncertainty. *Cocks* v. *Manners* (42), is an answer to that. As I said above the trustees may take into their heads to promote the Hindu religion or to contribute to the spread of the Hindu religion by giving the whole of the amount to one person or to a particular Mutt. A religious purpose, which in England should necessarily be a public purpose in order to validate a bequest need not be so in India.

In *Townsend* v. *Carus* (10), Wigram, V. C. held that a gift to be applied to promote the spiritual welfare of God's creatures was for religious, and therefore, charitable purpose.

It is contended that a general bequest for the spread of Sanskrit language is good on the authority of *Attorney-General* v. *Flood* (43). In that case a bequest was given to the Trinity College, Dublin, for the study of Irish language. There can be no objection at all to a bequest to the University or to a College, or even to the Rajahmundry Hindu Samajam, being held good if it is for the study of Sanskrit or any other language. Where the bequest is not to a society but to trustees who are asked to do certain things, and where the Court is not in a position to control the discretion of the trustees, there the Court has to see whether the intention of the testator is specific enough to control the discretion of the trustees. In *Re Scowcroft Ormford* v. *Wilkinson* (44), a bequest to the vicar of a parish for the time being of a building used as a village club and reading room 'to be maintained for the furtherance of conservative principles and religious and mental improvement and to be kept free from intoxicants and dancing' was held good. In this case the intention is clear and the object is of a charitable and of a public nature.

In *Clode* v. *Andrews* (12), the testatrix directed her trustees to pay trust monies to M to be applied by him 'for such missionary object or objects at home, abroad, or in the colonies as he shall in his absolute discretion select.' M was known by the testatrix to have been engaged in assisting the Christian Mission in foreign countries and abroad, Warrington, J., held the bequest to be good. He said:

"It is suggested that the words of the gift are too vague, as the words 'Missionary objects' are not necessarily confined to Christian Missions. But there is a widely spread use of the word "Missionary" as one engaged in the work of religious and particularly Christian Missions. I think that I am entitled to consider who Dr. Maclean was, and that he was engaged for many years in the work of Christian Missions, and that he and his work were known to the testatrix. I think that the testatrix used the word "Missionary" in its ordinary and popular sense, and I hold that the gift was a valid charitable gift."

In the course of the arguments, the Irish case of *Scott* v. *Brownrigg* (14), was quoted to show that the word missionary was not capable of any definite meaning. Warrington, J., as the report shows, declined to follow it.

In *Morice* v. *The Bishop of Durham* (45) a bequest in trust for such objects of benevolence and liberality as the trustee in his own discretion shall most approve, was not held to be a charitable legacy. The Lord Chancellor (Eldon) in meeting the contention that it was a charitable bequest and that the trustee might devote every shilling to charitable use, observed as follows:

"But the true question is whether, if upon the one hand he might have devoted the whole to purposes, in this sense charitable, he might not equally according to the intention, have devoted the whole to purposes benevolent and liberal, and yet not within the meaning of charitable purposes, as this Court construes those words; and if, according to the intention it was competent to him to do so, I do not apprehend, that under any authority upon such words the Court could have charged him with maladministration if he had applied the whole to purposes, which according to the meaning of the testator are benevolent and liberal: though not acts of that species of benevolence and liberality, which this Court in the construction of a will calls charitable acts.

But the question is, whether, according to the ordinary sense, not the sense of the passages and authors alluded to, treating upon the great and extensive sense of the word "charity" in the Christian religion, this testatrix meant by these words to confine the defendant to such acts of charity or charitable purposes as this Court would have enforced by decree, and reference to a Master. I do not think, that was the intention; and, if not, the intention is too indefinite

43. (1816) 1 Hayes 611.
44. (1898) 2 Ch. 638.
45. (1805) 10 Ves. Jun. 521 S. C. 32 E. R. 947.

to create a trust. But it was the intention to create a trust; and the object being too indefinite, has failed."

In the present case if the trustees choose to apply the whole of the amount to a religious purpose which is not of a public character, could the Court say that it is not within the discretion of the trustees to do so? If the trustees be held to have a discretion under the will to do so, then the Court would be powerless to control that discretion, and applying the principle of the case of *Morice* v. *Bishop of Durham* (45), I must hold that the discretion is too wide to be controlled by a Court and, therefore, the bequest is bad.

In re Macduff, Macduff v. *Macduff* (20), a bequest of money for some one or more charitable purposes philanthropic or..... was held not bad simply by reason of the existence of the.....(blank), but should be treated as one for the purposes of charitable or philanthropic purposes. Such a bequest is not a good charitable bequest as there are philanthropic purposes which are not charitable. Lord Lindley, after referring to Lord Eldon's dictum in *Morice* v. *Bishop of Durham* (45) observes at page 463:

"Therefore when we are dealing with general words, we must consider whether there is such an indication of purpose or of trust that the Court if called upon to execute it, can see what it has to do, can see the limits of its own powers. The words here are "purposes charitable or philanthropic," "charitable," I suppose is there used in the popular sense. Then what is the meaning of the word "philanthropic?" The Attorney-General says, "What philanthropic purpose is not charitable." My answer is, you are dealing with two words of so vague a meaning that it is extremely difficult to say, but we can suggest purposes which might be philanthropic and not charitable purposes indicating good will to rich men to the exclusion of poor men. Such purposes would be philanthropic in the ordinary acceptation of the word that is to say, in the wide, loose sense of indicating good will towards mankind or a great portion of them; but I do not think they would be charitable. I am quite aware that a trust may be charitable though not confined to the poor, but I doubt very much whether a trust would be declared to be charitable which excluded the poor."

He refers to the judgment of Lord Macnaghten in *Commissioners for Special Purposes of the Income Tax* v. *Pemsel* (39) and observes:

"Now Sir Samuel Romilly did not mean, and I am certain Lord Macnaghten did not mean, to say that every object of public general utility must necessarily be a charity. Some may be and some may not be. In *Kendall* v. *Granger* (46) where the language was "for encouraging undertakings of general utility" Lord Langdale came to the conclusion that that was not a charity and I am not aware that his decision has ever been overruled or questioned. Now, what Lord Macnaghten said is obviously a paraphrase of the words of Sir Samuel Romilly which I have just read: "Charity" in its legal sense comprises four principal divisions; trusts for the relief of poverty, trusts for the advancement of education, trusts for the advancement of religion and trusts for other purposes beneficial to the community not falling under any of the preceding heads. Leaving out those somewhat significant words of Sir Samuel Romilly as to the fourth head, "which is the most difficult" which showed perfectly plainly that Sir Samuel Romilly saw, and I do not doubt that Lord Macnaghten saw also, that there might be some purposes of public general utility which might be charitable and some which might not. In deciding the case we must fall back upon the Statute of Elizabeth, not upon the strict or narrow words of it, but upon what has been called the spirit of it, or the intention of it. As Lord Eldon says, this Court has taken great liberties with charities, but the liberty is always restricted by falling back or professing to fall back upon the Statute of Elizabeth."

I may observe that the high water mark of liberal interpretation as regards the intention of a testator was reached when the House of Lords held that a bequest that a hospital be establised at Dundee to accommodate 100 boys was a good bequest. In *The Magistrates of Dundee* v. *Morris* (47) the Lord Chancellor observed at p. 156:

"It is said on the part of the respondents that the mere *wish* to establish an hospital for a number of boys is so indefinite and uncertain that it is impossible to carry it out without the danger of defeating instead of effectuating the testator's intention; that it is at the best but the indication of a mere floating desire, not of any former and settled determination. But the expression of a wish by testator that his property should be applied to a particular object amounts to a bequest for that object: and the language of this will appears to convey with sufficient certainty what the testator desired should be carried into effect. The words 'establish an hospital' must, I think, be taken to express an intention that a building should be provided which seems to have been assumed as the meaning of the word 'establish' in the case of the *Attorney-General* v. *Williams* (48):

He held:

"That the testator having intimated his wish to devote his property to the establishing an hospital, every subsequent writing of the testator, upon the same half sheet of paper, is to a certain extent a confirmation of the previous chari-

46. 5 Beav. 300=49 E. R. 593.
47. (1857) 3 Macq. 154.
48. (1794) 2 Cox. 387.

table bequest. It amounts to a declaration that the funds which he had appropriated to that purpose is to be subject to a reduction to the amount of the legacies, and the first of them, after those which relate to the hospital, had an express reference to this appropriation of his property by its commencing with the words, 'I further wish.''

The later decisions of the Court of Chancery in England are for a narrower construction not only of the word 'Charity' but also of the terms of the will regarding the intention of the testator. In *Dunne* v. *Byrne* (15) the Privy Council held that a residuary bequest to " the Roman Catholic Archbishop of Brisbane and his successors to be used and expended wholly or in part as such Archbishop may judge most conducive to the good of religion in this diocese " is not a good charitable bequest and is void. The words of the will are ' I will and bequeath.....that the residue of my estate should be handed to the Roman Catholic Archbishop of Brisbane and his successors to be used and expended wholly or in part as such Archbishop may judge most conducive to the good of religion in this diocese.' Lord Macnaghten, who delivered the judgment of their Lordships of the Privy Council, observes, at page 411.

"The language of the bequest (to use Lord Langdale's words) would be 'open to such latitude of construction as to raise no trust which a Court of Equity could carry into execution.' *Baker* v. *Sutton* (41). If the property as Sir William Grant said in *James* v. *Allen* (49) might consistently with the will be applied to other than strictly charitable purposes, the trust is too indefinite for the Court to execute."

In this case the bequest was to the Archbishop of Brisbane and his successors to be used in a way most conducive to the good of the religion. It may be taken for granted that the Archbishop of Brisbane would not use the income of the property bequeathed to any other purpose than for the good of religion in his diocese. But inasmuch as a discretion was given him to use the amount wholly or in part for such a purpose, the bequest was held void, because the discretion of the Archbishop could not be controlled by the Court.

Can it be said in this case that if the trustees choose in conjunction with the trustees of the Hindu Samajam at Rajahmundry to use the funds for a religious purpose which is not of a public character or a purpose which is not strictly religious as the Courts understand, the Court could pull them up or charge them with maladministration? When such a thing cannot be done and when the trustees could always plead a discretion under the will to waive the control of the Court, the bequest cannot be held to be valid bequest.

In *Blair* v. *Duncan* (6), where a testatrix by codicil in her own handwriting directed her trustee that, in the events which happened, one half of the residue of her estate should be applied for ' such charitable or public purposes as my trustee thinks proper, the House of Lords held that the direction was void for uncertainty, Lord Halsbury in the course of his judgment observes:

" It appears to me that it would be equally the law of England as it would be the law of Scotland that the disposition here given to A. B. to determine what particular public purposes should be the object of the trust is too vague and uncertain for any Court either in England or Scotland to administer."

Lord Robertson says at p. 49:

" The Courts have, I think, as matter of historical fact, reflected more or less consciously or unconsciously, the bias which disposes everyone favourably towards charity : and this never appeared more plainly or was avowed more frankly, than in the decision of your Lordship's House in the Morgan Case, *Magistrates of Dundee* v. *Morris* (1). To this favour for charities I ascribe the decision in favour of the validity of a bequest for such charitable purposes as a trustee may select. Accordingly, when I am asked to apply, by analogy, to public purposes decisions about charitable purposes, I decline to do so. The proper inference from those cases is, not that the law that the testator must select a particular class or particular classes of objects before he can leave it to a trustee to select the object of the bequest is relaxed, but merely that it is settled that charitable purposes form such a particular class ."

As I have said above the House of Lords adopted a very liberal interpretation, as Lord Robertson says, in the case of the *Magistrates of Dundee* v. *Morris* 47. The most important case in my opinion which bears upon this question is the case of *Grimond* v. *Grimond* (7). There a testator directed his trustees to divide a portion of the residue of his estate to and among such ' charitable or religious institutions and societies' as they might select. The House of Lords held that the bequest was void for uncertainty. The dissenting judgment of Lord Moncreiff applies with great force to the conditions prevailing in India

49. (1817) 3 Mer. 17.

Speaking of religious purposes he says (p. 608):

"It is said that the term 'religious purposes' is more restricted and definite than 'public purposes.' This may be true, but it does not follow that the term 'religious purposes' is sufficiently specific to be enforced. Indeed there may be as much doubt and dispute as to its interpretation and limits as in regard to 'public purposes.'

This view was upheld by the House of Lords. If there is so much difficulty in understanding the words religious purposes' in a place like Scotland, where there are not many religions, in India, the difficulty will be all the greater, where it is not possible to postulate definitely what the Hindu religion is. No two persons will give the same answer to the question "what is Hindu religion." The popular expression "Hindu religion" included in its ambit the highest aspirations of the human soul and the noblest ethics as well as the lowest and debased forms of animal and demon worship. Lord Halsbury says, (at p. 126):

"In my opinion the testator here has not given a class from which he allowed his trustees to select individually but he has left his directions so vague that it is in effect giving some one else power to make a will for him instead of making a will for himself, which I conceive to be the objection always entertained where the directions are so extremely vague that you cannot say what it is that the testator meant. In this case the testator has not made any will himself; he has allowed some one else to make a will for him after his death, and that the law will not allow."

Lord James said:

"I concur for the reasons which have been given by Lord Morcreiff in his judgment."

What the respondent wants us to do here is to make a will for the testator. He says if the objects are not plain the Court should frame a scheme and make the objects plain. That is not the function of the Court and as Lord Halsbury has laid down no Court can make a will for any testator.

In *Kandall* v. *Granger* (46) a bequest of personalty to trustees to be 'applied for the relief of domestic distress' assisting indigent but deserving individuals, or encouraging undertakings of general utility was held void as a charitable bequest. Lord Langdale laid down the law thus:

"Now, a charitable purpose may very well, I conceive, be a purpose of general utility; but the question which seems to me to arise in this case, as in the case of a gift to benevolent purposes, is, are all purposes of general utility necessarily such purposes as this Court deems to be charitable? I own that in my opinion, according to the decisions which have taken place in this Court, they are not. The words 'general utility' are so large, that they comprehend purposes which are not charitable and comprising purposes which are not charitable, the trustees have an option to apply them to purposes which are not charitable, and consequently to divert the trust fund from those purposes which this Court is in the habit of considering charitable."

I will now consider briefly the Indian cases on the point. In *Chandi Charan Mitra* v. *Horibola Das* (16), it was held that under the Hindu system of law a general endowment for the expenses of worship of God without giving the name of the deity for whose benefit the endowment is to take effect was void for uncertainty. This case follows the case in *Phundan Lal* v. *Arya Prithi Nidhi Sabha* (50). Where it was held that a dedication not to any particular deity which was subsequently to be installed in a temple, but to Thakurji in a Thakurdwara without mentioning the particular Thakurji to whom the property was dedicated was void for uncertainty. Richards and Bannerjee, JJ., held that:

"It was not a dedication to any particular deity which was subsequently to be installed in a temple. It was a dedication to the Thakurji in his Thakurdwara without mentioning the Thakurji to whom the property was dedicated. As we have already said there was no Thakurji and no Thakurdwara therefore the dedication was bad on the ground of uncertainty".

In *Parbati Bibee* v. *Ram Barun Upadhya* (51) the residuary clause of the will of a Hindu governed by the Mitakshara school of Hindu Law was as follows:

"As to the rest and residue of my estate I give and devise the same to my executor in trust to spend and give away the whole thereof in charity in such manner and to such religious and charitable purposes as he may in his discretion think proper."

The bequest of the residuary estate was held to be a valid and charitable bequest. Henderson, J., observes at page 899.

"In my opinion, however, the direction to spend and give away the whole of the residue in charity governs the words that immediately follow and, therefore, the purposes for which the fund is to be spent must be charitable though they may at the same time be religious. Upon this construction the executor will not be justified in applying the subject of the trust to objects which are not charitable. In that view I declare the bequest of the residuary estate of the testator to be a valid charitable bequest."

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50. (1911) 33 All. 793=8 A. L. J. 944=11 I. C. 260.

51. (1904) 31 Cal. 895=8 C. W. N. 653.

If the objects of the charity are not definite but if the purpose is definite the Court will uphold the bequest. In *Gordhan Das* v. *Chunni Lal* (19) it was held that a settlement of the income of seven villages to the extent of Rs. 500 a month to be applied to charitable purpose of dharmasala which he had founded was held to be a good bequest. The learned Judges observe at page 114:

"The dedication in the case before us is for charitable purposes and for charitable purposes alone. A trust for such purposes, that is, for charity generally, will always be carried out notwithstanding that the objects of the charity are not specifically defined. The Court can, if necessary, in such a case, settle a scheme for its proper administration."

In the present case also, if the whole amount is to be spent for only a charitable purpose, it will be competent for the Court to indicate the objects of the charity.

In the light of these decisions I must hold that the bequest contained in Cl. 11 of the Will is void for uncertainty.

The next point urged is that the defendant is not bound to give effect to the terms of the will as he, by right of survivorship, is entitled to the whole of the property. It is urged that unless at the time of the adoption it was made a condition that the bequest should not be disturbed by the adopted son and unless the natural father had agreed to such a condition, the adopted son could repudiate the terms of the Will making a bequest in favour of charity. Before I consider the law on the point, it is necessary to notice a few facts. The testator died in 1909. The adoption was not made till 1911. The widow was in possession of the property and carried out the terms of the will. The testator was a well-known man in the place. The widow made the adoption by virtue of the power given in Cl. 6 of the will. The Will is a registered Will. It cannot be contended that the natural father was unaware of the terms of the will and did not tacitly acquiesce in the terms of the will. The appellant urges that the plaintiffs should have specifically pleaded that there was such a consent on the part of the natural father. I do not think that in the circumstances it was incumbent on the plaintiffs to plead that. The Court is entitled to draw an inference of tacit consent from the evidence in the case. It is unnecessary to discuss this point at length on account of my decision on point (2).

The appellant relies upon *Balakrishna Motiram* v. *Shri Uttar Narayan Dev* (23); *Bhyri Appamma* v. *Bhri Chinnammi* (52); and *Lakshmi* v. *Subramanya* (53). In *Balkrishna Motiram* v. *Shri Uttar Narayan Dev* (23) a Hindu who was in possession of ancestral property executed when he took the defendant in adoption a Vyavastapatra with the consent of the natural father of the defendant whereby he directed payment of an annual sum for the purpose of lighting lamps in a specified temple. The Court held that the grant in favour of the temple was invalid as not having been recognised by custom to be appropriate at the time of adoption or binding upon the adopted son in modification of the strict rules of Hindu Law. The learned Judges observe at page 549:

"It would appear to have been established by these decisions that agreements for reasonable provision for widows ought to be upheld as valid according to general custom modifying the strict terms of Hindu Law. But no authorities have been quoted before us in favour of any other persons in such connection or in support of a geneal extension of the modification so as to include as here claimed, reservations in favour of charities and religious endowments. The burden of establishing any such extension would lie upon the person seeking to prove such modifications of the strict rules of the Hindu Law. That burden has here not been discharged."

A Hindu can settle a portion of his ancestral property upon anybody he likes and then take a boy in adoption. The adopted boy could not under such circumstances impeach an alienation made before the date of his adoption. The Court would view with suspicion only such arrangements as are unreasonable and subversive of the interests of the adopted son.

The case *Bhyri Appamma* v. *Bhyri Chinnammi* (52) decided that in the absence of any agreement with the natural father at the time of adoption, if there is a bequest in favour of the widow in the Will of the testator, the adopted son could repudiate the bequest. A widow can at the time when she makes the adoption with the consent of Sapindas may stipulate for the maintenance of herself in cases of disputes arising between her and her adopted son and such an arrangement is reasonable.

52. (1920) 12 L. W. 17=58 I. C. 511.
53. (1889) 12 Mad. 490.

The Courts would uphold such an arrangement, but where a widow makes an adoption by virtue of the power given under the Will of her husband then, unless the natural father was aware of the provisions of the Will, it might be contended that if the father was aware of the provisions he would not have given his boy in adoption and therefore the adopted son is not bound. In *Ganapati Ayyan* v. *Savithri Ammal* (24) Subramania Ayyar, J., observes as follows:

If, from the hypothetical case, we turn to the actual facts of the case before us,there is no doubt that the title of the adopted son could not effect the right of the charity for the latter right had vested long before the adopted son's right arose. The second defendant's rights must therefore be held to be subject to that created in favour of the charity by the oral devise, and it is hardly necessary to point out that Ex. A does not evidence an alienation by the widows, but is a mere formal declaration executed by the persons appointed by the testator to bring into existence such written evidence of his disposition and who held possession of the property devised till they transferred the same, to the duly constituted manager of the charity only as the trustees for the charity. Compare *Bhaskar Purshotam* v. *Sarasvatibai* (54).

In the present case the widow acted in conformity with the will and it cannot, on the evidence before us, be said that the natural father was unaware of the terms of the will. The adopted son cannot approbate and reprobate the Will at the same time. He owes his existence to the Will and in the circumstances of the case the onus lies heavily upon him to show that his father was unaware of the provisions in the Will and he has not discharged the burden. I find this point against the appellant. The question of arrears need not be considered as I hold that the defendant cannot be directed in this suit even if it were held that the suit is maintainable, to pay up any amount due to the trust.

The appeal therefore should be allowed.

As regards costs, the three executors appointed by the testator declined to act and all the trouble has evidently arisen on account of their unwillingness to act. One of the executors is the second plaintiff. In these circumstances I think the plaintiffs ought to be made to bear the costs of the appellant both in this Court and in the lower Court.

54. 17 Bom. 486.

The appeal is allowed with costs throughout and the Memorandum of Objections is dismissed without costs.

Appeal allowed.

** **1923 Madras. 392.**

SPENCER AND DEVADOSS, JJ.

Gopala Iyengar (dead) and others ... Appellants.

v.

Mummachi Reddiar and others ... Respondents.

Appeal Nos. 166 and 239 of 1918, dated 11th August 1922, against the decree of the Court of the Sub. Judge of Trichinopoly in O. S. No. 49 of 1916.

(a) *Contract Act, Ss. 69 to 70—Payment under sale held valid but upset by Appellate Court.*

Per Spencer, J. (*contra*: Devadoss, J.) Because a party's purchase is not *bona fide*, it does not follow that after he took a sale deed, the payments he made to preserve the property from the clutches of the vendor's creditors were not made *bona fide*, especially those which he made after his title had been established in the Court of First Instance, though it was upset by the Appellate Court. Though it is well established that ss. 69 and 70 were not designed for the benefit of persons who intermeddle with the affairs of others, a man who gets a genuine sale deed and on the strength of that sale deed obtains a valid decree for possession from a competent Court in a contested suit cannot fairly be accused of an endeavour to manufacture evidence of title if he pays off charges upon the property in order to preserve it from sale.

[P. 394, Cols. 1, 2.]

(b) *Limitation Act, Art. 97—Decree—Limitation—Final decree.*

Per Spencer and Devadoss, JJ. When an appeal to a superior Court only results in the decree appealed against being confirmed, in India there is no interruption in the running of time calculated from the date of the original decree ; where sale to plaintiff was held to be invalid, the starting point for limitation began and the decree of the Appellate Court dismissing appeal against the decision will not extend the period.

[P. 395, Col. 1.]

(c) *Limitation Act, Art. 97, 116—Registered sale—Possession lost—Starting point.*

Per Spencer, J. Lessee or purchaser who gets possession on the strength of a registered contract and is subsequently evicted for want of title in his lessor or vendor has six years from the date of his dispossession under Art. 116 to sue for damages for breach of the title for quiet enjoyment; but if from the inception the vendor had no title to convey and the vendee never gets possession, the starting point of limitation is the date of the sale. Suit by A as vendee of B who was himself vendee of C against C for money paid which C was bound to pay to his secured creditors is not one for damages or for return of the

purchase-money, as there is no privity of contract between the parties.

[P. 395, Col. 2.]

(*d*) *T. P. Act, S.* 74—*Nominal vendee—Right to claim reimbursement.*

If a vendee is in possession and is about to be evicted on the suit of the real owner, the Court might, as an equitable relief, direct in its decree that on the decree-holder first paying him the costs incurred by him in redeeming the mortgages that existed on the land, delivery of possession should be given. There would be no limitation against an equitable claim of this sort being set up asa defence to a suit for possession.

[P. 396, Col. 1.]

(*e*) *T. P. Act, S.* 95—*Vendee of sham title.*

Vendee of sham title of the mortgagor is not entitled to any rights under S. 95, T. P. Act.

[P. 396.]

(*f*) *Limitation Act, Art.* 132—*Scope.*

When one person pays off a debt which another is bound to pay, the ordinary relief that the Courts can give is a personal decree, against the defendant for money had and received as S. 69 of the Contract Act does not provide any higher remedy. If that remedy is barred owing to the plaintiff's delay, he cannot extend the period of limitation by asking for an enlarged relief by way of a charge upon the defendant's property.

[P. 396, Col. 1.]

(*g*) *T. P. Act, S.* 55—*Implied covenant of title.*

Assuming that upon valid sales of immoveable property there is an implied covenant for quiet enjoyment between the vendor and the vendee, where the sale deed conveyed no title and the vendee was aware of the defects of his vendee's title, there is no lawful and enforceable contract of sale and further no implied covenant attaches to such an agreement. The plaintiff is only entitled to a return of the money paid by him on a consideration that failed.

[P. 396, Col. 2.]

(*h*) *Decree—Effect to create title.*

Per DEVADOSS, J :—Except in few cases where decrees themselves are a source of title, the decrees of Civil Courts cannot confer a title to immoveable property which a person did not possess and, therefore, when the plaintiff had no title at all to the plaint property, the mere fact that a Civil Court considered or held that he had title would not confer an interest which he did not possess before.

[P. 400, Col. 2.]

(*i*) *Civil P. C., O.* 41, *R.* 33—*Grounds.*

Where a joint decree was passed against defendants and only one of the defendants appealed and it was found that the suit was barred against all, it must be dismissed even against the non-appealing defendants.

(*j*) *Civil P. C., O.* 47, *R.* 1—*sufficient reason*

Where decree has not yet been signed there is "sufficient reason" within the meaning of O. 47, R. 1 to review a decision apart from the inherent powers under S. 151, Civil Procedure Code, as the powers of a Court to correct an error obvious on the fact of the record before the order has been completed are very clear.

S. Gopalaswami Aiyangar — for the Appellants.

K. R. Rangaswami Aiyangar and R. Purushothama Aiyangar—for the Respondents.

SPENCER, J :—This suit was brought to recover from 1st defendant certain sums of money paid by the plaintiff to 1st defendant's creditors in pursuance of directions contained in a sale-deed of immoveable property purchased from 13th defendant who had previously purchased the same property from 1st defendant.

The sale by the 1st defendant to 13th defendant was effected on January 20th, 1907, through a registered instrument (Ex. A) and was for Rs. 5,000. That by 13th defendant to the plaintiff was through another registered sale-deed (Ex. B) dated August 22nd, 1908.

When the plaintiff sued in O. S. No. 3 of 1909 to recover possession of the lands purchased by him he was successful in the District Munsif's Court, but his suit was dismissed in the Sub-Court owing to a finding by the Subordinate Judge that his vendor's purchase under Ex. A was a nominal sale which never took effect. There was a second appeal but the High Court declined to interfere for the obvious reason that what was decided by the lowever appellate Court was a question of fact.

The learned Subordinate Judge in the present suit has granted the plaintiff a charge over the suit properties for certain sums of money and a direction for sale in default of payment, (the date by which they are to be paid is not specified in the decree); also a personal decree against defendants 1 and 13 and a decree against the family properties against 1st defendant's sons, defendant's Nos. 2 and 3, for the unrealised balance after sale of the suit properties ; also a personal decree against the 13th defendant for a sum of Rs. 800 paid in the hands of 13th defendant on August 22nd, 1908, and interest thereon up to the date of suit. Plaintiff and 13th defendant appeal.

The memorandum of objections filed by respondents Nos. 1 to 13 strikes at the root of the plaintiff's case and has therefore been heard first. The two main objections to the decree of the lower Court are (1) that the payments made by the plaintiff were made voluntarily by him on his own account and give rise to no legal obligation for his being reimbursed : (2) that the suit is barred by limitation.

The finding of the Subordinate Judge's Court in appeal from the Munsif's decree in O. S. No. 3 of 1909, to which 1st defendant was a party, that the sale to 13th defendant was a nominal transaction and never took effect, binds the plaintiff in this subsequent suit as *res judicata*. Ex. VII which is a notice sent on May 18th, 1908, by 1st defendant to the plaintiff warning him that the sale in favour of 13th defendant was nominal, unenforceable and had not been given effect to, and that he would be liable for any loss, consequent on any second sale that he might take from 13th defendant, was sufficient to put him on notice of 13th defendant's title. After this he cannot put forward any plea that he is a *bona fide* purchaser without notice. But although plaintiff's purchase was not the *bona fide* act of a stranger, it does not follow that after he took a sale-deed from 13th defendant the payments he made to preserve the property from the clutches of the original vendor's creditors were not made *bona fide*, especially those which he made after his title had been established in the Court of First Instance. His purchase was no doubt speculative as with his eyes open he took the risk of his sale-deed turning out to be a worthless bit of paper, but having taken it, he was bound by the terms of his contract with 13th defendant, and by the provisions of S. 55 (5) (d) of the Transfer of Property Act to make these payments. He was interested in the widest sense in which the word is used in S. 69 of the Indian Contract Act in making these payments of money which 1st defendant was bound by law to pay. The decision in *Radha Madhub Samonta* v. *Sasti Ram Sen* (1), justifies a liberal interpretation of the word "interested".

Whatever may be said of his determination to secure for himself by hook or by crook the 1st defendant's properties which adjoined those of 1st defendant's brother which he had previously purchased, a subject on which the learned Subordinate Judge has enlarged in his judgment, the payments which plaintiff made after purchase in order to discharge encumbrances on the land cannot be characterised as meddlesome or officious. Though it is well established that Ss. 69 and 70 of the Indian Contract Act were not designed for the benefit of persons who intermeddle with the affairs of others (see *Raja of Pittapuram* v. *Secretary of State* (2), *Damodara Mudaliar* v. *Secretary of State* (3), and *Suchand Ghosal* v. *Balaram Mardana* (4). I agree with the learned Subordinate Judge that a man who gets a genuine sale-deed and on the strength of that sale-deed obtains a valid decree for possession from a competent Court in a contested suit cannot fairly be accused of an endeavour to manufacture evidence of title if he pays off charges upon the property in order to preserve it from sale.

In *Syamalarayudu* v. *Subbarayudu* (5), *Chama Swami* v. *Padala Anandu* (6) and *Palamalai Mudaliar* v. *The South Indian Export Company* (7) transferees for value who in good faith discharged mortgages binding on the property have been treated as entitled to equitable relief on account of the payments made by them although the transfers in their favour turned out to be void or voidable.

In *Janki Prasad Singh* v. *Baldeo Prasad* (8) the plaintiff's own purchase was fictitious and inoperative. Here it is his vendor's purchase that failed.

In *Karuppan Ambalagaram* v. *Sakuth Levvai* (9) it was recognised by Ayling, J., and Tyabji, J., that the sale may be invalid and even fraudulent, but a person who pays valuable consideration for it may yet in all good faith make perfectly honest payments to discharge liabilities existing on the property. The sale in that case was collusive and without consideration and was not followed by possession and the payments were made long afterwards with the object of strengthening the colourable purchase. The learned Judges therefore refused the equitable relief of subrogation to a person who did not come into Court with clean hands. Here the plaintiff after due notice purchased a title which turned out to be nominal and worthless owing to his vendor's collusion with the original

1. (1899) 26 Cal. 826.

2. (1914) 16 M. L. T. 375=25 I. C. 783.
3. (1895) 18 Mad. 88=4 M. L. J. 205.
4. (1911) 38 Cal. 1=14 C. W. N. 945=12 C. L. J. 566=6 I. C. 810.
5. (1898) 21 Mad. 143.
6. (1908) 31 Mad. 439=18 M. L. J. 306=3 M. L. T. 395.
7. (1910) 33 Mad. 334=20 M. L. J. 211=7 M. L. T. 167=(1910) M. W. N. 239=5 I. C. 33.
8. (1908) 30 All. 167=5 A. L. J. 163=(1908) A. W. N. 58.
9. (1914) 26 M. L. J. 74=14 M. L. T. 478=(1914) M. W. N. 131=22 I. C. 253.

owner, but until that title was tested in Court and pronounced to be bad he may have honestly believed that the only course open to him for preserving the property and saving any possible right he might be possessed of through his purchase, was to stave off attachment and sale by satisfying the 1st defendant's creditors and when he acted thus he certainly did not intend to do it gratuitously for the 1st defendant's benefit. I am of opinion that the first objection fails.

Coming now to the question of limitation, the important thing is to see what is the starting point from which limitation began to run on the plaintiff's cause of action. In this plaint he puts it as February 14th, 1913, when the High Court dismissed his second appeal. But this is not supportable in view of the Privy Council decision in *Juscurn Boid* v. *Pirthichand Lal Choudhury* (10), which laid down the principle that, when an appeal to a superior Court only results in the decree appealed against being confirmed, in India there is no interruption in the running of time calculated from the date of the original decree. For the purposes of execution Art. 182 of the Limitation Act especially provides for the final decree of the Appellate Court forming a starting point and the decision in *Visvanatha Sastri* v. *Sitalakshmi Ammal* (11) dealt with an application for execution. The case in *Sarvothama Rao* v. *Chinnasami Pillai* (12) was decided before the Privy Council case in *Juscurn Boid* v. *Pirthichand Lal Choudhury* (10) was published in this country and cannot be followed so far as it lays down a different principle from that propounded by the superior tribunal. Similarly with *Rajagopalan* v. *Tirupananthal Tambiran.* (13) *Muhammad Ali Sheriff* v. *Venkatapathi Raju* (14) which was later than *Sarvothama Rao* v. *Chinnasamy Pillai* (12) followed *Juscurn Boid* v. *Pirthichand Lal Choudhury* (10). I propose to proceed as the Judicial Committee proceeded in *Hanuman Kamat* v. *Hanuman Madur* (15) and take either of two alternative articles when it is doubtful which of the two is more appropriate to the facts of the case.

Now whether the appropriate article in the present suit is Art. 97, which applies to suits for money paid upon a consideration which afterwards fails or whether Art. 62 applies, the period of limitation in either case is only 3 years, and the starting point in the first alternative is the Subordinate Court's judgment (Ex. P.) dated July 12th, 1911, which dismissed the plaintiff's suit for possession with the observation that his claim to be reimbursed for the debts he paid for the defendent must be separately adjusted, and in the other alternative is the date of payment of each of the debts. The last payment was on November 26th, 1912, and this suit which was instituted on February 17th, 1916, is time-barred whether 3 years are reckoned from July 12th, 1911 or November 26th, 1912.

It appears from *Arunachala Aiyar* v. *T. Ramasami Aiyar* (16), *Mahomed Ali Sheriff* v. *Venkatapathi Raju* (14) and *The Secretary of State for India* v. *Venkayya* (17) that a lessee or purchaser who gets possession on the strength of a registered contract and is subsequently evicted for want of title in his lessor or vendor has six years from the date of his dispossession under Art. 116 to sue for damages for breach of the title for quiet enjoyment; but if from the inception the vendor had no title to convey and the vendee never gets possession, the starting point of limitation in the opinion of Seshagiri Aiyar, J., in *Subbaroya* v. *Rajagopala* (18) is the date of the sale. The present suit was brought within six years of the plaintiff's losing possession on 31st August, 1911, in consequence of the first Court's decree being reversed on appeal.

But this suit is not one for damages or for return of the purchase money, so far as first defendant is concerned, and there is no privity of contract between the

10. (1912) 46 Cal. 670=23 C. W. N. 721=30 C. L. J. 71=17 A. L. J. 514=36 M.L. J. 557=21 Bom. L. R. 632=(1919) M. W. N. 258=26 M. L. T. 131=10 L. W. 416=50 I. C. 444 (P. C.),

11. (1921) 13 L. W. 37=(1921) M. W. N. 181=61 I. C. 979.

12. (1919) 42 Mad. 507=36 M. L. J. 157=25 M. L. T. 291=9 L. W. 379=(1919) M. W. N. 432=49 I. C. 729.

13. (1907) 30 Mad. 316=17 M. L. J. 149.

14. (1920) 39 M. L. J. 449=11 L. W. 537=27 M. L. T. 304=60 I. C. 235.

15. (1892) 19 Cal. 123=18 I.A. 158=6 Sar. 91.

16. (1915) 38 Mad. 1171 = 1 L. W. 849=27 M. L. J. 517=16 M. L. T. 397=25 I. C. 618.

17. (1916) 40 Mad. 910=19 M. L. T. 318=3 L. W. 443=(1916) 1 M. W. N. 343=30 M. L. J. 575=35 I. C. 254.

18. (1914) 38 Mad. 887=15 M. L. T. 240=(1914) M. W. N. 376=23 I. C. 570.

plaintiff and 1st defendant for such a suit to lie.

Lastly an attempt has been made to bring the plaintiff's case within Art. 132 which gives a period of 12 years from the date of money charged upon immoveable property becoming due. But the plaintiff is not the holder of a charge upon the suit property. If he was in possession and was about to be evicted on the suit of the real owner, the Court might as an equitable relief direct in its decree that on the decree-holder first paying him the cost incurred by him in redeeming the mortgages that existed on the land, delivery of possession should be given. There would be no limitation against an equitable claim of this sort being set up as a defence to a suit for possession. That, however, is not the plaintiff's position in this suit. Again, the plaintiff has no rights under S. 95 of the Transfer of Property Act as a purchaser of the equity of redemption, as it has been found that what he purchased was a sham title and thus he does not stand on the footing of a mortgagor.

The case in *Rajah of Vizianagram* v. *Rajah Setrucherla Somasekhararaz* (19) must be distinguished on the ground that there the plaintiff was a co-sharer with those whose revenue charges he paid off and could take advantage of S. 82 of the Transfer of Property Act and of the fact that under Ss. 2 and 44 of Act II of 1864 a statutory charge was created upon every portion of the land in the joint estate. In *Narayana Kutti Goundan* v. *Pechiammal* (20) no question of limitation arose.

When one person pays off a debt which another is bound to pay, the ordinary relief that the Courts can give is a personal decree, against the defendant for money had and received as S. 69 of the Contract Act does not provide any higher remedy. If that remedy is barred owing to the plaintiff's delay, he cannot extend the period of limitation by asking for an enlarged relief by way of a charge upon the defendant's property. In the cases above quoted where equitable charges were given, that in *Syamalarayudu* v. *Subbarayudu* (5) was probably under S. 82 of the Transfer of Property Act, but no provision of law is cited. *Chama Swamy* v. *Padala Anandu* (6) speaks of an equity to repayment, not an equitable right to charge. In *Palamalai Mudaliar* v. *The South Indian Export Company* (7), the defendant was the transferee and it was made conditional on plaintiff's getting a choice of setting aside the mortgage if he should reimburse the defendant. Apart from the legal position, the plaintiff's case has little or no merits. In spite of warning he made a speculative purchase from a person who, as it turned out, had no legal title. When plaintiff's case failed in the appeal to the Court which had the final determination of question of fact, he had 3 years to recover the money, he had wasted in paying the debts of another. He chose to await the issue of an appeal to the High Court on a point of law which did not exist. After that appeal failed, one year and five months still remained within which he might have brought this suit. But he waited till 3 years, all but 3 days had elapsed from the High Court's decree and now finds he is too late.

In the result the Memorandum of objections of respondents 1 to 3 is allowed with costs and the suit (O. S. No. 49 of 1916) is dismissed with the costs of 1st, 2nd, 3rd and 4th, 7th, 14th defendants (one set). No Order is necessary on 4th respondent's memo. of objections but the decree will stand as against 13th defendant's legal representative as he did not appeal. Appeal No. 239 of 1918 is dismissed with costs of respondents 1 to 4.

Appeal No. 166 *of* 1918.

This is an appeal by 13th defendant against the direction in the decree for the recovery from him for the sum of Rs. 800 paid to him at the date of his sale to the plaintiff and interest thereon. Assuming that upon valid sales of immoveable property there is an implied covenant for quiet enjoyment between the vendor and the vendee, (Ex. B) in this case, we have found that the sale deed conveyed no title and that the vendee was aware of its defects. There was therefore, no lawful and enforceable contract of sale and further no implied covenant attached to such an agreement. The plaintiff is only entitled to a return of the money paid by him on a consideration that failed and even if he had six years under Art. 116 as the contract was registered, this suit having been instituted more than 6 years

19 (1903) 26 Mad. 686=13 M. L. J. 83.

20 (1913) 36 Mad. 426=22 M. L. J. 364=11 M. L. T. 174=(1912) M. W. N. 353=15 I. C. 206.

after Ex. B. must fail. The appeal is allowed. The plaintiff will pay the costs of 13th defendant. The 13th defendant will pay the costs of 1st defendant.

DEVADOSS, J.:—In Appeal No. 166, 13th defendant is the appellant. In Appeal No. 239 the plaintiff is the appellant. The 1st defendant has filed a memorandum of objections in Appeal No. 239.

The facts are the 1st defendant executed a sale-deed in favour of the 13th defendant, Ex. A, on 20-1-1907 in respect of the plaint properties. The 13th defendant sold the plaint properties to the plaintiff by Ex. B on 22-8-1908. The plaintiff filed a suit A. S. No. 3 of 1909 for possession, alleging that the 1st defendant harvested the crops in February, 1907 and that he should be given possession of the property sold to him by the 13th defendant under Ex. B, and prayed for an injunction restraining the defendant, from committing waste or interfering with his possession. The plaint was filed on 22-12-1908 and is marked as Ex. 11 in this case. The defendant in the said suit who is the 1st defendant herein pleaded that the sale in favour of Gopala Iyengar, the 13th defendant herein, was a nominal sale, that it was not given effect to and that Gopala Iyengar was not entitled to sell the property to the plaintiff and the plaintiff purchased it with the knowledge that Ex. A the sale-deed evidenced a transaction not intended to be given effect to and was only intended as a shield against the cereditors of the 1st defendant. The District Munsif of Srirangam decreed the plaintiff's suit holding that Ex. A was a real transaction and that the plaintiff acquired a good title under Ex. B and that possession should be handed over to the plaintiff. His judgment is marked Ex. O. On appeal the Subordinate Judge of Trichinopoly held that Ex. A was a nominal transaction not intended to be given effect to and it had not been given effect to and that the plaintiff purchased the plaint properties under Ex. B in spite of notice to him 7 or 8 months previous to the date of Ex. B of the fact that Ex. A was a nominal sale. His judgment is marked Ex. P. Against the judgment the plaintiff preferred a second appeal to the High Court which was dismissed on 14th February, 1913.

The plaintiff in this suit sues for the recovery of certain sums of money said to have been paid by him to discharge encumbrances on the property and he asks for a charge on the plaint property in respect of those items.

The Subordinate Judge has given a decree in favour of the plaintiff as regards the major portion of his claim and has dismissed the suit as regards the rest. Appeal No. 166 is by the 13th defendant who objects to a certain item being decreed against him. Appeal No. 239 is by the plaintiff who appeals against that portion of the decree of the Subordinate Judge which disallows a portion of his claim.

The memorandum of objections by the 1st defendant is against the decree passed against him in respect of the sums alleged to have been paid by the plaintiff in accordance with the sale deed, Ex. B.

As the main question in these appeals is the liability of the plaint property for the amounts said to have been paid by the plaintiff, in order to discharge the encumbrances on it, the memorandum of objections was heard first. Upon the decision in the affirmative of the question whether the plaintiff is entitled to claim the amounts, the amounts paid by him in order to discharge the encumbrances depend the other questions, namely, the amount that he would be entitled to and the persons who would be liable to pay the amount.

A few facts are necessary in order to make the contentions clear. Ex. A was executed on 23rd January, 1907 and Ex. B, on 22nd August, 1908. The suit by the plaintiff in O. S. No. 3 of 1909, (Plaint marked Ex. 11) was filed on 22nd December, 1908. The judgment of the District Munsif was on 26th January, 1910. The judgment in appeal was on 12th July, 1911. The judgment of the High Court in Second Appeal was on 14th February, 1913, and the plaint in the present case was filed on 17th February, 1916.

Mr. Srinivasa Gopalachariar on behalf of the 1st defendant contends that the claim is barred under Art. 97 of the Limitation Act and that even if Art. 62 is held applicable, the claim would likewise be barred. The payments were made by the plaintiff as follows :—

Rs. 1,000 at 7 a. m., on 26th January,

1910 (*vide* Ex. F.) : Rs. 830 was paid on the same date, *vide* Ex. C. (1) ; Rs. 300 on 18th February, 1910, *vide* Ex. M ; Rs. 188 on 23rd March, 1910 *vide* Ex. G ; Rs. 350 on 10th February, 1911, *vide* Ex. H and Rs. 399 on 26th November, 1912, *vide* Ex. E.

The Subordinate Judge has held that the plaintiff's claim is not barred by limitation on the ground that time began to run only from the date of the judgment of the High Court in second appeal. This is clearly wrong. In *Juscurn Boid* v. *Pirthi Chand Lal Choudhury* (10), their Lordships of the Privy Council have held that time began to run from the date of the decree which deprived the plaintiff of the consideration given or paid by him. To quote their Lordships' words :

"Both Courts have held that the failure of consideration was at the date of the first Court's decree. Their Lordships feel no doubt that as between these two decrees this is the correct view, for whatever may be the theory under other systems of law, under the Indian law and procedure an original decree is not suspended by presentation of an appeal nor is its operation interrupted where the decree on appeal is one of dismissal."

Time, therefore, began to run in this case from the date of Ex. P, the judgment in appeal reversing the decree of the District Munsif ; and in order to claim money paid upon an existing consideration which afterwards failed, the suit should have been brought within 3 years of that date. The payments having been made more than 3 years before the date of the present suit, the claim is barred. It is unnecessary to pursue this question further as Art. 97 has no application to the facts of the present case. There is no privity of contract between the plaintiff and the 1st defendant. The plaintiff did not give any consideration to the 1st defendant for any sale. Mr. Rangaswami Aiyangar who appears for the plaintiff has conceded that his case did not fall within Art. 97 of the Limitation Act. Art. 62 cannot have any application to the present case as the plaintiff does not pretend that the defendant received any amount for the use of the plaintiff, and Art. 61 can have no application as the plaintiff did not pay any money for the defendant.

Mr. Rangaswami Aiyangar for the plaintiff contends that his client has paid off certain encumbrances on the property which had been created by the 1st defendant and he therefore in equity is entitled to be paid those sums on the security of the plaint property, burden on which he relieved. His case is that though Ex. A was a nominal sale not intended to be given effect to, yet Ex. B was a real transaction though with the knowledge of the nature of Ex. A and the plaintiff wanted to support his title by paying off encumbrances as he was anxious to get a good title to the plaint property. He further contends that in any event the payments being made by him after he obtained the decree of the Civil Court in his favour, he was entitled to discharge the burden on the property in as much as his title was declared by a Court of law, and that even though that title was negatived in appeal, he is entitled to be reimbursed the amounts which he paid during the time that decree was in force. He further contends that in respect of those sums he should be treated as having a charge on the property, and the period of limitation being 12 years for enforcing a charge, no question of limitation arises in this case. The learned Subordinate Judge held in appeal—*Vide* Ex. P—that Ex. A was a nominal transaction and that the plaintiff was aware of the nature of the transaction evidenced by Ex. A and therefore he was not entitled to any relief. Ex. VIII is a very important document which is a letter sent by the 1st defendant by registered post to the plaintiff, on 18th May 1908. Therein he distinctly told the plaintiff, that on account of the misunderstandings between him and the plaintiff, he was trying to cause loss to him by getting a re-sale from Srirangam Ammanji Gopala Iyengar of his lands mentioned in the sale-deed which he had executed to the aforesaid person and which was not enforceable and had not been given effect to and that it was not at all proper to try to cause loss thereby and he intimated to the plaintiff that in case either he or any other person through him, got a sale-deed executed, he should not be bound thereby, and that he should be liable for the loss and expenses etc., that might be incurred thereby. With the knowledge conveyed by Ex. VII the plaintiff purchased the plaint property under Ex. B on 22nd August, 1908. In his evidence before the lower Court the plaintiff admits that he received notice Ex. VII three months

before he bought the property under Ex. B, that he did not give any reply to it, that he knew that his vendor, the 13th defendant, had not possession of the property and that the 1st defendant was in possession of the property. It may be safely held, therefore, that the plaintiff had knowledge, constructive or express, of all the circumstances attendant upon the execution of Ex. A and of the circumstances that preceded and followed. When a man makes no enquiry or wilfully abstains from enquiry, the law presumes that he had knowledge of all the facts which an honest enquiry would have laid bare. In these circumstances, it cannot be contended for a moment that the plaintiff is a *bona fide* purchaser. His object, as stated by the Subordinate Judge was to get the plaint property by hook or by crook. It appears the plaintiff bought the property for Rs. 5,000 undertaking to discharge certain encumbrances on the property which the 13th defendant had undertaken to discharge by reason of Ex. A. The consideration for Ex. B is the same as that for Ex. A and there is also evidence that the plaintiff is a person who gambles in litigation, and he and the 13th defendant and one Sambasiva Aiyar seem to have been friends who were in the habit of entering into speculative transactions. The plaintiff cannot, therefore, be held to have made any payments *bona fide* for the purpose of preserving the property from execution proceedings for the benefit of the 1st defendant. His sole object seems to have been to put up a claim for the plaint property by means fair or foul. In order to claim payments made to discharge encumbrances on the property, the plaintiff must show that he was not a volunteer and that he did not make payments officiously. The *onus* is strongly upon him and to show his *bona fide* and I am not prepared to hold that he paid these amounts *bona fide*. *Syamalrayudu* v. *Subbarayudu* (5) is quoted for the purpose of supporting the contention that the plaintiff, though not a *bona fide* purchaser, was entitled to be repaid the amount that he spent in saving the property from execution proceedings. The facts of that case are not similar to those of the present. There A agreed to sell his property to C and then he sold the property by a subsequent conveyance to D. D in order to secure priority got the sale deed antedated and paid off the mortgage in favour of B. The learned Judges observe :—

"We fail to see in this circumstance any thing to affect the validity of the payment which was no doubt made by the plaintiff for the purpose of strengthening his own claim. The plaintiff's illegal act in antedating his sale-deed also for the purpose of supporting his title does not vitiate the payment subsequently made, and which in itself was legal. There was, therefore, no want of *bona fides*, and certainly no fraud."

There the sale was only a voidable sale. The sale in favour of D was a real transaction and was good till C moved in the matter and therefore, when a person who has got a defeasible title makes the payment for the purpose of saving the property in his possession, he is entitled to be paid the amounts which he spent for saving the property. In *Chama Swami* v. *Padala Anandu* (6), it was held that if a purchaser of land, while in possession of the land purchased, pays off an encumbrance on it, he is entitled, when his purchase is found invalid, to stand in the shoes of the mortgagee whom he has paid off. The learned Judges observe :—

"The American Courts apply to cases of this kind an equitable doctrine of subrogation borrowed from the Civil Law, and when equity requires it, allow persons paying off mortgages on properties which do not belong to them to be subrogated to the rights of the original mortgagees. This right of subrogation is not extended to mere volunteers who pay off other peoples' debts without having any concern in them."

The learned Judges make it quite clear that the equitable doctrine of subrogation can have no application to volunteers or persons whose conduct is officious. The plaintiff is only a volunteer for he knew that his vendor had no title at all and that the sale deed, Ex. A, was a sham transaction : and by his taking a conveyance from the 13th defendant he cannot be said to have acquired any right to the property when his own vendor had not the shadow of a title to it. If the plaintiff had a voidable or defeasible title he might bring himself within the principle of the decisions in *Syamalrayudu* v. *Subbarayudu* (5) and *Chama Swami* v. *Padala Anandu* (6). The Courts do not always make a distinction between a void sale and a voidable sale and a transaction which is only a sham one. A void sale can never be made good. A voidable sale is good till it is avoided, but a sham or nominal transaction is no transaction at all and is mere a waste paper. In *Palamalai Mudaliar* v.

The South Indian Expert Company (7) the transferee was a *bona fide* transferee and though the sale was avoided under S. 53 of the Transfer of Property Act, yet he was entitled to a charge for the amount spent by him in discharging the mortgage. In that case the transferee had a voidable title which is a good title till it was avoided and the payment by him to discharge any incumbrance on the property during the time he was in possession of it was a *pro tanto* relief of the burden existing on the property and as such the person who defeats his title should in equity pay or make good the amount paid by the transferee during the time his title was considered good. The same principle is applicable to cases of conveyances which are voidable under S. 55 and 56 of the Presidency Towns Insolvency Act. Where a person has paid off certain encumbrances during the time when his title was unchallenged, he could in equity claim to stand in the position of the creditor whom he has paid. In *Karppan Ambalagaram* v. *Sakuth Levvai* (9), Ayling J., after referring to *Syamalrayudu* v. *Subbarayudu* (5), and *Palamalai Mudaliar* v. *The South Indian Export Company* (7), says :—

"But a perusal of the judgments in these cases shows that in each the person claiming subrogation was at the time of making payment a transferee of the property for valuable consideration. He may have been guilty of fraud or misconduct in connection with the transfer which might render it voidable at the instance of another party ; but he had paid consideration for the transfer and was possessed, at the time he discharged the mortgage, of a substantial interest in the property. The payments for which subrogation was claimed were necessary to protect that interest. This, as it seems to me, is a very real distinction between those cases and the present one."

In the case before him and Tyabji, J., the transferee under a nominal sale was held not to be entitled to be subrogated to the rights of the mortgagee as against the purchaser in execution of the decree against the transferor.

The next contention that the plaintiff is entitled to be paid the amounts which he paid for the discharge of encumbrances between the dates of Ex. O and Ex. P requires careful consideration. By Ex. O the plaintiff's title to the property was recognised by a Court of law and till that decree was upset it was good and could not be questioned by anybody. The question whether payments made subsequent to this for relieving the burden on the property could be considered as payments by persons interested in the property is not free from difficulty. It is urged with some show of reason that when a person gets a decree in his favour from a Civil Court the payments made by him subsequent to the decree must be considered *bona fide*, for he has an interest to support and protect and if there is no appeal the plaintiff would be entitled to the property. This contention cannot hold good for the reason that a Civil Court does not confer a right to property which the person does not possess but only declares or enforces a right which he has. Except in a few cases where decrees themselves are a source of title, the decrees of Civil Courts cannot confer a title to immoveable property which a person did not possess and, therefore, when the plaintiff had no title at all to the plaint property, the mere fact that a Civil Court considered or held that he had title would not confer an interest which he did not possess before and he must have known that the District Munsif's decree in his favour dated 26th January, 1910, was liable to be appealed against and that any payments made by him before the decree was upset were made by him with the knowledge that the decree might be upset on appeal. Therefore I do not consider that the plaintiff paid the amounts detailed above *bona fide* with a view to protect the property. It is urged that there was an execution taken out by the mortgagee against the mortgaged property and plaintiff paid the execution creditor to save the property from execution. It must be remembered that the plaintiff was a mere volunteer and could not claim to have done it by virtue of an interest in the property. In *Madhamuni Iuuen* v. *Appu Odayan* (21) my learned brother (Mr. Justice Spencer) has laid down that a person who claims an equitable relief ought to come into Court with clean hands. ; and the plaintiff cannot be said to have come into Court with clean hands. *Rajah of Vizianagaram* v. *Rajah Setrucherla Somasekharaz* (19) is relied upon by the plaintiff for the contention that he had an interest in the property and that the payment made by

21. (1918) 48 I. C. 799.

him to protect that interest is a *bona fide* payment. The case at the footnote does not help the plaintiff as there is a clear finding that the plaintiff could not be regarded as having paid Krishna Bathan's debt officiously or as a mere volunteer. In *Bhagwati Prasad* v. *Radha Kishen Sewak Pande* (22) the Privy Council held that by the acts of the parties and their relations to one another, the money borrowed by an agent for a principal for the purchase of property was rendered a charge upon the latter in the principal's hands, he being the real purchaser, and the lender of money, which he advanced to the nominal purchaser of property who was the agent of the real purchaser, was entitled to a declaration that the advance of money for the purchase formed an equitable charge upon the property against the real purchaser. In that case the transactions were all real transactions and there was no contention that the payments were not made *bona fide*. In *Ammani Ammal* v. *Ramaswami Naidu* (23) Sadasiva Aiyar and Napier, JJ., held that a purchaser in good faith who buys from the guardian of a minor the property which he considers to be the property of the guardian and not that of the minor was entitled to be paid back the amounts which he paid for discharging the encumbrances on the minor's property when the sale was set aside. It was held that the principle of subrogation did not apply to the case of volunteer or stranger. This equitable principle of subrogation need not be considered in this case for the plaintiff does not contend that be is entitled to stand in the shoes of the mortgagee. All that he claims is, to he entitled to be paid back the sums he paid and to have a charge on the property for those sums. In *Radha Madhub Samonta* v. *Sashis Ram Sen* (1) it was held that the payment of rent made by a purchaser of a putni taluk after the decision of the first Court in a suit brought by the defaulting putnidars for the setting aside of the putni sale by which it was held that the sale was invalid, and during the pendency of an appeal preferred not by the plaintiff, the auction purchaser, but by the Zemindar at whose instance the said sale had been brought about, is not a voluntary payment, inasmuch as he (the plaintiff) is a person interested in the payment of the money, within the meaning of S. 69 of the Contract Act. Here again there was a real sale and the purchaser was bound to protect or rather was entitled to protect his interest in the property by payment of the amount due to the Zemindar; otherwise the holding might have been lost, and the person who had the real title to the property was in equity bound to reimburse the person, who had only voidable title, the amount which he paid for preserving the property from sale for arrears of rent. In the present case the plaintiff does not seek to defend his title against an attack but wants a decree against the property for money paid by him to discharge certain encumbrances. He cannot be said to have acquired a charge by reason of payments made by him when he had no title to the property. He was a mere adventurer who was trying to make out a claim for property to which he knew he had absolutely no title. A man cannot create a charge by paying off an encumbrance on a property when he had not any subsisting interest in the property. The law in certain cases creates a charge when payments are made by persons who are either bound or entitled to pay off certain amounts, but the law does not favour an adventurer who makes payments only for the purpose of creating a title to property. The case in *Janki Prasad Singh* v. *Baldeo Prasad* (8) is very similar to the present. There the plaintiffs alleging themselves to be the purchasers of the mortgagee's rights in certain land, paid the amount of a decree against the mortgagee in order to save the property from sale. But it had already been found in a suit under S. 283 of the Code of Civil Procedure that the sale to the plaintiffs was fictitious and inoperative. It was held that the plaintiffs were not entitled to recover the amount paid from their vendors. The learned Judges quote with approval a passage from the judgment of Straight, J. in *Chedi Lal* v. *Bhagwan Das* (24).

> "If the plaintiffs as mere volunteers chose to put their hands into their pockets and to pay a sum of money, not for the defendants but for themselves, that was their own look-out, and they cannot now claim the benefit of S. 70."

22. (1893) 15 All. 304.
23. (1919) 37 M. L. J. 113=(1919) M. W. N. 866=51 I. C. 57. 10 L. W. 75.
24. (1899) 11 All. 234=9 A. W. N. 67.

The plaintiff in the present case has made the payments as a mere speculator and in the gamble for the title he must lose what he has paid because he was a mere volunteer and made the payments officiously in order to make out a title to property when he had absolutely no title to it.

I therefore hold that the plaintiff cannot claim any amount alleged to have been paid by him for relieving the burden on the plaint property from the first defendant either personally or on the security of the plaint property. The plaintiff's suit so far as the 1st defendant is concerned must be dismissed with costs.

The memo. of objections by respondents 1 to 3 is allowed with costs. The appeal of the plaintiff (239 of 1918) is also dismissed with costs of defendants 1 to 4 In the result plaintiff's suit is dismissed with costs against all but the legal representatives of the 13th defendant.

I concur in allowing A. S. No. 166 of 1918 with costs against the plaintiff. The appellant will pay the costs of the 1st defendant.

[These appeals having been set down to be spoken to this day on the minutes of the decree and respondents No. 18 and 19 in Appeal No. 239 of 1918 having filed C. M. P. No. 1412 of 1922 under O. 47, R. 1, Civil Procedure Code praying for a review of the judgment of this Court dated 30th March 1922 in the said Appeal No. 239 of 1918, the Court delivered the following.]

JUDGMENT.—Although the 13th defendant did not appeal or join in the memorandum of objection filed by respondents 1 to 3, the decree for sale of properties under O. 34, R. 4, was a common decree against all the defendants; and the personal decree for any surplus that might remain due after the sale of the properties was a common decree against defendants 1 and 13.

Having held that the cause of action arising out of the sale, dated 22nd August, 1908, to the plaintiff was barred by limitation as against 1st defendant, we cannot in the light of S. 3 of the Limitation Act shut our eyes to the fact that it is also time-barred against 13th defendant, and his legal representatives and under O 41, R. 33, we must, to be consistent, make the same order in their case.

The decree has not yet been signed and we have no doubt that there is "sufficient reason" within the meaning of O. 47, R. 1 to review our decision apart from our inherent powers under S. 151, Civil Procedure Code, (see *Syad Tuffuzzool Hossein Khan* v. *Rujhoonath Pershad* (25) *Debi Baksh Singh* v. *Habit Shah* (26). See also *In re Nazaire Company* (27) and *In re Suffield and Wattas Ex Parte Brown* (28) as to the powers of a Court to correct an error obvious on the fact of the record before the order has been completed.

If the Court of first instance had taken the correct view on the question of limitation, it would have dimissed the suit, as laid, against all the defendants; and under S. 107 (2), Civil Procedure Code, we have the same powers and duties to see that a proper and workable decree is passed as the original Court had. The decree of the lower Court provided that if any surplus remained after the sale of the properties the plaintiff should have a decree against defendants 1 and 13 for the recovery of such amounts.

Now tnat the decree for sale has been held to be not maintainable, we shall in effect be allowing the nature of the case to be changed, and in effect be varying the decree of the lower Court as against 13th defendant if we were to allow a personal decree to be made against the 13th defendant's legal representative, irrespective of the charge.

The words in our judgment "but the decree will stand as against 13th defendant's legal representative as he did not appeal" will now be expunged and the decree will be drawn up as if they had never existed.

Decree modified.

25. (1871) 14 M. I. A. 40.
26. (1913) 35 All. 331=16 O. C. 194=40 I A. 150=17 C. W. N. 829=11 A.L.J. 625=18 C. L. J. 9=15 Bom. L. R. 640=14 M. L. T. 33=(1913) M. W. N. 566=25 M. L. J. 148=19 I. C. 526 (P. C.)
27. L. R. 12 Ch. Dn. 88.
28. (1888) 20 Q B. Dn. 693.

** **1923 Madras. 402.**

KRISHNAN AND RAMESAM, JJ.

Annadana Jadaya Gounder ... Appellant —1st Defendant.

v.

Konammal and another ... Respondents—Plaintiffs.

Appeal No. 75 of 1921, dated 26th October 1922, against the decree of the Dt. Court of South Arcot in O. S. No. 13 of 1916.

Hindu Law—Impartible estates—Succession.

It is a well settled proposition of law that the succession to an impartible estate is governed by the rule of survivorship if it is joint family property and by the rule of inheritance to separate property if it is separate property. [P. 403] Where the result of the arrangement was practically to substitute the junior line for the senior line to succeed to the estate but there was no evidence of any further interference with the right of senior line. *Held*, it did not affect the Jaghir being held as joint family property and the right of survivorship subsisting in the senior branch as well as in the junior branches. The possession of the second line being consistent with the joint family rights continuing, it cannot be treated as making the Jaghir the separate property of the 2nd line by adverse possession. The effect of that possssion is no more than that of the arrangement itself. *Held*, further that that line having become extinct, a new position would arise and there is nothing to prevent the senior line from claiming the Jaghir by survivorship. [P. 405] It is very doubtful if the owner of an impartible estate can get himself divided in status with reference to that estate by a mere unilateral declaration so as to destroy the joint family right of succession by survivorship to it which the members have. [P. 405] To show that an impartible estate has become the separate property of the holder it is not absolutely necessary to prove that there was some express division in which that property was involved or that the rights of others in it were abandoned. Each case has to be decided on its own facts. [P. 406] (1) If an impartible estate is the joint property of a family, the junior members have a right in it which, however unreal it may be for the purposes of actual enjoyment and preventing alienation, is still real and gives a chance of succession by survivorship. [P. 414] (2) The case of *Sataj Kuari v. Deoraj Kuari* (10 A 212) which, has stood "too long to be now touched" and First Pittapur case (22 M. 383) must be confined to alienation and cases in 41 M. 778; 21 C. W. N. 226=37 M.L.J. 188 and 24 C.W.N. 857; may be ignored. An impartible Zamindari (1) may be the self-acquired property of a particular member and therefore his separate property as in the *Sivaganga* Case or (2) might be renounced by a member of the family as in the *Padamatur* case so that he becomes completely separate from other members of the family *quoad* that property or (3) might be wholly alloted to a member in a family partition dealing with it and other properties of the family as in the case in *Vadrevu Ranganayakamma* v. *Balli Ramaiya* (5. C.L.R. 439). [P. 415] The holder of an impartible estate cannot, by giving a registered notice to the junior members that he intends to be divided in status as regards all the partible properties and impartible properties, put an end to the rights of junior members over the impartible estate. Such a notice destroys the undivided status only as to the partible properties, the principle being, one member cannot compel another member of the joint family to continue undivided when the latter wishes to divide and is willing to *share the property*. [P. 416] A junior member may, while dividing himself as to partible properties, also separate himself even as to the impartible estate. [P. 416]

T. R. Venkatarama Sastri, T. M. Krishnaswami Iyer and K. S. Sankara Iyer for the Appellant.

A. Krishnaswami Iyer, M. S. Venkatarama Iyer and P. S. Chandrasekhara Iyer —for the Respondents.

KRISHNAN, J.—This is an appeal by the 1st defendant against the decree of the District Judge of South Arcot in O. S. No. 13 of 1916 on his file. The suit was brought by the plaintiffs to recover, possession of the impartible estate known as Jadaya Goundan Jaghir, one of the hill Jaghirs on the Kalrayan hills in South Arcot, and also the moveable and immoveable properties and outstandings described in Schs, B, C. and D. The Jaghir is one of the estates included in the schedule of the Madras Impartible Estates Act, II of 1904, and is thus made inalienable by the holder beyond his life-time. The last holder of the Jaghir was one Naranappa Jadaya Goundan; the Jaghirdars are given the honorific title of Jadaya Goundars. He died in 1914 leaving a will which is not now disputed by which, he bequeathed all his properties to the 2nd plaintiff. The 1st plaintiff is his mother and the heir-at-law to his separate properties as he left no issue. The two plaintiff sue jointly, the 2nd plaintiff as the beneficiary under the will and the 1st plaintiff as the heir-at-law in case the Will is found to be invalid. Clearly the Will is of no effect by reason of Madras Act II of 1904 to pass the Jaghir to the 2nd plaintiff. The District Judge gave a decree for the Jaghir to the 1st plaintiff as the heir-at-law and to the 2nd plaintiff for the properties in the other schedules which he found to be self-acquisitions of Naranappa. Appeal No. 75 of 1921 is against that decree.

The 1st defendant himself had brought a suit O. S. No. 50 of 1916 against the 1st plaintiff and others to recover a house in Akkarapalayam in their possession which he claimed to be a part of the Jaghir which according to him passed to him on the death of the last holder by the right of survivorship taken with the rule of lineal primogeniture. The District Judge held that the house was not part of the Jaghir and having already held in the connected suit O.S. No. 13 of 1916 which was tried with this suit that he was not entitled to the Jaghir itself dismissed his suit. Appeal No. 76 of 1921 is against that decree.

The main question for decision is whc is entitled to succeed to the Jaghir on the death of the last holder. That would depend upon whether the Jaghir in his hands was the joint family property of himself and the defendant and others or his separate or self-acquired property. It is a well settled proposition of law that the succession to an impartible estate is governed by the rule of survivorship if it is joint family property and by the rule of inheritance to separate property if it is separate property. That was so laid down in the *Katama Natchiar* v. *The Rajah of Shivagunga* (1), and has since been affirmed in several cases, the last one being the case in *Baijnoth Prasad Singh* v. *Tej Bali Singh* (2). In the present case there is no difficulty in choosing a single individual out of a class for the Jaghirship, for it is conceded that if the rule of survivorship applies, the 1st defendant is entitled as the senior member of the senior line whereas if the rule as to succession to the separate estate applies, the 1st plaintiff the mother is entitled.

We have thus to address ourselves to the question whether on the evidence in this case the District Judge was right in holding that the Jaghir was the separate property of Naranappa the last holder. A genealogical table showing the relationship between the 1st defendant and Naranappa and others is attached to the judgment of the lower Court and has been accepted as correct by both parties. That shows that one Lakshmanappa was the 29th Jaghirdar. We know that Lakshmanappa was succeeded in 1822 not by his eldest son Ramappa who was said to have been of weak mind nor by his son Kannappa who was born at the time but was a minor of 5 years of age, but by his second son Annadana and the Jaghir has continued in his junior line till now, that is, for 4 generations. What exactly happened in 1822, when the senior line was set aside in favour of the junior line is not clear; nearly 100 years having elapsed there is naturally no direct evidence about it. We must gather what we can about it from the proceedings and the judgments of the first Court and of the High Court in O. S. No. 7 of 1875 brought by the widow of the 31st Jaghirdar as guardian of her minor son Annadana to recover the estate for him from Lakshmanappa of the senior branch who had usurped it. The plaint and the written statement in it and the decree and judgment of the first Court are marked together as Ex. B, the judgment of the High Court as Ex. C and the decree as Ex. D. In that suit the plaintiff Annadana succeeded in recovering the estate and he became the 32nd Jaghirdar. The judgment of the trial Judge deals more with the question whether the then plaintiff's mother was properly married and whether plaintiff was a legitimate child than with what happened in 1822 as he held as a point of law that Annadana the 30th Jaghirdar having succeeded to the estate, his descendants had a preferential claim to it. He has however made some remarks in his judgment which are in point. He says that:

> "The old father (the 29th Jaghirdar) yielded the title to him (the 30th man) before he himself died" and "that the defendant there (who was of the senior branch) was the next heir according to the ordinary rule of succession if the plaintiff the minor was not a legitimate child."

The latter however is only an opinion of the Judge and we cannot attach much weight to it.

In the judgment of the High Court something more appears as regards the point before us. Their Lordships say,

> "We think the plaintiff's claim may be regarded as resting on family arrangement made in 1820 and not challenged until the death of the minor plaintiff's father in 1866. Regarding the 29th Poligar who possessed the proprietary right in the property, it was competent to him with the members of his family to alter the succession by the arrangement referred to"

What exactly the arrangement was and what its scope was it is not possible to gather from the records. It was suggested for the respondents that what the 29th Poligar did was to make a gift of the Jaghir to his 2nd son before he died and the Jaghir was thus self-acquired property in his hands. Though according to the decision in *Rani Sartaj Kuari* v. *Rani Deoraj Kuari* (3), he could have probably made a gift, Madras Act II of 1904 not having been yet passed, there is no evidence

1. (1861) 9 M. I. A. 539.
2. (1921) 43 All. 228 (237 & 242)=48 I. A. 195 =19 A. L. J. 317=33 C L. J. 388=40 M.L.J. 387 =(1921) M. W. N. 300=25 C. W. N. 564= 2 Pat. L. T. 257=23 Bom. L. R. 654=29 M. L. T. 358=60 I. C. 534 (P. C.)
3. (1888) 10 All. 272=15 I. A. 51=5 Sar. 139.

on which we can hold that the arrangement in 1820 or 1822 was in the nature of a gift. The most that we can reasonably infer from the evidence is that here we have an arrangement similar to that in *Naragunty Lutchmeedavamah* v. *Vengama Naidoo* (4) and *Naraganti Achammagaru* v. *Venkatachalapati Nayanivaru* (5). The result of the arrangement was practically to substitute the junior line for the senior line to succeed to the Poligarship but there is no evidence of any further interference with the right of the senior line. It did not affect the Jaghir being held as joint family property and the right of survivorship subsisting in the senior branch as well as in the two junior branches of the 30th Poligar's brothers. (See the pedigree). The possession of the second line being consistent with the joint family rights continuing, it cannot be treated as making the Jaghir the separate property of the 2nd line by adverse possession. The effect of that possession is no more than that of the arrangement itself. The failure of Lakshmanappa of the 1st line in Original Suit No. 7 of 1875 did not result in any separation either ; the suit was decreed in favour of the minor of the 2nd line only on the footing that the arrangement in 1820 was not a temporary one as Lakshmanappa contended but was effective in continuing the Jaghirship in that line. Now that that line has become extinct, a new position has arisen and there is nothing in the two judgments to prevent the senior line from claiming the Jaghir now by survivorship.

In this connection reference may also be made to the entry in Inam Register Ex. III where in column 19 the heirs of the 31st Jaghirdar are given and they include members of the lines senior and junior to the then Jaghirdar's line. This is a strong indication that the joint family character of the Jaghir was not destroyed by what happened in 1820 or 1822.

The learned Vakil for the respondents then argued that the conduct of the parties showed that the two lines had become separate at some time or other and that the Jaghir was treated as the separate property of Naranappa's line. As apparently this family had no other joint properties of any value except the Jaghir he could not point to any particular act of partition or division and he therefore contended that it was sufficient for his clients to show that Naranappa was divided in status from his cousins of the senior line. It is very doubtful if the owner of an impartible estate can get himself divided in status with reference to that estate by a mere unilateral declaration so as to destroy the joint family right of succession by survivorship to it which the members have. It is not however necessary to decide this question here for we have no evidence of any such express declaration or of anything from which it could be inferred.

The learned Vakil for the respondents then relied on the following circumstances as showing separation, *viz.*,

(1) The removal of the residence of the Jaghirdars to Pottayam in 1872 and their continuance to live there ever after, whereas the other members of the family continued in the ancestral place of Chinna Tirupati ;

(2) The absence of evidence to show that the senior line kept up any rights in the Jaghir ;

(3) The absence of evidence of any application for help made by the members of the senior line to the Jaghirdar ;

(4) The absence of any consciousness of the existence of a joint family when guardianship proceedings took place in 1901 ;

(5) Proof of the hostile attitude of the senior line in the patta proceedings in 1898 ;

(6) Separate living and separate mess for 30 or 40 years ;

(7) Proof of non-participation in the worship at Chinna Tirupati temple and in the annual durbar held by the Jaghirdars ;

(8) Absence of a single joint dealing of the senior line with the Jaghirdar ; all dealings being separate ; and

(9) The fact that the members of the senior branch were treated just like any ordinary ryot with reference to collection of forest produce.

My learned brother has dealt with the evidence on these points at very great length and as I agree with his conclusions it is unnecessary to burden the record with a further discussion of the details of that evidence. It is clear that even if all the above points are found in favour of the 1st plaintiff, it is insufficient to establish that the Jaghir had become the separate property of the last holder. The points urged are all consistent with the Jaghir continuing as the joint family property of

4. 9 M. I. A. 66=1 W. R. (P. C.) 30=1 Sar. 826=1 Suther. 460.
5. (1882) 4 Mad. 250.

the members of all the branches. Considerable reliance was placed by the respondents' Vakil on the ruling of the *Tara Kumari* v. *Chaturbhuj Narayan Singh* (6) and the recent ruling of this Court in *Gurusami Pandiyan* v. *Pandia Chinna Thambiar* (7) following that case. It is true that the recent case in *Baijnath* v. *Tej Boli* (2) does not refer to *Tara Kumari* v. *Chaturbhuj Narayan Singh* (6) but that case must still be treated as of authority. I am therefore inclined to think that to show that an impartible estate has become the separate property of the holder it is not absolutely necessary to prove that there was some express division in which that property was involved or that the rights of others in it were abandoned. Each case has to be decided on its own facts. The present case however is completely distinguishable from *Tara Kumari* v. *Chaturbhuj Narayan Singh* (6) and *Gurusami Pandiyan* v. *Pandia Chinna Thambiar* (7) as in both those cases the indications of the Zemindari being the separate estate of the last holder were much stronger. Furthermore our decision in *Gurusami Pandiyan* v. *Pandia Chinna Thambiar* (7) is now in appeal before the Privy Council. Considering the whole of the evidence I agree with my learned brother that it falls short of proving that the joint family rights of the 1st defendant's line in the Jaghir were extinguished at any time. In the hands of Naranappa the last holder, the Jaghir must be looked upon as joint family property and not as his separate property and the finding on issues 3 and 4 must be in favour of the 1st defendant. In this view issue 5 requires no discussion but I may add that I agree with my learned brother that the finding of the District Judge on the point is correct. Issue 2 was expressly given up and the other issues were not argued before us.

In the result Appeal No. 75 of 1921 is allowed and the suit dismissed so far as the Jaghir is concerned and the rest of the appeal is dismissed; the 1st respondent will pay the appellant's costs in both Courts calculated on the value of the Jaghir given in the suit. The appeal is wholly dismissed against the 2nd respondent with costs payable by the appellant calculated on the relief claimed against him.

RAMESAM, J.—The suit, out of which this appeal arises, was filed by two plaintiffs to recover certain properties described in Schs. A, B, C and D attached to the plaint. Of these, the property described in Sch. A is the Jadaya Goundan Jaghir in the South Arcot District, which has been declared to be impartible by Madras Act II of 1904 (*vide* schedule to the Act). The 2nd plaintiff claimed the properties as the devisee under the will of the last Jaghirdar, Naranappa, who died on 17th August 1914. The 1st plaintiff claimed, in the alternative, as the heir of Naranappa. The District Judge of South Arcot gave a decree to the 1st plaintiff for the Jaghir and to the 2nd plaintiff for the properties in Schs. B, C and D. The 1st defendant, (who will be referred to hereafter as the defendant, being the only contesting defendant) appeals. The appeal has not been pressed so far as the properties decreed to the 2nd plaintiff are concerned. (*Vide* 6th, 9th and 10th issues). It has been argued only in respect of the Jaghir which was decreed to the 1st plaintiff who will hereafter be referred to as the plaintiff.

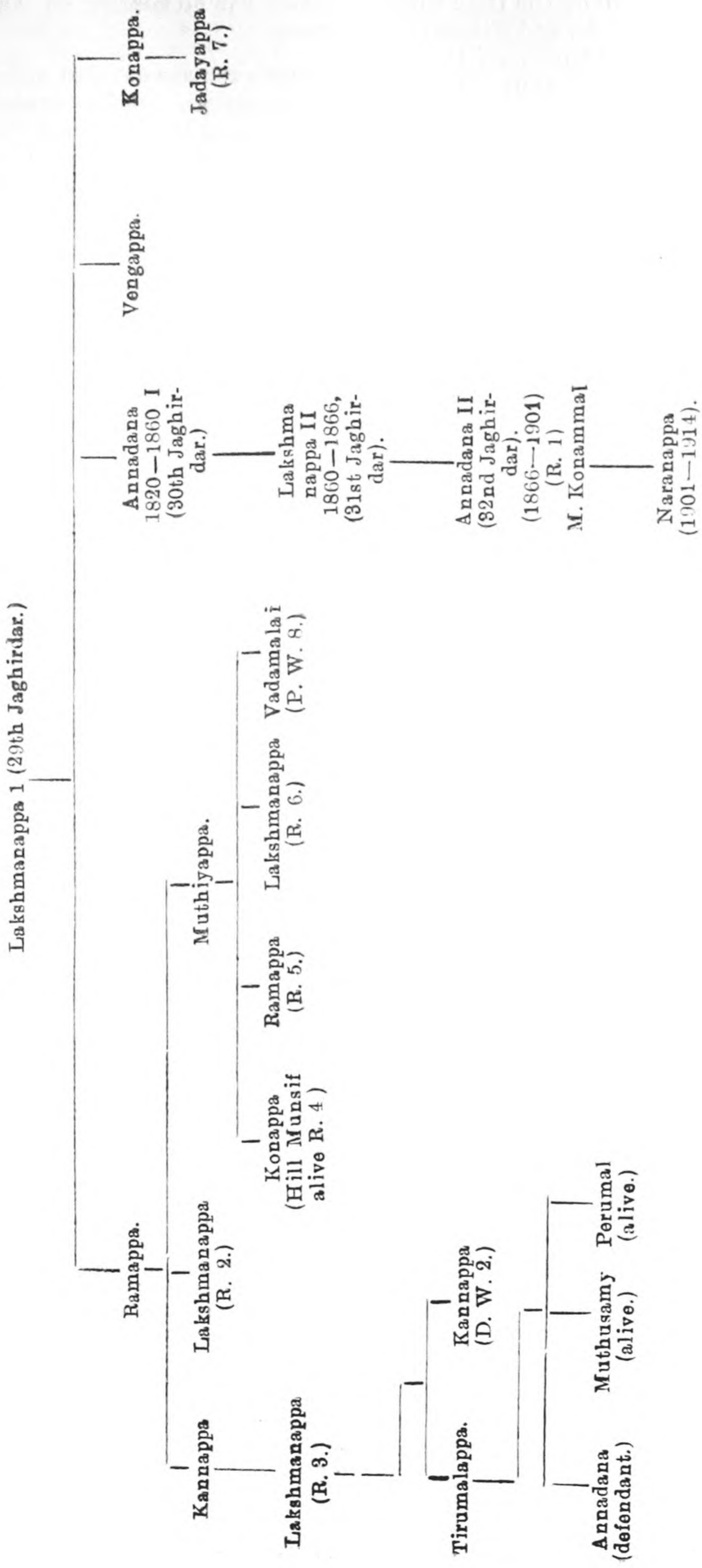
The plaintiff is the mother of the last Jaghirdar, Naranappa, and the defendant is his cousin. The following genealogical tree shows the parties and a few other relations some of whom have figured in the suit as witnesses.

See next page for Pedigree.

The common ancestor in the above pedigree Lakshmanappa I, died in 1822, leaving 4 sons, of whom the eldest was Ramappa and the 2nd was Annadana I. Annadana I, held the Jaghir from 1820 upto his death in 1860, when he was succeeded by his sons, Lakshmanappa II, who held it till 1866, when he died leaving a minor son Annadana II. It appears that Lakshmanappa, grandson of Ramappa, managed the property as the guardian of Annadana II till the end of 1871 but usurped the estate in 1872. A suit was filed by the mother of the minor as his next friend to recover the possession of the estate (O. S. 7 of 1875). It was decreed by the Judge of the Small Cause Court at Cuddalore in November 1876 and the

6. (1915) 42 Cal. 1179=42 I. A. 192=19 C. W. N. 1119=29 M. L. J. 371=18 M. L. T. 228=2 L. W. 843=13 A. L. J. 1031=17 Bom. L. R. 1012=22 C. L. J. 498=(1915) M. W. N. 717=30 I. C. 833 (P. C.).

7. (1921) 44 Mad. 1=39 M. L. J. 529=(1920) M. W. N. 660=28 M. L. T. 365=61 I. C. 242.


Lakshmanappa 1 (29th Jaghirdar.)
Ramappa.
Konappa.
Jadayappa (R. 7.)
Vengappa.
Annadana 1820—1860 I (30th Jaghirdar.)
Lakshmanappa II 1860—1866, (31st Jaghirdar).
Annadana II (32nd Jaghirdar). (1866—1901) (R. 1) M. Konammal
Naranappa (1901—1914).
Muthiyappa.
Vadamalai (P. W. 8.)
Lakshmanappa (R. 6.)
Ramappa (R. 5.)
Konappa (Hill Munsif alive R. 4)
Lakshmanappa (R. 2.)
Kannappa
Lakshmanappa (R. 3.)
Kannappa (D. W. 2.)
Tirumalappa.
Perumal (alive.)
Muthusamy (alive.)
Annadana (defendant.)

decree was affirmed in appeal (Regular Appeal No. 116 of 1876) by the High Court (Sir Walter Morgan, C. J., and Kindersley, J.) on 7th May, 1877. Annadana II held the estate till his death in 1901, when he was succeeded by his son, Naranappa, whose death in 1914 has given rise to the present litigation. The defendant, claiming to the person on whom the estate has devolved by survivorship on the the ground that, though impartible and capable of being held only by a single person at a time, it was still the joint family property of the family, took possession of the estate and even went through the ceremony of installation (*vide* paragraph 98 of the Judge's judgment). The plaintiff, on the other hand, contends that it was the "separate and absolute property" of the several holders of the estate who held it since 1820. (*Vide* paragraph 11 of the plaint). This is the most important point in the case. Before dealing with it, I will dispose of the other points in the case to clear the ground.

The learned Vakil for the appellant has expressly stated before us that he does not press the technical objection which is the subject of the 2nd issue. He made no reference to the 1st, 7th and 8th issues. The only issues pressed before us are the 3rd, 4th and 5th. So far as the 5th issue which raises the existence of a custom by which women are disqualified from holding the Palayam is concerned, I agree with the learned Judge's finding that no such custom has been made out. I agree with his reasons as given in paragraphs 96 to 108 of his judgment. In the first place, it does not appear that the practice of prostration before a Jaghirdar at the annual Pongal (January 14th) Darbar has anything to do with spiritual Headship. There has been no instance within living memory in which the succession in the direct male line has failed. Again, it cannot be said that the ceremony of installation, when the Ur Goundan places a mark on the forehead of the Jaghirdar (if a male) confers the title on the Jaghirdar. The same remarks apply to the functions of a Jaghirdar at the annual festival in the month of Peratasi (October to November) for the Idol in the temple of Chinna Thirupathi. If women cannot perform these functions, either they may not be performed at all or will be done through a deputy. Anyhow the matter has no bearing on the right to the estate.

There remain the 3rd and 4th issues for consideration. Before examining the law and facts on these issues, it is necessary to describe the nature of the estate and of its people, so that the facts in the evidence may be understood in their proper setting. This estate like four other similar estates is situated in the Kalrayan Hills, three of the estates (including the one now in question) being in the portion of the hills which are in the South Arcot District and the other two being in the Chinna Kalrayan Hills which are in the neighbouring District of Salem. The suit estate is divided into four nads (or subdivisions) containing 40 villages, the population of which was 10,009 in the census of 1901 :

"But the villages are merely fortuitous collections of huts with no definite boundaries and containing in several instances less than a dozen persons and the number of them has varied considerably at different times and in different reports. In charge of each Nad is a Moopan who collects the revenue and corresponds to the Revenue Inspector of Government villages, and whose post is hereditary. Every village has a headman called the Goundan or Moneygar and a menial servant known as the Kangany. The Nattan has peons called Natusevagars."

The hill villages are never surveyed. Only five of the villages of the suit Jaghir are situated on the low grounds below the hills. On the hills, the revenue is raised in a curiously primitive and patriarchal manner which is perhaps without a parallel in any other part of the Presidency outside the Agencies of the three Northern Districts. A large part of it is derived from such old fashioned imposts as plough taxes and poll taxes. The poll tax is levied at Rs. 2 per annum for every married couple and annas eight for each widower or bachelor above the age of ten years. Women are exempt. There is also a tax of 12 annas on each plough, on payment of which a man is allowed to cultivate as much land as he likes. Other contributions levied are annas two from each married, and anna one from each unmarried man towards the celebration of the festivals at the Chinna Thirupathi temple: the same amounts towards the poligar's expenses for Pongal; annas two and a half for Road cess and (in the Jadaya Goundan hills) annas two for ghee for the poligar. Miscellaneous payments to the poligar includes subscription to the cost of weddings and funerals in his family and a fee (of Rs 3 to Rs. 5) for permission to contract a marriage. Moreover, menial services in his house are performed for nothing by his subjects, men coming for a week or so at a time and hewing his wood and drawing his water.

Other considerable items in the revenue are the receipt from timber and forest produce and from monopolies. The monopoly income is derived by leasing to some merchant of the plains the right to buy the cultivators' grain at a fixed price' below the market rate. The ryots are obliged to sell this man certain kinds of produce at these fixed rates.

The cultivation on the hills is either permanent or shifting. The former is carried on the letvel tops of the hills, which have long been cleared of practically all their growth; and the latter on the wooded slopes, the jungle being cleared and burnt, the ground ploughed, and the seed sown broad cast. After one or two crops have been thus taken off it, the land is left fallow for a time until the growth has re-established itself, when the process is repeated."

(South Arcot Gazetteer, pp. 329—333).

The Vakil for the respondent expressly stated before us that he would put his case of 'absolute and separate property' in two ways'in the alternative (1) His branch and the defendant's branch became divided in 1820, when his ancestor Annadana I, obtained it, and ever since both branches have been separate. (2) Even if the family did not become divided in 1820 they became divided in 1872. In either case, he relies on the conduct of the family since 1872 as evidence of separation. In the first case, he also relies on the fact that the junior branch has superseded the senior branch in 1820, as evidence of hostile or adverse possession since that date.

It is necessary therefore to examine the events that happened in 1820 and to properly estimate their legal significance. In para 11 of his judgment, the District Judge stated :—

"It is common ground that the eldest, Ramappa, was passed over in the succession for the reason that he was a person of weak mind. Annadana appears to have succeeded about the year 1820, in the lifetime of his father, as the 30th Poligar."

Apparently, this statement was based on similar statements in Exs. B and C. In the judgment of Mr. (afterwards Mr. Justice) Parker, in paragraph 9, he states :

"It appears indeed that the old father yielded the title to him in 1820 before he himself died."

Again in the judgment of the High Court (Ex. C) we have got the following passage :

"In the judgment of the Court below it is stated, and *the document* No. 360 *among the printed papers supports this view*, that his father in his old age had relinquished to him the title and that this happened in 1820 some time before the father died. It is admitted that the eldest son, Ramappawas a person of weak mind and that his son, Kannappa, then born, was an infant of tender years. We think it may be gathered from the evidence that by an arrangement between the Poligar and the adult members of his family the Palayam was transferred to his son Annanda and also that intimation of this was given to the Revenue Officials and was recorded by them."

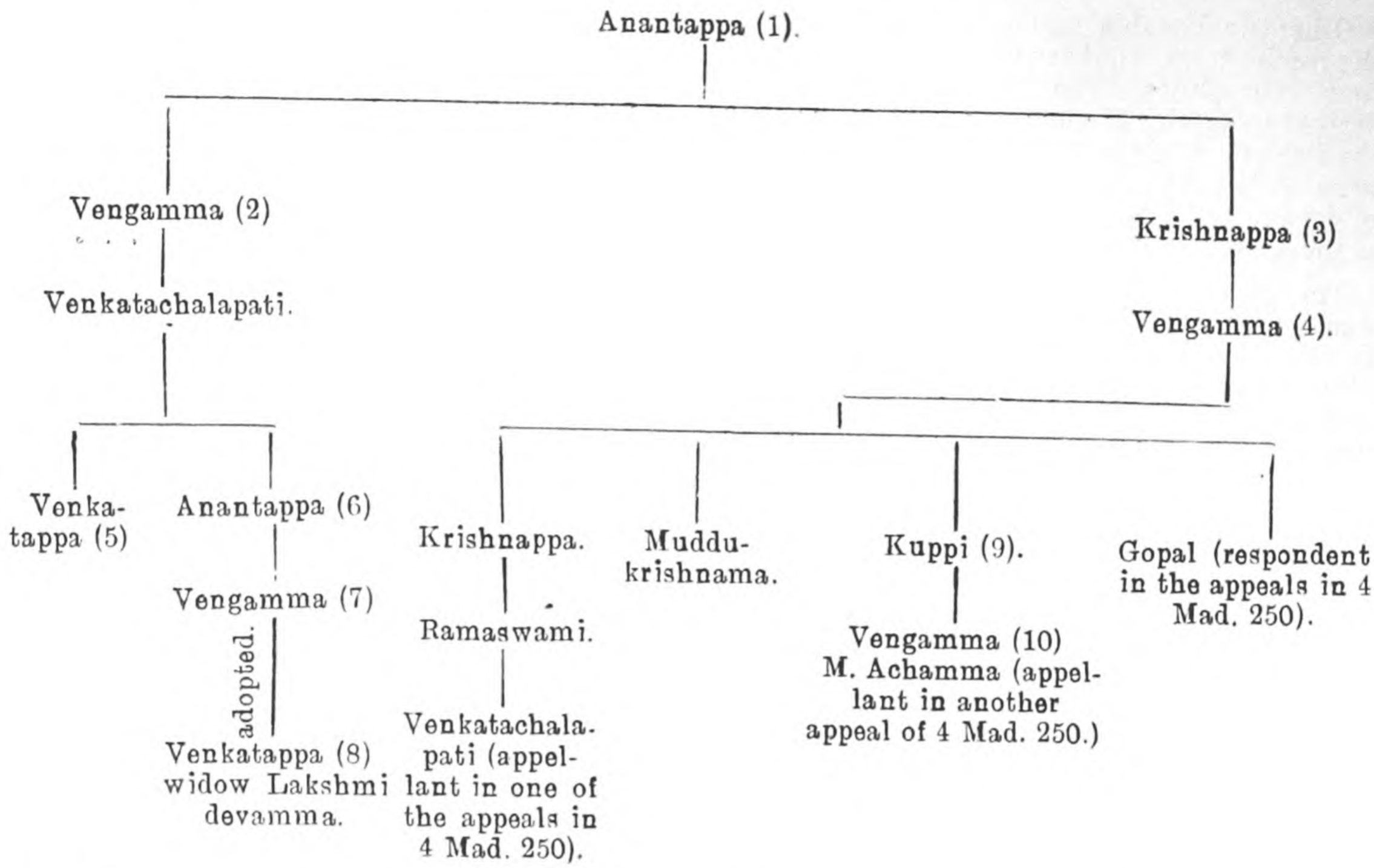
Again, in the next paragraph they say :

"We think that the plaintiff's claim may be regarded as resting *on family arrangement made in* 1820 and not challenged until the death of the minor plaintiff's father in 1866. Regarding the 29th Poligar Lakshmanappa Jadaya Goundan as in effect he possessed the proprietary right in the property, it was competent *to him with the members of his family* to alter the succession by the arrangement referred to."

Their Lordships then proceed to find that the arrangement was not temporary but permanent so that the senior line had lost its right to hold the estate so long as the junior line has not failed.

The two sets of cases (1) *Naraguntу Lutchmeedavamah* v. *Vengama Naidoo* (4) and *Naraganti Achammagaru* v. *Venkatchalapati Nayanivaru* (5) (a case approved of by Lord Macnaughten in *The Udayarpalayam Case* (8), by Lord Hobhouse impliedly in *Muttuvaduganadha Tevar* v. *Periasami Tevar* (9) and by Lord Dunedin in *Baijnath Prasad Singh* v. *Taj Bali Singh* (2) and *Stree Rajah Yanumula Venkayamah* v. *Stree Rajah Yanumula Boochia Venkondora* (10) and *Gavuridevamma Garu* v. *Ramandora Garu* (11) show that when a line in the family holding an impartible estate has been superseded by another, this may be consistent with the former still continuing to be part of the joint family along with the latter, the only result of the supersession being that the headship of the family [to use Lord Dunedin's language in *Baijnath Prasad Singh* v. *Tej Bali Singh* (2)] including the right to hold the estate will be in the superseding line, and the superseded line will be relegated to a subordinate position. In the first set of decisions, the history of the family can be easily seen with the help of the following pedigree [there being a printing mistake in the pedigree given in the margin of page 251 of *Naraganti Achammagaru* v. *Venkatachalapati Nayanivaru* (5).]

8. (1905) 28 Mad. 508=32 I. A. 261=2 C. L. J. 231=15 M.L.J. 312=1 M. L. T. 12=7 Bom. L. R. 907=2 A. L. J. 845= (P, C.)
9. (1896) 19 Mad. 451=23 I. A. 128=6 M. L. J. 149=7 Sar 83.
10. (1869) 13 M. I. A. 333.
11. 6 M. H. C. R. 93.



The figures attached to the names indicate the order in which the polliem was held.

The following points appear in the history of the case.

(1) The elder line was susperseded by the younger line after the 2nd poligar's death.

(2) The younger line was again superseded by the elder line after the 4th poligar's death.

(3) When Kuppi sued Venkatappa (8th poligar, in O. S. No. 24 of 1831, the latter pleaded among other pleas *a jus tertii*, that even if the adoption on which he relied was not true, the title of Kuppi's elder brothers to succeed to the 7th poligar (Vengamma) was better than Kuppi's, on the footing that both branches were members of an undivided family: Kuppi replied that his elder brothers renounced their right of succession in his favour. Kuppi failed in this suit.

(4) On 8th poligar's death, Kuppi sued his widow Lakshmidevamma. The suit was based on the footing of an undivided family comprising both branches. He succeeded in the High Court and the Judicial Committee [*Naragunty Lutchmeedavamah* v. *Vengama Naidoo* (4).] It is noteworthy that the two branches continued joint even after a litigation between them (as mentioned in the preceding paragraph).

(5) In the actual litigations which were the subject of *Naraganti Achammagaru* v. *Venkatachalapati Nayanivaru* (5), the effect of the renunciation by the elder brothers of Kuppi had to be considered. At page 260 their Lordships say: "When in 1831 he recommenced proceeedings, the Palayam was in the hands of a person who established title as a member of a family, and consequently those proceedings failed. There was neither *a hostile* possession nor a recovery. When Kuppi Naidu again asserted his claim, the Palayam was in the possession of a widow whose possession was *to this extent* hostile to the family that she denied any right in the members as co-parceners with her husband." Again at p. 261: "Therein he maintained that in virtue of a family arrangement he was to be the successor of Vengamma, the 7th Poligar. He claimed therefore to occupy the same position which had been occupied by the 7th Poligar—a position consistent with the enjoyment by the other members of the family of their co-parcenary interests in the estate represented by their enjoyment of maintenance and possibility of succession. All that it was necessary his brothers should abandon to entitle him to that position was their *preferential* right to the *immediate enjoyment of the dignity* of Palaiyagar and actual possession of the estate. Looking to the claim advanced by Kuppi Naidu and supported by his son, there is no evidence of any *more extensive abandonment* of their right by the elder brothers of Kuppi Naidu, unless it be found in the karars executed by two of them." Again "We find no evidence to show that Kuppi Naidu or his son, who obtained the estate as the joint property of the family, at any time asserted a title to the Palayam as their separate property in virtue of the litigation in which they were engaged." At page 263: "So construed, the instrument is very far from being a disavowal of all right to the Palayam property as a co-parcenary estate. Krishnappa intended no more than that he should stand in the same relation to Kuppi Naidu as that in which he would have stood to the son of the seventh Poligar, had a son been born to that Poligar. In favour of Kuppi Naidu, but in favour of no other person, Krishnappa consented *pro hac vice* to postpone his claim to occupy the dignity and estate of the Poligar. If, by the custom obtaining in the family, the dignity and estate passed from father to son, in assenting to the succession of Kuppi Naidu, Krishnappa must be taken to have assented also to the devolution of the Palayam to the lineal

descendants of Kuppi Naidu ; but, unless a construction is placed on the terms of the Karar, of which they do not naturally admit, it cannot be held that he intended to renounce all claim on the part of himself and his heirs to the succession, if it opened by reason of the extinction of the line of Kuppi Naidu * *

* * * * * *

The conduct of Krishnappa and his descendants is not inconsistent with the construction we have placed on that instrument. Until the line of Kuppi Naidu was extinct, Krishnappa and his descendants had no occasion to re-assert their claims, and, when that event occurred, a claim was immediately preferred on behalf of the appellant."

At page 264 referring to *The Padamatur case* (12) they say :

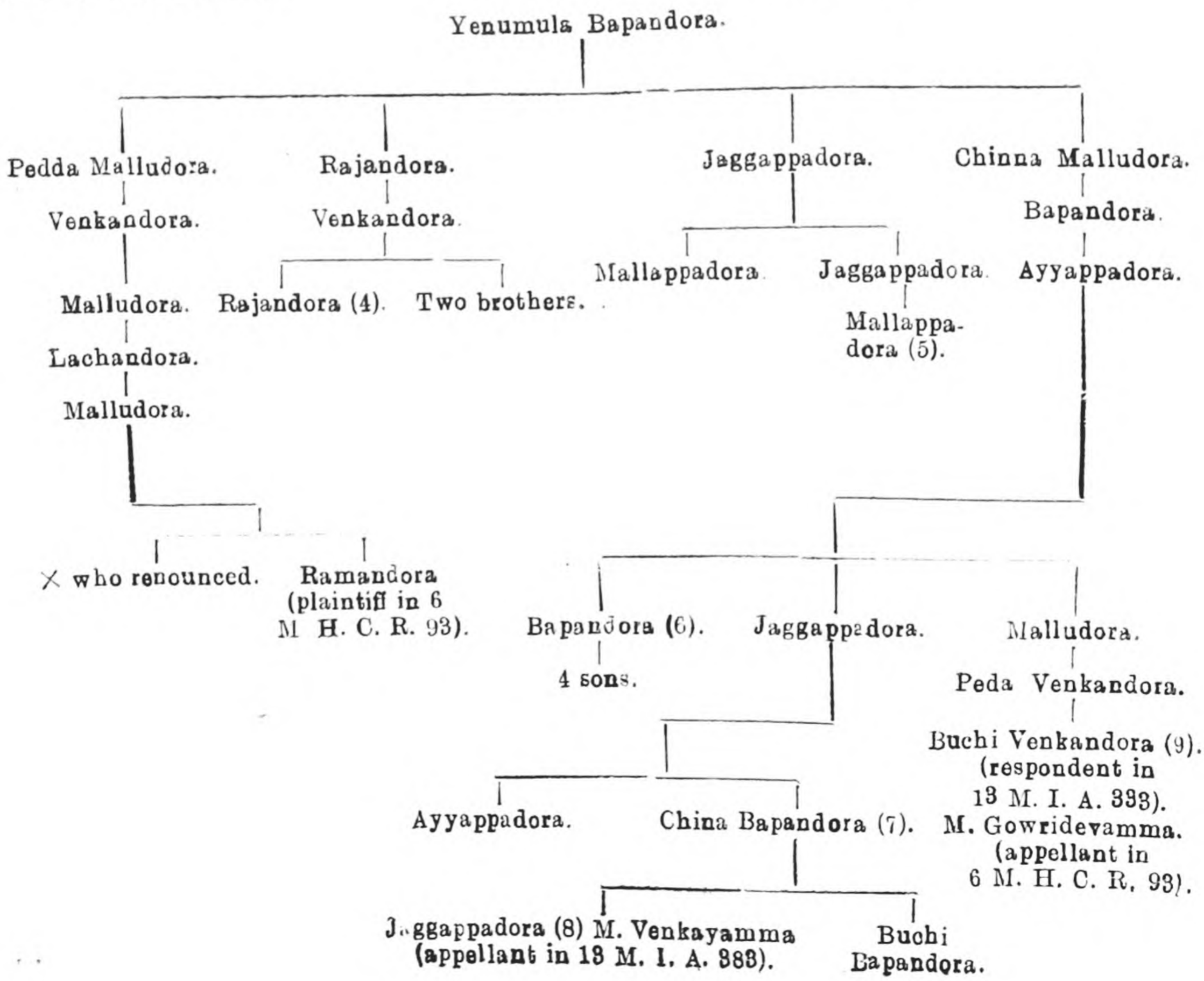
"The decision in the Padamatur case, which the Judge has regarded as governing this case, proceeds on a renunciation differing widely in its terms from those of the Karar of July 1st, 1831, and executed under circumstances altogether dissimilar. Muthu Vaduganatha Tever, who conceived he would succeed to a large Zemindari, renounced for himself and his off-spring all interest in the small and dependent Palayam of Padamatur, and undertook the payment of all debts contracted by him as Paliayagar, thus manifesting an intention to separate himself and his descendants completely from the Palayam."

The above quotations from *Naraganti Achammagaru* v. *Venkatachalapathi Nayanivaru* (5) show that :

(1) When the individuals of a line renounce their right to an impartible estate and those of another take, by a family arrangement, the persons who take the estate by the arrangement, do so by an act not hostile in the sense that the members of the former line cease to be members of the joint family but hostile only to the extent that as long as the latter line lasts the members of the former line cannot claim it. When it fails, the members of the former line or other lines of the family can claim the estate by survivorship against a female heir (claiming by succession strictly so-called) unless the renunciation amounted to a 'complete separation' or a 'more extensive abandonment.' (2) A litigation as to the right to hold the Zemindari between two such lines does not necessarily effect such a 'complete separation.' (This follows from the decision in *Naragunti Lutchmeedavamah* v. *Vengama Naidoo* (4)) and *Stree Rajah Yanumula Venkayamah* v. *Stree Rajah Yanumula Boochia Venkondora* (10).

The cases as *Stree Rajah Yanumula Venkayamah* v. *Stree Rajah Yanumula Boochia Vankondora* (10) and *Gavuridevamma Garu* v. *Ramandora Garu* (11) relate to the Totapalli estate. The following pedigree (taken from *Gavuridavamma Garu* v. *Ramandora Garu* (11)) gives the history of the family.

(12) (1876) 1 Mad. 312.



It is unnecessary to refer to the facts in great detail. It is only important to note that (1) the 5th Mansabdar (Mallappa) fell out with his overlord having joined the people called 'Desastulu' and caused much disturbance. Thereupon Bapandora (6) offered his services to turn out the said Mallappadora and accordingly drove him out and took possession of the estate, as 6th Mansabdar. Here is a distinctly hostile act. It was held that Bapandora, the 6th Mansabdar took possession of the estate for the undivided family and that when the 8th Mansabdar Jaggappa died, Buchi Venkandora (9) took the estate by survivorship against Venkayamma, the widow of Jaggappa. (2) The decision of the Judicial Committee was followed and the principle therein again applied by the High Court in *Gavuridevamma Garu* v. *Ramandora Garu* (11), when the 9th Mansabdar died leaving a widow Gouridevamma and the plaintiff who belonged to the eldest line (superseded for a long time) got it by survivorship against the widow. It is significant that the common ancestor of the propositus and the claimant was their ancestor in the sixth line of ascent.

The learned Vakil for the respondent conceded with reference to the above groups of cases that the supersession of one line by another may be consistent with either the continuance of the joint family, only an abandonment of the headship of the family or the right to hold the estate being intended or (2) a more extensive abandonment involving complete separation between the two lines, but he argued that the latter view is the *prima facie* view and the burden of proving that all that happened is the former alternative is on those who allege it. Assuming that this contention is correct and without deciding a rule of burden of proof, no question of burden of proof arises where all the facts are known. In the present case, the High Court found in 1877 upon the evidence, that the supersession of the senior line was by a family arrangement due to the weak intellect of Ramappa and the infancy of his son. It is true that possession of the junior line since 1820 was adverse to the senior line in the sense that so long as Annadana I had male descendants, Ramappa's descendants could not claim the estate. This conclusion of the Courts in 1877 is perfectly consistent with the law as expounded in *Naraganti Achammagaru* v. *Venkatachalapati Nayanivaru* (5). The Courts did not decide that the succession of Annadana was adverse in the larger sense so as to effect a separation between the two lines. Such a point did not then arise and the Courts could then express no opinion on it.

It is not possible in 1920 to get evidence of what happened in 1820 and the view of the High Court in 1877 (fifty years earlier) is the view from which one would start. But there are other indications in the record that this is the correct view and the consciousness of the members of the family after 1820 was that the joint family continued. This Jaghir was enfranchised by the Inam Commissioner in 1867. The proceedings before the Inam Commissioner consist of a statement by the holder of the Inam (generally described in the proceedings as the Inam Statement) and of a Register (known as the Inam Register) prepared by the Commissioner. These proceedings were described by the Judicial Committee of the Privy Council in *Arunachellam Chetty* v. *Venkatachalapathi Guruswamigal* (13), as a great act of State and in this Presidency are valuable as throwing important light on the titles to inams. The judgment of Mr. Parker in the suit of 1875 shows that a genealogical table filed before the Inam Commissioner and the endorsement given by him were exhibited before him in that suit (Exs. I and D.) In the present case, the Inam Register is filed as Ex. III. The heading of column 19 is "surviving heirs of the present incumbent." The "present incumbent' in it was Latchmanappa II in the pedigree. Seven persons are shown as heirs in this column. I have shown all these seven in the pedigree with the sign R—1. R—2, etc., opposite to their names. The first one is the son of Latchmanappa II; the 7th is in a line younger than the incumbent s heir. The other five (2 to 6) all belong to the senior line of Ramappa. In what sense could these be 'heirs' except on the footing that all the members are members of an undivided family? It is noticeable that no female (such as the wife or wives of the incumbent) who would be heirs if the

13. (1920) 43. Mad. 253 (263)=37 M. L. J. 460 =24 C. W. N. 249=22 Bom. L. R. 457=17 A.L.J. 1007=26 M. L. T. 479=(1919) M. W. N. 850 =46 I. A. 201=53 I. C. 288. P. C.

second branch was separate was mentioned in the column 19. Again, in Mr. Parker's judgment para. 8, dealing with the question of the legitimacy of Annadana II (raised in that case) he says :

"If plaintiff's minor son was not legitimate, defendant was the *next heir* according to the ordinary rule of succession."

This can be only on the footing that he was not divided from the junior branch. It is significant that in the plaint of that case (*vide* Ex. B) though the defendant was described as a "distant *gnati* of my husband" he was not alleged to be separate or divided. It may also be observed that, when Ramappa was superseded by Annadana, there were two younger brothers. If, as contended by the learned Vakil for the respondent, the supersession amounted to a separation, what is the exact nature of the separation—is it that Annadana and his line became separate from the 3rd and 4th brothers as well? If so, why should it be so? What act of renuniciation on their part or act of hostility against them resulted in their separation? Their position is exactly that of Gopal (last brother of Kuppi) in the pedigree of *Naraganti Achammugaru* v. *Venkatachalapati Nayanivaru* (5) whose claim was held by the High Court to be better than Achamma's. though it did not prevail against Venkatachalapati descendant of the eldest brother of Kuppi. If it is contended that only the elder line became separate, this involves the position that Annadana's holding was on behalf of the whole joint family—exactly like Bapandora's action in *Stree Rajah Yanumula Venkayamah* v. *Stree Rajah Yanumula Boochia Venkondora* (10) the object of the transaction being to substitute one head for another and not to separate any line or lines of the family. On this part of the case my conclusion is that, by the supersession of the senior line in 1820, it did not become separate but continued to be part of the undivided family. This seems to be the conclusion of the learned District Judge at the end of para. 47. In para. 48 also he observes that nothing certain can be said about the relations of the two branches in those early days. *Prima facie* they were undivided and it is for those who allege separation to prove it.

If there was no separation in 1820, was there a separation in 1872 or afterwards as shown by the conduct of the family? Before discussing the evidence bearing on this part of the case, I will first refer to decisions dealing with the nature of an impartible estate and as to how one branch can get an exclusive right to it or one branch can completely lose its right in respect of it.

Following the elaborate discussion of these cases by Lord Dunedin in the *Baijnath Prasad Singh* v. *Tej Bali Singh* (2) the cases may be now grouped into four heads.

(*a*) Cases up to and prior to *Sartaj Kuari* v. *Deoraj Kuari*.

(1) *Katama Natchiar* v. *The Rajah of Shivagunga* (1).

(2) *Stree Rajah Yanumula Venkayamah* v. *Stree Rajah Yanumula Boochia Vankondora* (10) and *Sri Rajah Yanumula Gavuridevamma Garu* v. *Sri Rajah Yanumula Ramandora Garu* (11) (discussed by me above).

(3) *Maharani Hiranath* v. *Baboo Ram Narayan Singh* (14).

(4) *Chintamun Singh* v. *Nowlukho Konwari* (15) not discussed by Lord Dunedin.

(5) *The Padamattur case* (12).

(6) *Doorga Persad Singh* v. *Doorga Konwari* (16).

(7) *Vadrevu Ranganayakamma* v. *Vadrevu Bulli Ramaiya* (17). This decision of the Judicial Committee is discussed in Mayne's Hindu Law, S. 542 but referred to in all former editions as unreported (not discussed by Lord Dunedin).

(8) *Naraganti Achammagaru* v. *Venkatachalapati Nayanivaru* (5) and *Naraguntу Lutchmedavamah* v. *Vengama Naidoo* (4) (discussed by me above).

(9) *Raja Rup Singh* v. *Rani Baisni* (18).

(*b*) *Sartaj Kuari* v. *Deoraj* (3) and cases following its line of thought.

(1) *Sartaj Kuari* v. *Deoraj, Kuwari* (3).

(2) *Sri Raja Rao Venkata Surya Mahipati Rama Krishna Rao Bahadur* v. *The Court of Wards* (19).

(3) *Rama Rao* v. *Rajah of Pittapur* (20).

(4) *Jeypore case* (21) (Following *Second Pittapur case* (20) (not discussed by Lord Dunedin).

(5) *Bettia case* (22) referred to as unreported by Lord Dunedin in *Baijnath Prasad Singh* v. *Tej Bali Singh* (2).

(*c*) Cases after *Sartaj Kuari* v. *Deoraj Kuari* (3) but keeping up the old line of thought except as to alienation.

(1) *Jogendro Bhupati Hurrochundra Mahapatra* v. *Nityanund Mansingh* (23).

(2) *Ram Nundun Singh* v. *Janki Koer* (24).

(3) *Udayarpalayam case* (8).

(4) *Muttuvaduganadha Tevar* v. *Periasami Tevar* (25).

(5) *Parbati Kunwur* v. *Chandarpal Kunwar* (26) (Lord Collins).

(6) *Tara Kumari* v. *Chaturbhuj Narayan Singh* (27).

(*d*) (1) *Baijnath Prasad Singh* v. *Tej Bali Singh* (2).

(2) *Shiva Prasad Singh* v. *Madhab Chowdhury* (28) (applies *Baijnath Prasad Singh* v. *Tej Bali Singh* (2).

I may say that in making the above classification I have omitted (1) cases under the Dayabhaga law such as the *Tipperah case*(29),Lord Dunedin explains this case on the ground that it was on the Dayabhaga law, in *Baijnath Prasad Singh* v. *Tej Bali Singh* (2): (2) Cases like *Rajah Suraneni Venkata Gopala Narasimha Row* v. *Rajah Suraneni Lakshma Venkama Rao* (30) and *Sri Raja Lakshmi Devi Garu* v. *Sri Raja Surya Narayana Dhattaazu Bahadur Garu Surya* (31) as they relate to partible Zemindaries and they were discussed by Lord Dunedin in *Baijnath Prasad Singh* v. *Tej Bali Singh* (2). I will refer to the latter again on the question of separation. Prior to the *Second Pittapur case* (20) which was supposed to negative any rights to maintenance on the part of junior members of a zamindari (except a brother) even if never divided from the Zamindar, the line of thought of the (*a*) and (*c*) groups of cases was followed by the Madras High Court in awarding maintenance to junior members of the family (when not separated or divided) even when somewhat or very remote:—(1) *Visvanathaswamy Naicker* v. *Kamu Ammal* (32) (Bodinayakanur), (2) *Tirumal Rao Saheb* v. *Rangadani Rao Saheb* (33) (Arni Jaghir), (3) *Venkatachella Reddiar* v. *Venkatachella Reddiar* (34) (where argument exactly similar to that which was supposed to be the second ground of decision in the (5) *Second Pittapur case* (20) was rejected by the High Court.)

I have placed the case of *Baijnath Prasad Singh* v. *Tej Bali Singh* (2) in a separate category, as it must be admitted that the impression created in India by the *Second Pittapur case* (20) and the *Bettia case*, *viz.*. that in an impartible estate, no co-parcenary exists—this is the argument of the appellants' Counsel before the Judicial Committee in *Baijnath Prasad Singh* v. *Tej Bali Singh* (2) even for purposes of succession and maintenance, has been removed and the angle of vision in (*a*) and (*b*) group of cases is *restored*. At the time the District Judge decided the present case, *Baijnath Prasad Singh* v. *Tej Bali Singh* (2) had not been decided.

The effect of the decisions is that (1) if an impartible estate is the joint property of a family, the junior members have a right in it which, however unreal it may be for the purposes of actual enjoyment and preventing alienation, is still real and gives a chance of succession by survivorship. (2) The cases of *Sartaj Kuari* v.

14. 9 B. L. R 274=17 W. R. 316.
15. (1875) 1 Cal. 153=2 I. A. 263=24 W. R. 255=3 Sar. 537=3 Suther. 204.
16. (1878) 5 I. A. 149=4 Cal. 190=3 C. L. R. 31=3 Sar. 827.
17. 5 C. L. R. 439 (P. C.).
18. (1885) 7 All. 1=11 I. A. 149=(1884) A. W. N. 246=4 Sar. 533.
19. (1902) 29 Cal 828=29 I. A. 178=7 C. W. N. 57=4 Bom. L. R. 664.
20. (1918) 41 Mad. 778=45 I. A. 148=35 M. L. J. 392=24 M. L. T. 276=16 A. L. J. 833=28 C. L. J. 428=5 Pat. L. W. 267=20 Bom. L. R. 1056=23 C. W. N. 173=(1918) M. W. N. 922 =47 I. C. 354 (P. C.).
21. (1919) 24 C. W. N. 226=37 M. L. J. 188 =21 Bom. L. R. 930=10 L. W. 436=17 A. L. J. 1011=(1919) M. W. N 824=31 C. L. J. 91=52 I. C. 333 (P. C.).
22. (1919) 24 C. W. N. 857=28 M. L. T. 105 =12 L. W. 319 (P. C.).
23. (1891) 18 Cal. 151=17 I. A. 128 (P. C.)
24. (1902) 29 Cal. 828=29 I. A. 178=7 C. W. N. 57=4 Bom. L. R. 664.
25. (1896) 19 Mad. 451=23 I. A. 128=6 M. L. J. 149=7 Sar. 83 (P. C.)
26. (1909) 31 All. 457=36 I. A. 125=10 C.L.J. 216=13 C. W. N. 1073=6 A. L. J. 767=11 Bom. L. R. 890=12 O. C. 304=19 M. L. J. 605=4 I. C. 25 (P. C.).
27. 143 Cal. 179.
28. 1922 P. 529=1 Pat. 387.
29. (1862) 12 M. I. A. 523=12 W. R. (P. C.) 21=3 B. L. R. (P. C) 13.
30. (1863) 13 M. I. A. 113=3 B. L. R. 41=2 Suther. 265=12 W. R. (P. C.) 40.
31. (1897) 20 Mad. 256=24 I. A. 218.
32. (1913) 24 M. L. J. 271=21 I. C. 724.
33. (1912) 23 M. L. J. 79=12 M. L. T. 245=(1912) M. W. N. 790=15 I. C. 412.
34 (1909) 20 M. L. J. 394=7 M.L.T. 31=4 I. C. 302.

Deoraj Kuari (3) which, has stood "too long to be now touched" and *First Pittapur* case (19) must be confined to alienation and cases (3) (4) and (5) in (*b*) group may be ignored. The *First Pittapur* case resulted in the Madras Presidency in special legislation—in Madras Act II of 1904 which prohibits alienation so as to affect a successor.

Is it to be said then that an impartible Zemindary can never be the separate property of its holder and can never descend to a Hindu female by heirship (as opposed to survivorship)? The answer is 'no' for an impartible Zemindari (1) may be the self-acquired property of a particular member and therefore his separate property as in the *Sivaganga* case or (2) might be renounced by a member of the family as in the *Padamatur* case so that he becomes completely separate from other members of the family *quoad* that property or (3) might be wholly allotted to a member in a family partition dealing with it and other properties of the family as in the case in *Vadrevu Ranganayakamma* v. *Bulli Ramaiya* (17). I do not claim to exhaust the modes in which it may become the separate property of a member. These only illustrate the principle that the right to it may be renounced by members of the family becoming separate in some manner known to law—by actual partition or otherwise—provided the transaction, either expressly or impliedly, was meant to give up the chance of succession to the impartible property. I do not mean it should make special reference to the impartible property. It may be specially with reference to it or generally with reference to all the property of the family so as to include the impartible property of the family. It may be inferred from conduct provided the intention to separate covers the impartible property also. Examples of such general separation occur in *Tara Kumari* v. *Chandarpal Kunwar* (1) and *Gurusami Pandiyan* v. *Pandiya Chinna Thambiar*(1) (a decision of the Madras High Court before *Baijnath Prasad Singh* v. *Tej Bali Singh* (2) which is now under appeal to the Privy Council). This involves the position that members of a family may be divided as to the partible properties and undivided as to the impartible estate. That members of a family may be divided as to some properties and undivided as to others was decided in *Muthusami Mudaliar* v. *Nallakulantha Mudaliar* (35). Such a state of things is inevitable in the case of a family having an impartible estate as one of its possessions. The presumption that if there is some division, the status of the family should be regarded as divided unless the contrary is shown, *i.e.*, that some properties were reserved as the joint family properties in respect of which the undivided status continues, must be very weak in the case of a joint family with an impartible estate as one of its possessions. This is illustrated by the case in *Raja Yaralagadda Mallikarjuna Prasada Nayadu* v. *Raja Yarlagadda Durga Prasada Nayadu* (36). The brothers of the Zemindar of Devarakota (*alias* Challapalli) sued him for partition. As to the Zemindari they failed on the ground that it was impartible: *Mallikarjuna* v. *Durga* (37). Then they sued for maintenance. It was contended that the family became separate by the former suit for partition. Their Lordships of the Judicial Committee in repelling the contention say:

"Their Lordships fully agree with the High Court that the family of the parties has not been a divided one in consequence of proceedings in the prior suit to which reference has already been made. It is true that, in that suit, a decree was made for the partition of a portion of the family property, but it was a very inconsiderable portion and *had no relation what ever to the Zemindari estate.*"

In my opinion these last words furnish the true test. Even where there is some kind of separation (by partition or conduct) has it any relation to the impartible estate? If it has, the impartible estate is the separate property of the holder. If not, it is still the joint family property of the family. To hold otherwise is to allow the most anamolous results. For instance, where a family has both partible and impartible properties, if the holder of the impartible estate refuses, however wantonly, to divide even the partible properties or the members do not agree as to the manner of division and thus the junior members are driven to a Court to seek their remedies in respect of the partible properties, the result of following a different rule from *Raja Yarlagadda*

35. (1895) 18 Mad. 418.
36. (1901) 24 Mad. 147=27 I. A. 151=10 M. L. J. 294=2 Bom. L R. 945=5 C. W. N. 74.
37. I. L. R. 13 Mad. 406=17 I. A. 139 (P. C.

Mallikarjuna Prasad Nayadu v. *Raja Yarlagadda Durja Prasad Nayadu* (36) is to say that the junior members have lost all rights of maintenance from or succession by survivorship to the impartible estate. I think it also follows from these considerations, though it does not arise in this case, that the holder of an impartible estate cannot, by giving a registered notice to the junior members that he intends to be divided in status as regards all the partible properties and impartible properties put an end to the rights of junior members over the impartible estate. Such a notice destroys the undivided status only as to the partible properties—the principle being one member cannot compel another member of the joint family to continue undivided when the latter wishes to divide and is willing to *share the property*. In *Girja Bai* v. *Sadashiv Dhundiraj* (38) his Lordship Right Honourable Mr. Ameer Ali refers to Harihar's "intention to *separate himself and enjoy his share in severalty*, by the notice of 1st October 1908." I do not think that the correctness of *Raja Yarlagadda Mallikarjuna Prasad Nayadu* v. *Raja Yarlagadda Durja Prasad Nayadu* (36) has been affected by the decision in *Girja Bai* v. *Sadashiv Dhundiraj* (38). But a junior member may, while dividing himself as to partible properties, also separate himself even as to the impartible estate though he may not get its equivalent or may get only an inadequate *quid pro quo* for the renunciation, from motives of his own. A good example of this is the *Padamatur* case where a member renounced the right to the estate thinking that he was going to become the Zemindar of a much larger estate (the Shivaganga) and though he failed to get the latter estate, it was held he had no right to the former.

In the present case, the Jaghir was the ancestral property of Lakshmanappa I the (29th Jaghirdar). In col. 18 of Ex. III it was stated that he was the 28th, male descendant in a direct line from the original grantee. In 1820, it was the joint family property of himself and his sons. I have already shown that the supersession of the senior line merely amounted to a change in the headship of the family and not to a separation of the line of his first son from the rest of the family which then consisted of a third son and fourth son also. Is there anything that happened since to constitute separation? The litigation of 1875 in which the headship of the family was in question cannot have that effect. (This follows from *Naraganti Achammagaru* v. *Venkatachalapati Nayanivaru* (5) and *Raja Yarlagadda Mallikarjuna Prasad Nayadu v. Raja Yarlagadda Durja Prasad Nayadu* (36)). What else is there to constitute separation? The District Judge thinks the following points were established in this case and prove division in status. They are (1) complete separation in food and residence (2) no community of estate (3) no community of household worship and ceremonies (4) the action of defendants on certain occasions as if they were not members of a joint family. Of these, one would suppose item (3) follows item (1) and both may be discussed together.

I regret I am not able to agree with the learned District Judge or to follow his line of thought in paragraphs 47 to 95. He admits in para. 52 that, since the litigation of 1875, the relations between the families have been strained. That circumstance is enough to explain all the facts found by the District Judge. If his conclusion is correct, if the holder of an impartible estate, owing to misunderstandings or otherwise, only takes care not to live in the same roof with the junior members and not to be on social terms with them, they lose all rights to maintenance and division. Even in a family having partible properties only, joint residence is scarcely to be expected in these days, except in the case of brothers. The remoter the relationship, the less likely is joint residence. In the case of ordinary families, long separate residence will connote separation in status —the members being equivalent in social position. But in the case of the holder of an impartible property and the junior members of his family, the inequality in wealth and social position is so great that no such holder will ever permit the junior members to live with him in the same roof or assign his palace as their residence during his absence or move with them on a position of social equality in public functions—except, perhaps, in the

38 (1916) 43 Cal. 1031, (1045)=43 I. A. 151=20 C. W. N. 1085=14 A. L. J. 822=20 M. L. T. 78=12 N. L. R 113=(1916) 2 M. W. N. 65=18 Bom. L. R. 621=4 L. W. 114=24 C. L. J. 207=31 M. L. J. 455=37 I. C. 321 (P. C.)

case of brothers, so long as their relations remain cordial. One's experience shows that the feelings, between a holder of an impartible estate, and his junior members, even when not openly hostile, are normally strained and always in a state of tension. The lucky holder of the estate thinks that the junior members are jealous of him, which is very often true. Even when they are not, he imagines that they must be so. He keeps them at a distance. He thinks socially they are his inferiors and his dignity suffers if he moves on terms of equality with them. This is the normal history of Zamindars and their junior members. Much more accentuated is this state of things when there are previous litigations between them always bitterly fought out. With these general remarks, I proceed to consider the particular facts in this case.

1. *Residence.*—The village of Chinna Tirupati was the chief place in the Jaghir. There was an ancestral palace at the place (see Ex. B). So late as 1878, in the Manual of the South Arcot District at p. 374 we have "The cheif village in it, where he resides, is called Chinna Tirupati." It is also noticeable that in the whole litigation of 1875 (Exs B and C) the Jaghir itself was described not as the Jadaya Gounden Jaghir as it is now known, but as the Palayapat of Chinna Tirupati Hill. It appears from Ex. B that the marriages in the family usually take place there though the marriage of Unnamalai Ammal (mother and guardian of the plaintiff in the suit of 1875) had been celebrated, for special reasons, at Mundiyoor. After that marriage, Lakshmanappa II (who was then Jaghirdar) was living with his newly-married wife at Pottiyam, where Annadana I had been for some time living till 1860. But it is also clear that the palace at Chinna Tirupati must have been kept up as the family residence, for, after 1860, Lakshmanappa II was living at Pottiyam and Chinna Tirupati, and he died of cholera in 1866 at Chinna Tirupati. From 1866 to 1871, the family must have continued there and the relations between the defendant's branch and them must have been very cordial for, it is said, that Lakshmanappa (defendant's grandfather), "held the infant Jaghirdar (Annadana II aged three) on his knees when the installation ceremony was performed and for five years thereafter acted as his guardian" (*Vide* para. 47 of the Judge's judgment). When misunderstandings arose in 1872 she removed with the minor, to 'proper places' (see the plaint in Ex. B) probably Pottiyam, for it is admitted by both sides (see para. 49 of the Judge's judgment) that Annadana II lived at Pottiyam from 1875 till his death in 1900. From 1900 the last Jaghirdar was living at Akkarapalayam in order that facilities might be afforded for the education of the last Jagirdar. Now, I do not see any sign of intention to separate *quoad* the impartible estate in any of these changes of residence. If Annadana I had begun to live in Pottiyam prior to 1860, that must have been because Chinna Tirupati is on the hills (see P. W. 4) and Pottiyam is lower down or because he had several wives or for some other similar reason. Certainly there is no evidence that Annadana I removed to Pottiyam in token of separation from the other members of the family. Nor, can it be said that merely by removing his residence from the ancestral place, the holder of an impartible estate can effect separation from the other members *quoad* the impartible estate, so as to deprive them of the right to maintenance or the chance of succession. If this is the law, no junior member in India can be getting any maintenance. As to the ancestral palace at Chinna Tirupati, I may first observe that the so-called palace was a mere thatched building. The evidence of plaintiff's witnesses about it is indefinite. They are either not old enough to give evidence or not willing to give information for we find some of them denying admitted facts.

(His Lordship then discussed the evidence and proceeded as follows:—

My conclusion from the whole evidence I have set forth is that at Chinna Tirupati there is a block of buildings known as the palace little deserving that name. Relatively to the rest of the habitations of that village the name was perhaps justified. From 1820 onwards, presumably, this block of buildings was occupied by various branches of the Jaghirdar's family. The best portion was probably in the occupation of the Jaghirdars until they finally left it. A building was used as the Jaghir office or Kutcheri. After the Jaghirdars have finally left the place, this Kutcheri has fallen into ruins. The rest of the buildings is in the occupation of the junior

members of the family. It may be that separate branches are occupying separate portions of the block. It is not that I differ from the District Judge as to the actual facts of residence. I agree with him in thinking that since 1875 there has been no joint residence and the Kutcheri has fallen into ruins. But I do not agree with the District Judge in making a point against the defendant that the Kutcheri was not kept up and assigned to the defendant's branch as a residence. In the first place it was only intended for an office and not for living in. Secondly, the defendants had their old place of residence and continued to live in it and there was no need to enlarge it. Thirdly, no other building except the Kutcheri had fallen into ruins and all the buildings are now in the occupation of the junior members including what used to be occupied by the Jaghirdars before 1875. The junior members thus seem to have had an addition to their total accommodation, resulting in some adjustments and changes. Thus the junior members have neither been driven away from the ancestral house nor left it, but had it added to, by the abandoned residence of the Jaghirdars. This is entirely unlike the facts in *Tara Kumari.* v *Chaturbhuj Narayan Singh* (6) where the junior member built a new pucca house, established a Tulsi Pinda there, removed his family to it.....and established a separate Thakurbari in it. I will refer to this case again. In the present case, no junior member has changed his residence or left the ancestral home permanently so as to indicate separation.

After the above detailed reference to the evidence about the residence, I do not think it necessary to deal with the evidence about the household worship and the car festival. I will only observe that in Southern India there is no such thing as a private temple or a Thakur or idol or deity in a house. Except in a few orthodox houses of the higher castes which are daily diminishing in numbers, no such thing as household worship exists. In the houses where it is still performed it is of a routine character and only the inmates of the house take interest in it, if at all. I have never known in my experience of Southern Indian life that relatives (even not resident in the house) participate either in such household worship or public worship (such as a car festival) as a token of *undivided status.* Nor have I been referred to any decisions where such facts are used as tests of division or non-division. Nor is there any evidence in this case tending to show such a custom, as participation by members of a joint family (even when they do not reside in the same house) in household worship or car festivals. All that one could expect is that on occasions of marriages and other festivities and funerals, kinsmen with whom the relations are cordial are expected to attend and, conversely those with whom the relations are unfriendly *do not.* If the Jaghirdar has got some functions to discharge *qua* Jaghirdar at the annual car festival, I do not see why the junior members, who have no such functions to discharge, should participate in them. As to attendance at the festival, they may attend as sight-seers or not as they choose.

2. I now take up the second of the District Judge's items.—No community of property. It is admitted that, apart from the Jaghir, there is no property in existence which can be regarded as the joint family property of the family. The properties in Schedules B, C and D are the separate acquisition of the last Jaghirdar or of his predecessor and cannot be joint family properties in which the defendant can claim a share unless they had been incorporated with the Jaghir. Even if they were acquired out of the income of the Jaghir (we do not know how they were acquired), as the income of the Jaghir is at the absolute disposal of the Jaghirdar on account of its impartible nature, they are the acquirer's separate property without such incorporation. There is no evidence to prove incorporation. Only if property that was acquired by Lakshmanappa I who died in 1822 is in existence, can we expect any community of interest outside the Jaghir. Such being the case, I am unable to follow the learned Judge's remark in paragraph 60. He admits that the reply of the defendant to his query was a correct rendering of the law and yet makes out a point against the defendant. The same remarks will apply to new residences built by the Poligars at Pottayam and Akkarapalayam (see paragraph 61 of the Judge's judgment) and to the respondent's Vakil's contention based on the absence of joint dealings. If the family had joint partible properties of considerable value or yielding considerable in

come as in *Gurusami Pandiyan* v. *Pandia Chinna Thambiar* (7), one may expect joint dealings. To raise these points is to overlook the impartible nature of the only joint family property and the fact that it is at the absolute disposal (since *Sartaj Kuari* v. *Deoraj Kuari* (3), of its owner.

3. It is said that the conduct of Tirumalappa, defendant's father in taking the cause of the ryots in some disputes between them and the Jaghirdar when the latter attempted to change the land tenure is not of one having an interest in the Jaghir. Here again, it seems to me that the nature of the estate is overlooked. The interest of a junior member in an impartible estate, from the point of view of present enjoyment, is illusory and unreal. It is real only in the sense of a remote chance of succession. But, apart from this, the bitter enmity between the Jaghirdar and Tirumalappa is enough to explain those events.

Again it is said that in Ex. F a petition filed by Tirumalappa for the guardianship of the Jaghirdar in 1901 (who was then a minor) he did not state that he was a senior member of the joint Hindu family to which the minor belonged. Now, Ex. F was prepared according to the requirements of the Guardians and Wards Act VIII of 1890 (S. 10) and had to allege the petitioner's fitness for guardianship of the minor. Now, while it is true that Tirumalappa was the next heir to the Jaghir (on the defendant's case) on the ground of being senior by lineal primogeniture, it does not follow that he was competent to be a guardian. The fact is irrelevant in an application for guardianship. Very often the nearest heir (on the footing that the family is separate) would be older in age and better experienced in life and worldly affairs than the person entitled by lineal primogeniture, and the fact that the petitioner was the next heir was, if at all, a circumstance disqualifying him for guardianship. This was the very ground on which his petition was opposed. In Ex. G, his petition was opposed by Konappa (who would be the nearest male reversioner to the estate after the mother if the property were separate) on the ground that the petitioner was the nearest reversioner (see para. 3) (*see also* Ex. E—a counter-petition by plaintiff). This can be correct only on the footing that the family was joint. I do not say that the statement in Ex. G binds the plaintiff but it shows the consciousness of a member of the family who is certainly not interested in the defendant; and it is because of this document that perhaps, he does not figure as a witness in the case. In my opinion the allegation in paragraph 7 of Ex. F that "petitioner is a near relation of the minor" was all that was relevant and the non-mention of more (taken in the light of Ex. G) cannot be used as a point against the defendant.

I am therefore of opinion that all the points relied on by the District Judge and summed up by him in paragraph 62 do not make out a separation *quoad* the impartible estate. It is a matter for observation that the points relied on are negative pieces of evidence. It cannot be said that either on the Jaghirdar's side or on the defendant's side any one did any positive act with a view to separate.

On the footing that the plaintiff has made out a *prima facie* case by proving the facts noted in paragraph 62, the learned Judge proceeded to consider certain points relied on by the defendants in rebuttal of the plaintiff's case. In the view I have taken, *viz.*, that the plaintiff on whom the burden of proving separation lies has failed to make out a *prima facie* case, I need not discuss these points which are stated in paragraph 64 especially, as to the first two of those, as they are merely negations of what the plaintiffs claim to have proved. But, as regards the 3rd and the 4th points, I wish to make a few observations. It is said that the junior branches of the family have divided *interse* and therefore they are not joint with the Jaghirdar *quoad* the impartible estate. Assuming that the junior branches are divided *inter se* in respect of their private dealings and other properties, it does not follow that they are divided either between themselves or from the Jaghirdar's line *quoad* the impartible estate. To assert such a proposition is to assert that a family cannot be divided partly (*i.e.*, as to some properties) and undivided as to others —a proposition which is not always true even when no impartible property is in question and which is always false when such a property is one of the properties of the family. The anomaly which such a view leads to is this—However numerous

the junior branches of a family might become they should not divide their partible properties and become separate as to their personal acquisitions but must continue to be joint, if they wish to preserve their rights of maintenance and succession as against the impartible estate. On this ground also I refuse to discuss the evidence on this heading which is contained in the evidence of P. Ws. 6 and 8. The former says that Tirumalappa and Konappa would go down the hills and sell their goods separately and purchase salt and cloths separately. P.W. 8 says that he and the others have no lands in common in this Jaghir of shifting cultivation in lands.

The next point relates to exemption of the defendant and other members of his family from payment of tribute to the Jaghirdar. In my opinion this is a point established in the case in favour of the defendants. P. W. 1 says in cross-examination :—

"To my knowledge 1st defendant cultivates some lands in the hills ; he does not pay any poll-tax. Lands don't pay any rent. Members of the Poligar's family are exempt from the payment ofthe poll-tax and also from the plough-tax. That is the family privilege. They or any tenant can bring under cultivation any extent of land they please without limit."

The defendant claims that this exemption allowed to members of the family was in lieu of maintenance. Now, when we remember that the net income of the family is Rs. 1,300 (see end of plaint) in 1915—1916 and the share of a person in the position of the defendant (if the property is partible)—Omitting all extinct branches and seeing that Kannappa, P.W. 8 in a higher line and D.W. 2 in the next line and the defendant's two brothers are alive—is one twenty-fourth or property yielding an income of Rs. 54, if he is to be awarded *maintenance*, it may not be more than Rs. 10 or 12 in a primitive Zamindari like this with its primitive people and primitive mode of raising revenue, the provision for maintenance made by mutual arrangement would be rather in kind than in actual cash payment. The exemption from plough-taxes and poll-taxes exactly corresponds to this. The District Judge deals with this in paragraph 92 and says (1) that it is so small that it cannot be regarded in lieu of maintenance ; (but the claim for maintenance could be no more than what the exemption represents) ; and secondly (2) that it is a family privilege, just as the Nattars, Ur Goundan and the Moopans are exempt by virtue of the office from the poll-tax. The second reply of the learned Judge seems to me really to concede the point while making a show of denying it. The Nattan and other officers render service to the Jaghirdar and instead of getting a payment, get what is its equivalent, an exemption from the poll-tax. This is exactly same as a payment. In the case of the junior members of the Jaghirdar's family they don't render any service. Why should they get an exemption which is measurable in money and which is equivalent to payment? There is no legal obligation on the part of theJaghirdar to allow such exemption, if they are separate. But if they are undivided, there is a legal obligation to pay some amount or what is its equivalent to exempt them from taxes. By saying it is only a family privilege, the legal significance cannot be got rid of under what seems to me to be a mere verbal quibble. To say that the Jaghirdar is allowing the exemption because the defendant is a member of the family is to recognise the obligations due to a member of the family. One may as well say where a defendant is actually getting some maintenance, it is given gratis and as a matter of grace and not as a matter of obligation. In all such cases when the junior member is receiving as much as he thinks he is entitled to for maintenance, what more could he do to keep up the link between him and the holder of the impartible property? Anyhow the Jaghirdars could not say that the defendants were not getting any maintenance from them and so long as they have not asserted that it was not in lieu of maintenance, the link is kept up. One of the plaintiff's witnesses P. W. 5 gave evidence in a former deposition that the exemption of the junior members from poll-tax was in lieu of maintenance. He admits his deposition but says "I might have said this because it struck me at the time." It is clear that he wishes to discount his former statement as he is now arrayed on the plaintiff's side. One other point relied on by the respondent in appeal is that no contribution was made by the Jaghirdar for the marriages and deaths in the junior branches. When we remember that in this primitive Zamindari, the costs

of a wedding and funerals even in the Poligar's household were defrayed by subscriptions and fees from his subjects, one cannot expect him to make a cash contribution for similar events in the families of the junior members. There is evidence for the defendants that the people of the Nads send supplies and money for the expenses of the ceremonies attendant on these events. The learned District Judge disbelieves the evidence of the witnesses on the ground that they are for the most part, Nattans and Moopans who owed their office to defendant. But as the offices of Nattan and Moopan are hereditary offices, I do not think that these witnesses can be discredited on this ground. It does not appear that defence witnesses 5 and 6 were appointed by the defendant. Besides there is the evidence of defence witness 2 (at page 99).

"On occasions of marriage we send word to the Chief Nattan and he sends words to the other Moopans and Nattans and they bring what is required without payment. That is our customary due as members of the Poligar."

As these things must have been going on openly, I am not inclined to discount the evidence on the other ground given by the District Judge (paragraph 93) that it has not been shown that these presents were sent with the knowledge or permission of the Poligar. The respondent has strongly relied on *Tara Kumari* v. *Chaturbhuj Narayan Singh* (6) and *Gurusami Pandiyan* v. *Pandia Chinna Thambiar* (7). In my opinion these cases do not help the respondent. In the former the facts found are:

(1) Ranjit granted in 1879 to his brother Bhupat Narain a Mokrari potta (perpetual lease) of a portion of the taluk for the maintenance of the latter.

(2) Bhupat built a separate pucca house, established a Tulsi Pindi there, removed his family to it and lived there separately. He established a separate Thakurbari in it.

(3) No help was given to Chaturbhuj Narayan by Ranjit at the time of the marriage of the former's daughter.

(4) Bhupat and Chaturbhuj mortgaged the property granted to them freely as if it was their absolute property.

(5) In 1905 Chaturbhuj stated in a judicial proceeding 'I am separate from the Thakur of Telwa.'

There are no facts in the present case similar to any of these. In *Baijnath Prasad Singh* v. *Tej Bali Singh* (39) referring to *Tara Kumari* v. *Chaturbhuj Narayan Singh* (6) Richards, C.J., and Rafiq, J. said.

'In this case their Lordships decided the question of separation as a question of fact and not of law."

The decision in *Baijnath Prasad Singh* v. *Tej Bali Singh* (4) was affirmed by the Judicial Committee in *Baijnath Prasad Singh* v. *Tej Bali Singh* (2) (above referred to).

In *Gurusami Pandiyan* v. *Pandia Chinna Thambiar* (7) again it is a decision on the facts. These are :

(1) In 1842, the father of Peria Dorai, the Zamindar who got the estate as daughter's son, separated from him and went to live in Veppangulam.

(2) In the suit filed by ChinnaDorai, brother of Peria dorai for partition of the partible properties, an agreement was filed and was found to be genuine and it was found by the Subordinate Court that the plaintiff had accepted by that agreement a specific allowance from the defendant in full discharge of all claims. In appeal Chinna Dorai contended that the words "no right whatever to the Zamindari". in it were subsequently added after he had signed it. But this contention was rejected by the High Court.

(3) Chinna Dorai who also was living in Veppangulam was alienating ancestral properties without any reference to Peria Doria and was also making acquisitions separately for himself.

(4) In 1877, the Veppangulam palace was sold in court auction for the debt of Periasami (son of Chinna Dorai) while his brother Chinnasami filed a claim and got his share released, no claim was made by the Zamindar, who, on the other hand, purchased it. In fact, as regards all the paternal ancestral properties, there was no evidence of any interference by Peria Dorai or his descendants. The conduct showed the original ancestral properties of the family were regarded as the exclusive property of Chinna Dorai and his branch. Perhaps this was the reason why the Zamindari became the exclusive property of Pedda Dorai.

It is unnecessary to say more about this case beyond saying that it was before *Baijnath Prasad Singh* v. *Tej Bali Singh* (2) and that it was a decision on the facts especially as it is under appeal to the Judicial Committee.

In *Sri Raja Lakshmi Devi Garu* v. *Sri Raja Surya Narayana Dhatrazu Bahadur Garu* (40) grant of two villages for maintenance and separate food and residence even for 70 years was held not to constitute separation.

[To sum up the history of the family from 1820 to 1916.]

39. 38 All. 590=14 A. L. J. 913=38 I. C. 894.

40. (1897) 20 Mad. 256=24 I. A. 218 (P.C.)

(1) There is no positive act of separation—no Samakhya [as in *Vadrevu Ranganayakamma* v. *Bulli Ramaiya* (17)], no agreement [as in *Gurusami Pandian* v. *Pandia Chinna Thambiar* (7)], no grant of a large property in view of separation [as in *Tara Kumari* v. *Chaturbhuj Narayan-Singh* (6)], and no remuneration [as in *Padamatur case* (12).]

(2) No assertion that the families of the defendant and plaintiff were separate *until the plaint in this case.*

(3) Contrary assertions in the litigation of 1875 and in Ex. G that the defendant's grandfather and father were the next heirs.

(4) The continuance of all the junior members in the ancestral homes, either contiguous to the residence of the Jaghirdar or part of the so-called palace.

(5) The exemption of all the junior members from taxes—which is measurable in money and which is equivalent to (if not in lieu of) grant for maintenance.

(6) The receipt of supplies for marriages and other occasions as in the case of the Jaghirdar.

In my opinion there has never been separation of the senior line and the Jaghirdar's line. I would allow the Appeal in respect of the Jaghir and dismiss the plaintiffs' suit for it. As to costs I agree with the order of my learned brother.

Appeal allowed.

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* **1923 Madras. 422**

SCHWABE, C. J., AND WALLACE, J.

The Secretary, Board of Revenue (Income-Tax, Madras ... Referring-Officer.

v.

The Madras Export Company, Madras ... Assessee.

Referred Case No. 4 of 1922, dated 30th October 1922, under S. 51 of Act VII of 1918 by the Secretary, Board of Revenue (Income-Tax), Madras.

Income-Tax Act (VII of 1918) *Ss.* 3 (1) (5) *and* 33—*Foreign firm purchasing in British India as agents not liable.*

S. 33 (1) is not a charging section at all, but a machinery section and is not intended to impose any taxation upon any income which would not otherwise be liable to tax, but points to the method of collecting the income-tax, where a person whose income is to be taxed is not himself available. The condition precedent to assessability is business in British India and it is not laid down in the Act that the two phrases are identical in meaning. The test is : —

Is the non-resident firm by its agency out here in British India, making profits in British India which pass to it through the hands of its agent ?

If it is, then S. 33 (1) applies. If not, not. S. 33 (1) was not intended in any way to enlarge the scope of S. (5) or to bring into the net any income accruing outside British India merely because that income was received through or from a business connection in British India. [Page 425.]

The Government Pleader — for the Government.

R. N. Aiyangar and O. T. Govindan Nambiar instructed by King and Patridge.—for the Assessee.

SCHWABE, C.J.— The question for determination in this case is whether the profits made by a resident in France with a branch or agent here—which profits are received and retained in France are liable to Income-tax.

The relevant facts are that a French Firm has a branch in Madras whose sole duty is to buy leather goods here and ship them to France. The French Firm are a firm of commission agents and they make the profits in question by being paid at a defined rate of commission on the value of the goods shipped. I had some doubt whether the fact that the French Firm made this profit by commission distinguished the case from that in which a similar firm brought here through agents and made a profit by re-sale in France but have come to the conclusion that it is an irrelevant consideration how it makes its profits, if it is in fact made and received in France and not here. By S. 3 (1) the Act is to apply to all income from whatever source it is derived if it accrues or arises or is received in British India, or is under the provisions of the Act deemed to accrue or arise or to be received in British India. By S. 5 which is the charging section, certain classes of income are chargeable to Income-tax and they include "(IV) income derived from business." Chap. IV of the Act, headed "liability in special cases," contains a group of sections providing for taxation of certain persons although not the actual persons entitled to the income in question such as guardians, trustees, agents and partners in a firm which has discontinued business. S. 33 (1), one of those grouped sections is in the following words :—

"In the case of any person residing out of British India all profits or gains arising to such person, whether directly or indirectly through or from any business connection in British India, shall be deemed to be income accruing or arising within British India and shall be chargeable to Income-tax in the name of the agent of any such

person and such agents are to be deemed for the purpose of this Act to be assessees in respect of such income-tax."

It is argued on behalf of the Government that this section brings into tax income wherever earned or whether received in British India or not by a foreign resident if any part of the business which ultimately results in profits is conducted in British India. If this contention is right it would result in all foreign purchasers of goods in India for the purpose of manufacture or resale elsewhere being liable for Indian Income-tax on any ultimate profits made in fact in the countries to which the goods are exported. This would be a startling innovation and quite contrary to the established principle of taxation in England, and as far as I know, elsewhere and one which might lead to protest on the ground that it was contrary to the Comity of Nations, and would also in all probability result in residents in foreign countries as far as possible avoiding purchasing in this Country, its products though these are considerations with which the Courts are not concerned if the statute clearly imposes such taxation, though they are material considerations in selecting between alternative interpretations if there is found to be an ambiguity. It may be that the words of S. 33 (1) taking its language literally, would be sufficient to impose this taxation though, it is to be observed the words 'through or from any business connection in British India' are very vague and the meaning thereof is not defined. The words are in my view most unsuitable if intended to have a wider meaning than the well-known meaning of the words in the charging S. (5) (a) *viz.* "income derived from business' and bring into tax in respect of residents something which is not covered by those words. I think the right view is that S. 33 (1) is not a charging section at all, but a machinery section and is not intended to impose any taxation upon any income which would not otherwise be liable to tax, but to point to the method of collecting the income-tax where a person whose income is to be taxed is not himself available. In this view, we are supported by authority in which the same point arose in England. S. 31 (2) of the Finance Act II of 1915 is in the following terms ;

A non-resident person shall be chargeable in respect of any profit or gains arising whether directly or indirectly through or from any branch, factorship agency, receivership or management, and shall be so chargeable under S. 41 of the Income-tax Act of 1842 in the name of the branch, factor, agent, receiver, or manager.

In *Greenwood* v. *Smith* (1), the House of Lords affirming the decision of Rowlatt, J., in *Smidt & Co.* v. *Greenwood* (2) and of the Court of Appeal in *Smidt & Co.* v. *Greenwood* (3) decided that this section, though in terms wide enough to bring into tax non-residents in respect of profits earned abroad through direct or indirect dealing through an agency in England, did not bring into tax profits unless earned or received in Great Britain and held that that section was a machinery section and not a charging section. Lord Buckmaster at p. 423 stated the priniciple in the following words :—

It is important to remember the rule which the Courts ought to obey that when it is desired to impose a new burden by way of taxation it is essential that the intention should be stated in plain terms. The Courts cannot assent to the view that if a section in a taxing statute is of doubtful and ambiguous meaning it is possible out of that ambiguity to extract a new and added obligation not formerly cast upon the taxpayer.

In my judgment this rule applies to this case.

Nor is the matter without authority here, for in the *Board of Revenue, Madras* v. *Ramanadhan Chetty* (4) this Court although it was not necessary for the decision of that case, expressed its view that S. 33 (1) was merely a machinery section and not a charging section and I agree with the reasoning on that point, and particularly with that of Oldfield and Seshagiri Aiyar, JJ.

For these reasons the judgment of this Court must be in favour of the assessee with costs to be taxed.

WALLACE, J :—This is a case referred to this Court under S. 51 of the Income-tax Act, VII of 1918, by the Board of Revenue. The stated case rests on the following facts. A firm with head-quarters in Paris purchases skins in British India to the orders of constituents in various parts of Europe, and America and makes its profit by commission on the sales. The skins are bought in British India for the

1. [1922] 1 A. C. 417.
2. [1920] 3 K. B. 275.
3. [1921] 3 K. B. 583.
4. (1920) 43 Mad. 7 ; 37 M. L. J. 663=(1919) M. W. N. 826=26 M. L. T. 447=10 L. W. 570=53 I. C. 976. (F.B.)

firm by an agency called the Madras Export Company resident in Madras. This Company buys skins at the lowest prices it can get, subject to a maximum fixed by the Paris firm and ships them in the raw state, as purchased, under the directions of the Paris firm. It is admitted that the Madras Export Company makes none of the profit on the sales of these skins and that no part of the profits of the firm in Paris are remitted as such to Madras. It is presumed that the Paris firm puts the Madras Export Company in funds for the purchases out here. The question is whether the Madras Export Company is assessable by force of S. 33 (1) of the Income-tax Act, VII of 1918, as the agent of the Paris firm on the profits made in Paris, by the Paris firm through or from its business connection with the Madras Export Company in British India.

2. The section of the Act called in aid by the Board S. 33 (1), runs as follows :

"In the case of any person residing out of British India all profits or gains accruing or arising to such person whether directly or indirectly through or from any business connection in British India, shall be deemed to be income accruing or arising within British India, and shall be chargeable to income-tax in the name of the agent of any such person, and such agent shall be deemed to be for all the purposes of this Act the assessees in respect of such income-tax."

The phrase 'shall be deemed to be income accruing or arising within British India' relates back to S. 3 (1) where under the heading "Taxable Income," it is enacted that

"This Act shall apply to all income from whatever source it is derived if it accrues or arises or is received in British India, or is, under the provisions of this Act, deemed to accrue or arise or to be received in British India".

Hence S. 3 (1) and 33 (1) read together import that the Act shall apply to all income accruing or arising to a non-resident in British India, whether directly or indirectly through or from any business connection in British India. The Government Pleader, on behalf of the Board of Revenue, contends that this renders liable to income-tax all business profits made by a non-resident received not only within but outside of British India in so far as these accrue or arise through or from any business connection in British India. If the phrase 'business connection' is to be read as the Government Pleader contends, as something much wider than the term 'trade' or 'business' itself, then the far reaching effects of such a claim are obvious, and will extend far beyond what has been hitherto recognised in British India as the territorial limit of taxation of income derived from trade. Hitherto such taxation has been limited to incomes accruing or arising in or received in British India from trade carried on in British India whether the recipient resides in British India or not and to income received in British India though derived from a foreign source when the recipient resides in British India. The general scope of Ss. 3 and 5 of the Act of 1918 does not seem to me to alter the previous general principle that the profits taxed should accrue in British India. If it was intended to abandon this well-recognised restriction and to reach profits accruing outside British India, more apt and express terms should have been employed in those sections.

3. The term 'business connection' has not been defined in the Act. That perhaps is not surprising in an Act which does not even define the source of gain which it sets out to tax; but when it is contended that 'business connection' was designed to mean something different from and wider than the business itself, which *ex hypothesi* takes place outside British India, and thus to cast wider the net of the income-tax gatherer, it behoves us to be cautious, and not to accept the contention unless we find it justified by the legal maxim enunciated by Lord Sterndale, Master of Rolls in *Smidth & Co.* v. *Greenwood* (3); the well known canon of construction of taxing Acts "is that no one is to be taxed except by express words". Does the Act then expressly charge income accruing outside British India, but derived through or from a business connection in British India.

4. The charging section of the Act is S. 5, Sub S. 4 makes chargeable 'income' derived from business and income for the purposes of this case according to the meaning read into S. 3 (1) which I have set out above, would cover income accruing or arising outside British India through or from any business connection in British India. Thus such income itself is only chargeable when it is "income derived from business" by force of S. 5. The phrase in S. 5 is not "income derived from or through any business connection." At one stage of his argument the Government

Pleader contended that such a phrase might be implied under Sub-S. (vi) of S. 5 "income derived from other sources" but such a contention I cannot accept, as it violently contravenes the principle enunciated above that taxation must be imposed by express words. The real question for decision is: Is the phrase 'through or from any business connection' in S. 33 (1) governed and controlled by the phrase, 'derived from business' in S. 5 (iv) or not. That it is, seems to me to be obvious from the fact that S. 33 (1) is not designed or situated in the Act as a charging section in addition to S. (5). It is not found under the chapter 'Taxable Income' alongside the charging section, but under the chapter headed "Liability in special cases" a chapter which is designed to provide for the collection of the tax from persons other than the direct beneficiaries of the income received, that is, guardians, trustees, agents, receivers and so on. That is, it is a part of the 'machinery' sections setting out the method by which the tax if otherwise chargeable is to be collected in certain cases when the direct beneficiary cannot be got at, and it is not a charging section designed to declare some other gains taxable beyond what has been declared by S. 5 to be taxable. I am fortified in this conclusion by the remarks of Oldfield, J., no doubt *obiter dicta* in *Board of Revenue, Madras,* v. *Ramanadhan Chetty* (4), that S. 33 is intended to provide for the liability to tax of a person through whose hands in one capacity or other the profits in question will pass in British India, and whom therefore the Crown can reach in order to collect it, and also by the rules framed under S. 33 by the Governor-in-Council, printed at p. 76 of the Income-tax Manual of 1920, where it is laid down that profits in a case like this may be calculated on the percentage of the turnover of the *business carried on* in British India. The object of S. 33 (1) then is merely to provide for an agent being the assessee in place of his non-resident principal, so far as that principal is liable under S. 5 as hitherto interpreted, to the tax (*i.e.*,) in respect of income derived by the principal from business in British India. The condition precedent to assessability is business in British India and not merely a business connection in British India and it is not laid down in the Act that the two phrases are identical in meaning. The test, I take it, is :—

> Is the non-resident firm by its agency out here in British India, making profits in British India which pass to it through the hands of its agent.

If it is, then S. 33 (1) applies. If not, not. I am therefore unable to hold, in the absence of more clear and express words, that S. 33 (1) was intended in any way to enlarge the scope of S. (5) or to bring into the net any income accruing outside British India but not derived from business within British India merely because that income was received through or from a business connection in British India.

5. S. 33 (1) then is governed and controlled by S. 5 and really applies and was intended to apply to cases where a non-resident firm takes income or profits from business carried on by it in British India, which are transmittable and are transmitted to it through its resident agent. The agent will be taxed and will be the assessee, for the purposes of the Act, for, the profits in British India of that business, and, in order to guard against the section being taken to mean that it is merely the agent's own profits, which are chargeable, language is used implying that it is the profits of his firm accruing in or arising through its business connection in British India which are taxable through the agent.

6. In the present case the non-resident firm in India is merely buying raw material for shipment and sale abroad and the profits realised from the sales are realised in Paris. There is clear authority in the leading case of *Sulley* v. *The Accountant General* (5). which is an exactly parallel case, for holding that the firm does not thereby carry on trade or business in British India. It was there held that the place of trade is the place where the profits come home to the firm, and a non-resident firm is not assessable on profits made abroad merely because it has a resident agent for purchasing and shipping raw material, and that it is no part of the Income Tax law as so far laid down that the firm shall be taxable in every country in which it has established buying agents. To a similar effect is the decision in *Smidth & Co.* v. *Greenwood* (3),

5. (1860) 5 H. and N. 711.

where it is laid down that a trade is exercised in the place where the business transactions are closed, that is, in the case of a selling business, the place where the sales are effected and the profit thereby realised. The later decision interprets S. 31 (1) and (2) of the British Finance Act II of 1915 which closely resembles S. 33 (1) of the British India Income-tax Act of 1918, and it is noteworthy that, though in the case of *Sulley* v. *The Accountant General* (5), the Nottingham partner in the case was obviously a 'Branch' of the New York firm, the Court in *Smidth & Co.* v. *Greenwood* (3) held that the decision in *Sulley's case* (5) had not been radically affected by the new legislation, and held in effect that the extension of the Income-tax Act of 1842 which made a non-resident firm chargeable in the name of its branch did not mean that the existence of a branch sufficed to imply that the non-resident firm carried on trade in the United Kingdom or sufficed to make the profits of the non-resident firm received outside the United Kingdom taxable.

7. In the present case, no profits of a non-resident firm exist in this country or pass from it through the hands of the Madras Export Company. That Company transmits to the Paris firm raw material and not profits derived thereon. It realises for the Paris firm no income made in British India which is taxable before it leaves British India. To my mind then there is no income chargeable with income tax under S. 5 of the Act, and S. 33 (1) read with S. (3) does not bring within the scope of S. 5 income accruing or arising wholly outside British India to the firm of which the Madras Export Company is the local agent.

8. Therefore the answer to the reference is that the Madras Export Company is not liable to be taxed on the profits of the business carried on in Paris by its Paris Principals which are realised by the latter's business connection with British India.

Reference answered.

1923 Madras 426.

OLDFIELD AND DEVADOSS, JJ.

K. Kunhahamad Haji ... Appellant.

v.

Emperor ...

Cr. Appeal No. 695 of 1922, dated 11th October 1922, against the sentence of the Court of the Special 1st Class Magistrate of Tirur in Summary Case No. 3 of the Calendar for 1922.

(a) *Criminal P.C. S. 439—Power to revise order of its own judge by High Court.*

Notwithstanding the reference to procedure ordinarily peculiar to trials in a High Court, S. 439 does not empower a High Court to revise the judgment of one or more of its own Judges.

(b) *Criminal P. C. S. 369—Review of order of one Judge of High Court.*

S. 369 expressly negatives (subject to certain exceptions) the power of Courts other than High Courts to review and, no other provision authorising High Courts to exercise that power, their exclusion from the purview of the section cannot be read as conferring it by implication. When a criminal appeal or a criminal revision petition is dismissed for default of appearance, there is no decision on the merits and therefore there is no proper disposal of it according to law and the Court may rehear it. 1922 M. W. N. 982 (Diss.) (Case Law Discussed.)

[P. 427, Col. 2 ; P. 432, Col. 2.]

(c) *Madras High Court Appellate Side rules—Rule No. 4—Vacation Judge's powers.*

The powers of the vacation Judge are not to be looked for in the notification, as though it were a self—contained and exhaustive advertisement to the public of their scope and nature. For it need not and must not be regarded as more than a general statement of the powers, which the Vacation Judge ordinarily will exercise, and cannot be read as derogating from those, which by virtue of Statute and Rules he possesses and of which he cannot, consistently with them, be deprived.

[P. 428, Col. 1.]

S. T. Srinivasagopalachariar—for the Appellant.

J.C. Adam—(*Public Prosecutor*)—for the Crown.

OLDFIELD J :—This appeal is by the 3rd accused in S.C. No. 3 of 1922 on the file of the Special 1st Class Magistrate, Tirur against the conviction and sentence therein. The Public Prosecutor opposes it on the ground that Criminal Appeal No. 395 of 1922 against that conviction and sentence has already been dismissed by a learned Judge of this Court. The facts are that Criminal Appeal No. 395 was presented by the accused under S. 420, Criminal Procedure Code, through the officer in charge of the Jail, where he is, on 6th May 1922 and was dismissed under S. 421,

as out of time, by Krishnan, J. sitting as Vacation Judge, on 2nd June 1922. The accused, presumably in ignorance of this, presented the present appeal on 17th July 1922 on the re-opening of the Court through counsel. It is not disputed that, unless the decision of 2nd June 1922 can on some ground be disregarded, we are debarred from disposing of the present appeal on the merits.

We have been asked first to meet this difficulty by treating the present appeal as an application for the revision of the previous decision of Krishnan, J. But that is not the way in which it is expressed: and in any case S. 439, Criminal Procedure Code, notwithstanding the reference of procedure ordinarily peculiar to trials in a High Court, does not empower a High Court to revise the judgment of one or more of its own Judges. For that reference may be explained either, as it was by Mitter, J. in *In the matter of Gibbons* (1) as applicable to the exceptional cases, in which the High Court procedure has been extended to other Courts, or as intended *ex-abundanti cautela* to prevent any possible conflict with the Letters Patent or other legislation by which High Courts are affected. It cannot be read as conferring or recognising by implication a power, the existence of which is negatived by the wording of the remainder of the section. This is supported by the case already referred to; and the obvious anomalies, which the contrary view entails, are probably the reason for the absence of further authority against it. On behalf of the accused we have been referred to no case, in which revision of the judgment of one or more Judges of a High Court has been allowed. The conclusion must be that there is no power to revise it.

The next suggestion is that the appeal before us should be treated as an application for a review of Krishnan, J.'s previous order; and here again that is not the form of the petition. But, if that can be treated as immaterial, the accused relies next on the fact that the present appeal was, it happens, actually admitted by Krishnan, J. sitting in admission, and urges that this amounts to a setting aside by the learned Judge of his previous order and a re-opening of the case on its merits, such as takes place, when an application for review is granted in civil proceedings. This can be rejected on the short ground that, as Mr. Srinivasagopalachariar admits on accused's behalf, the learned Judge was not conscious that there was any previous decision, which would be a bar to the present appeal and which would have to be set aside, before that appeal could be heard.

We have then to deal with the argument that we can ourselves review the decision of Krishnan, J. as that of the Court, although it was given by a single Judge; and it is not necessary to rely on the fact that the Court is now constituted differently from the Court, which passed that decision, in order to hold that we cannot do so, with reference either to any power conferred by the Code or to the position of the High Court as a Court of record or any general inherent power. As regards this section 369 expressly negatives (subject to certain exceptions not at present in question) the power of Courts other than High Courts to review and, no other provision authorising High Courts to exercise that power, their exclusion from the purview of the section cannot be read as conferring it by implication. High Courts no doubt under S. 106 (1), Government of India Act (5 and 6 Geo., C. 61) are Courts of Record and in a Court of Record, "if there appear any mistake of the clerk in making up the record, the Court will direct him to amend it; and in general all slips in legal proceedings may be amended by an order of the Court to be obtained in a summary way" Stephen's Commentaries, 16th Edn. III 502. But this, which in fact goes no further than S. 369 does as regards inferior Courts, is not sufficient to support accused's argument, since the question is of a dismissal which may or may not have been mistaken, but which was certainly deliberate, on a ground of limitation, to which the Court must be supposed to have applied its mind. As regards authority, decisions such as *Rajjab Ali* v. *King Emperor* (2) and VII M. H. C. R. App. XXIX (if the latter was really given judicially) are not in point, because they deal with cases, in which the accused not having had the reasonable notice enjoined in S. 420, Criminal Procedure Code, a condition precedent to the exercise of the Court's jurisdiction was not fulfilled, the conclusion

1. (1887) 14 Cal. 42.

2. (1919) 46 Cal. 60=20 Cr. L. J. 265=50 I. C. 25.

not being reached strictly in review, but on the ground that there was no previous valid adjudication to bar a hearing on the merits; and the absence of reasonable notice is not in question here, since it is not disputed that accused had the notice, to which appellants from Jail are entitled under Criminal Rule of Practice No. 59. Generally the course of authority is plain against the power to review. For, a fact conclusive, in the nature of the case, against the existence of an inherent power, no instance of its exercise has been produced and it is negatived in the case last referred to and in *In re Gibbons* (1), *Queen-Empress* v. *Durga Charan* (3) *Queen-Empress* v. *Fox* (4) and *In re Ranga Rao* (5). The accused's claim must therefore fail, if it is regarded as a review.

The accused finally argues for his right to a hearing of this Appeal on its merits on the ground that the dismissal of his previous appeal is void, because it was not within the power of Krishnan, J. sitting (as he was) as Vacation Judge, to deal with it at all. This can no doubt at first sight be supported to some extent by the terms of the notification of 20th March 1922 regarding Krishnan, J.'s sittings. For, it is notified that the Vacation Judge will dispose of "urgent" applications which require to be heard immediately and, in spite of the wording of Appellate Side Rule 1 (1) (*f*), it is doubtful whether an appeal can be described as an application; the only reference to appeal is that implied in the specification of urgent Criminal work" as one to be disposed of by an appellate Court of two Judges: and, although there is no doubt provision for the reception of appeals under S. 420, Criminal Procedure Code from appellants in Jail, it is made in the portion of the notification, which refers to the Registrar's office, not to the Judge. But, even so, the appointment of Krishnan, J. as Vacation Judge was notified with no qualification of his powers but in the usual way in accordance with an order of the Chief Justice, nominating him for that function, which we have seen; and, even if no definition of the powers and duties of the Vacation Judge could be deduced from Statute or Rules, the practice of the Court would afford guidance and the fact that, as we have ascertained, some Vacation Judges in past years have admitted or dismissed appeals from accused in Jail without complaint would go some way towards negativing the argument before us. In fact however the answer to that argument is that the powers of the Vacation Judge are not to be looked for in the notification, as though it were a self-contained and exhaustive advertisement to the public of their scope and nature. For it need not and must not be regarded as more than a general statement of the powers, which the Vacation Judge ordinarily will exercise, and cannot be read as derogating from those, which in virtue of Statute and Rules he possesses and of which he cannot, consistently with them, be deprived. Appellate Side Rule No. 4, which has the force of law, directs that during the vacation of the Court its "Appellate Jurisdiction may be exercised by a single Judge acting as Vacation Judge" this being subject only to an exception not alleged to be in question at present. S. 108, Government of India Act, 1915 (5 and 6 Geo. V. 61) provides that "each High Court may by its own rules (the Appellate Side Rules) above referred to provides, as it thinks fit for the exercise by one or more Judges of the Appellate Jurisdiction vested in the Court "and that" the Chief Justice shall determine what Judge is in each case to sit alone." Appellate Side Rule No. 1 (1) (*f*) provides for the hearing and determination by one Judge of applications for the admission of Appeals from the judgment or order of a Criminal Court. It is not necessary for the present purpose to attempt an exhaustive enumeration of the Vacation Judge's powers or to go beyond these references to establish that Krishnan, J. was competent to dismiss accused's appeal. Its dismissal therefore cannot be regarded as a nullity or otherwise than as a bar to the hearing of a second appeal against the same conviction.

The result is that the appeal cannot be heard and must be dismissed.

DEVADOSS, J.—This is an appeal presented under S. 419, Cr. Pro. Code by one Kunhammed Haji against his conviction by the Special 1st Class Magistrate of Tirur under S. 436, I. P. C. The appellant presented under S. 420, Cr. Pro. Code what is commonly known as a Jail appeal which was dismissed by Mr. Justice Krishnan

3. [1885] 7 All. 672=(1885) A.W.N. 177.
4. [1887] 10 Bom. 176.
5. [1912] M. W. N. 982=23 M. L. J. 371=12 M.L.T. 350=13 Cr. L. J. 710=16 I. C. 518.

the Vacation Judge of 1922 with the remarks "the appeal is out of time, and there is no proper ground for excusing the delay and the case is proved against the accused by the prosecution evidence which there is no reason to discredit. The sentence is correct." Mr. Srinivasagopalachari who appears for the appellant urges that the judgment of Krishnan J, on the appeal presented by the appellant through the Superintendent of Jails was passsd without jurisdiction, and that this Court has Power to hear the appeal presented by him on the merits.

He urges three points. (1) The order of Krishnan J. having been passed without jurisdiction the order is no order at all and therefore his appeal should be heard on the merits, (2) The appellant had no reasonable opportunity of being heard in support of his appeal and so the appeal could be reheard. (3) The order of Krishnan, J., could be reviewed by a bench of two Judges hearing Criminal Appeals.

The appellant was convicted on 13—4—1922, the copy of the lower Court's judgment was given to him on 24—4—'22 and the Jail appeal was forwarded to the High Court on 4—5—1922. The High Court was closed for the long vacation on 6—5—1922 and the Jail appeal was dismissed on 2—6—1922, Mr. Srinivasagopalachari presented the appeal petition on behalf of the appellant on 17—7—1922. It was moved before Krishnan J. who was sitting in the admission Court and he ordered notice on 27—7—1922 with the remark "Admitted as regards sentence only. It is not clear why the 3rd accused should be given a fine also." It is conceded by Mr. Srinivasagopalachari that the learned Judge was not informed of the dismissal of the Jail appeal when he moved for notice on his appeal, and that both Counsel and Judge were not aware at the time of the order on 2—6—1922.

The learned Counsel's contention is that the Vacation Judge could only hear urgent applications and the Jail appeal not being an application regarding an urgent matter, Mr. Justice Krishnan had no jurisdiction to dispose of it and that the notice published under the signature of the Registrar simply said that the office of the Registrar would be open for the receipt of urgent applications, Jail appeals under S. 420 and applications in non-contentious matters.

The question for determination is whether a Judge of the High Court sitting as Vacation Judge has or has not jurisdiction to dispose of not only urgent matters but also matters which came up before him.

By S. 2 of 24 and 25 Vict. Cap. 104, an Act for establishing High Courts of Judicature in India, it was provided that the High Court of Judicature at Madras shall consist of a Chief Justice and as many Judges, not exceeding 15 as Her Majesty may from time to time think fit and appoint. By S. 13 of the Act it is provided "subject to any laws or regulations which may be made by the Governor-General-in-Council, the High Court established in any Presidency under this Act may, by its own rules, provide for the exercise, by one or more Judges, or by Divisional Courts constituted by two or more of the Judges, of the said High Court of the Original and Appellate Jurisdiction vested in such Court in such manner as may appear to such Court to be convenient for the due administration of justice."

S. 14 is in these terms: "The Chief Justice of each High Court shall from time to time determine what Judge in each case shall sit alone, and what Judges of the Court whether with or without the Chief Justice, shall constitute the several division Courts as aforesaid." It is clear from these two sections that the High Court may by its own rules provide for the exercise by one or more Judges or by Division Courts, of the Original and Appellate Jurisdiction of the Court. The rules framed by the High Court under S. 13 would give jurisdiction to Judges to dispose of any matter excepting those which by statute they could not dispose of. The function of the Chief Justice is to determine what Judge in each case shall sit alone, and what Judges of the Court shall constitute Divisional Bench. He has to assign work and when work has once been assigned, the Judge or Judges have full jurisdiction to dispose of it. The contention of Mr. Srinivasagopalachari is that the learned Chief Justice restricted the power of the Vacation Judge to urgent applications. In the first place there is no evidence that the learned Chief Justice, granting he has the power to do so, ever intended to restrict the jurisdiction of the Vacation Judge to urgent matters only.

The Notification published under the

signature of the Registrar is only to inform the public that the Vacation Judge was prepared to hear urgent applications, and not that the Vacation Judge has power only to hear urgent matters. Secondly the jurisdiction of a Judge can only be restricted by statute as in the case of appeals by persons under sentence of death (*vide* S. 377, Crl. Pro. Code) and as in the trial under the Indian Criminal Law Amendment Act of 1908, section 11 or by rules framed by the High Court under S. 13.

The case of *In the matter of Abdool Sobban* (6) throws considerable light on this question. In that case an application for transfer was made before a Division Bench consisting of Mr. Justice Cunningham and Mr. Justice Prinsep. When the counsel opened the case for transfer, the learned Judges indicated there was no use in going on further with the matter and dismissed the application. Whereupon another Counsel moved the Chief Justice to have the matter re-heard on the ground that the learned Judges composing the Division Bench did not give full hearing to the case. In the course of the argument Chief Justice Garth observed: "Suppose I did the same thing, who is to set me in order? Is a Division Bench consisting of two Puisne Judges in a different position from a Division Bench consisting of myself and another Judge? In such a case the proper course is to appeal to Government." The counsel answered: "Your Lordship is undoubtedly above the other Judges of the Court." To which he replied: "As Chief Justice I have certain functions to perform in constituting Benches, but having done so, have I power to call them to account?" The learned Chief Justice held that he as Chief Justice could not ask the learned Judges to rehear the case. In that case the application was an application for transfer of a case from one Court to another which could be renewed on proper grounds as the order on a transfer application is not *res judicata*. The learned Chief Justice intimated that they might renew the application or ask the Judges if they were disposed to do so to hear counsel fully. In the course of the judgment reference was made to a precedent which happened during the time of Sir Barnes Peacock, Chief Justice of Bengal. To quote the words of Chief Justice Garth in respect of that case "A Criminal Bench of this Court, consisting of two Judges, had been established by the Chief Justice in the usual way, for the purpose of hearing Criminal Appeals. Instead of sitting together to hear these appeals, the Judges thought proper to hear them separately, that is to say, one Judge sitting alone heard some of them, and the other sitting alone heard the rest; but the judgments in all the cases were signed by both Judges. Upon this being represented to the Chief Justice, he considered that in point of law there had been no hearing at all of these appeals because they had not been heard by a legally constituted Court and one Judge sitting alone had no jurisdiction to hear them. He therefore ordered the same Criminal Bench to hear them again; and upon the Judges of that Bench declining to do so upon the ground that they had been already judicially decided, the Chief Justice sent them to another Division Bench, by whom they were finally determined. In this view of my learned predecessor I entirely agree. It is the province and duty of the Chief Justice under S. 14 of the High Courts Act, to determine what Judge or Judges shall decide each case and if two Judges are appointed by him to hear an appeal, it is quite clear, I think, that no single Judge has any jurisdiction to hear it." With regard to the case of *The Queen* v. *Muhiruddin* (7) the learned Chief Justice observed: "In that case a prisoner was committed to take his trial at Patna. On the application of the District Magistrate by letter to this Court, the Judge in an English Department under a summary order transferred the case for trial to Shahabad. The prisoner then applied to this Court for a rule calling on the Crown to show cause why the order of transfer should not be rescinded, upon the ground that it had been made without notice to him, and that the Judge in the English Department has no power to make it. This rule was heard by a Full Bench, of which the Judge of the English Department was a member, and with his entire concurrence the rule was made absolute." It is clear therefore that where a Judge or a Bench of Judges is asked to dispose of a certain matter they have jurisdiction to dispose of it. The

6. [1884] 8 Cal. 63.

7. [1876] 1 Cal. 219.

constitution of the Benches is the province of the Chief Justice and if the Judges refuse or neglect to be constituted into Benches as arranged by him and choose to dispose of cases as they please they would be acting without jurisdiction. If a learned Judge who has been asked to do admission work takes into his head to do Sessions work or without his being asked to do Original Side work calls up Original Side cases of his own accord and disposes of them he may be said to be acting without jurisdiction. That a Vacation Judge has all the powers of the High Court can be inferred from Cl. 36 of the Letters Patent which is in these terms: "We do hereby declare that any function which is hereby directed to be performed by the said High Court of Judicature at Madras in the exercise of its original or appellate jurisdiction, may be performed by any Judge, or by any Division Court thereof, appointed or constituted for such purposes under the provisions of the 13th section of the aforesaid Act of the 24th and 25th years of our reign." The Government of India Act of 1915, 5 and 6 George V. Chap. 61, S. 108 reproduces Ss. 13 and 14 of the older Act. In England the rules of the Supreme Court regulate the sittings during vacation. Order 63, R. 11 provides for the selection of two Judges at the commencement of the long vacation to be Vacation Judges. R. 12 provides for the arrangement of the sittings. Two Judges sit separately or together as Divisional Court as occasion shall require and may hear and dispose of all causes matters and other business to whichever Division the same may be assigned. *In Ex parte George Wise* (8) Hamilton, J. (now Lord Sumner) issued a writ of *Mandamus* during the vacation. In the course of the argument by Mr. F. E. Smith (now the Lord Chancellor); the learned Judge observed: "If you satisfy me that I have the jurisdiction to do so, I should certainly grant a rule *nisi*. A Vacation Judge is not a Divisional Court." The learned counsel answered: "It is provided by O. 63, R. 12 that Vacation Judges may sit either separately or together as a Divisional Court as occasion shall require and may hear and dispose of all causes, matters and other business to whichever division the same be assigned." Hamilton, J., said "you may take your rule *nisi*," and passed an order to that effect. This shows that an application for a prerogative *writ of mundamus* which according to the Supreme Court orders has to be made to a Divisional Court of King's Bench was made before a single Vacation Judge who granted a rule *nisi* and considering who the learned Judge is and the learned counsel who appeared before him is, we may assume that the issue of the rule was within the jurisdiction of the single Vacation Judge.

The practice for the office is to circulate Jail appeals presented under S. 420 to the Judges. Jail appeals are disposed of by only one Judge. Notice is issued on Jail appeals or they are dismissed summarily by the Judge in Court after the appellant's name has been called. The Vacation Judge has been pursuing this practice at least for some years. The Vacation Judge disposes of matters which are ordinarily disposed of by a Bench of two Judges. Transfer applications are as a rule made to a Bench of two Judges. But during the Vacation a single Judge disposes of transfer applications. Till recently it was the practice in the High Court to post Second Appeals for notice before a single Judge sitting in the Admission Court. The Admission Judge either ordered notice or dismissed the appeal. For the last few years the practice has been changed, and Second Appeals are circulated to the Judges who order notice if they find there are sufficient grounds for notice, and if they find there are no points of law they order the cases to be posted under O. 41 R. 11, and then they come up before a Bench of two Judges who after hearing appellant's counsel or vakil either order notice or dismiss them.

If the practice obtaining here is an indication of what is considered to be the jurisdiction of a Vacation Judge we find he disposes of matters which are usually disposed of at other times by a Bench of the High Court consisting of two Judges. I hold that Krishnan, J.'s jurisdiction to dispose of Jail appeals was not in any way restricted by the Notification of the 20th March 1922 under the signature of the Registrar.

The next contention is that the appellant had no opportunity to engage counsel to argue his case because the notification specifically stated that only urgent applica-

8. 127 L. T. 391.

tions could be made. The notification runs thus: "The Vacation Judge will dispose of urgent applications which require to be heard immediately whether in proceedings on the Appellate or Original Side of the High Court. In any case of great urgency application may be made by delivering to the Registrar a request to transmit the necessary papers to the Vacation Judge." Under the heading "Registrar's Office" the Notification is "Except petitions and applications in non-contentious, testamentary and intestate matters and appeals received under S. 420 of the Code of Criminal Procedure from appellants who are in Jail, no application other than an urgent application as above mentioned will be received or filed during the vacation." The appellant contends that the office would not receive a memo. of appearance on behalf of an appellant in Jail during the vacation because in the case of a Jail appeal unless there is a bail application, the appeal is considered not to be an urgent matter. Under S. 420 of the Criminal Procedure Code an appellant in Jail may present his petition of appeal to the officer in charge of the Jail who shall thereupon forward the same to the appellate Court. S. 421 provides "that no appeal presented under S. 419 shall be dismissed unless the appellant or his pleader has had a reasonable opportunity of being heard in support of the same." This provision does not apply to appeals presented under S. 420, Criminal Procedure Code. R. 59 of Criminal Rules of Practice lays down "that no appeal shall be summarily rejected until seven days have elapsed after its receipt by the appellate Court. In forwarding such an appeal, the officer in charge of the Jail shall invariably certify that the appellant has been informed that if he intends to appoint a pleader, an appearance must be put in within seven days from the date on which his petition may reach the appellate Court." Seven days' time is allowed before a Jail appeal is circulated to the Judges. So an appellant has an opportunity of engaging counsel if he wishes to do so. I do not think the office could have refused to receive a memo. of appearance from a practitioner on behalf of an appellant in Jail if it was brought to the notice of the office that the Jail appeal might be disposed of during the vacation. There is nothing to show that in this case the appellant had not had an opportunity of engaging counsel before his appeal was disposed of. So there is no substance in this contention.

It is further urged that as the appellant was not heard there ought to be rehearing of the case. When an appeal has once been disposed of, the Court is *functus officio* and cannot rehear the appeal. This is quite clear from a number of decisions of the Madras High Court as well as of other High Courts. In *Ranga Rao In re* (5) it was held that if a criminal revision petition is dismissed on account of the non-appearance of the practitioner who has filed it, the High Court is not competent to restore to its file such a petition. In the course of the judgment reference is made to R. T. 40 of 1905 of this Court. It appears that after the dismissal of the appeal the learned Chief Justice thought that his order was wrong and he wanted to allow the appeal. On the matter being urged before him and Mr. Justice Moore, they both thought that they were *functus officio* the moment they delivered their judgment and that they had no power to reopen the matter and they directed that a letter be addressed to Government for the exercise of the prerogative of mercy in view of the doubt which they entertained as to his guilt. It has been brought to our notice that in a recent case Mr. Justice Spencer who dismissed a criminal revision petition for default of appearance of a practioner restored it to file and heard the case on the merits. In the case of a criminal appeal or criminal revision petition there is no provision in the Code of Criminal Procedure for dismissing an appeal or revision petition for default of appearance. In a criminal matter the question is not between party and party. It is the duty of the Court to go into the matter and dispose of it on the merits. The only way of reconciling the conflicting decisions on this point is to hold that when a criminal appeal or a criminal revision petition is dismissed for default of appearance there is no decision on the merits and therefore there is no proper disposal of it according to law and the Court may rehear it. The order of dismissal for default of appearance in such cases is no judgment at all and the order is tantamount to an adjournment of the case till some one appears and moves the Court to hear him. With due respect to the learned

Judges who decided (1912) M. W. N. 982 I think that the High Court, though it is not bound to hear the practitioner in support of a criminal revision petition, is not entitled to dismiss it for default of appearance but could only dispose of it on the merits.

In 7 M. H. C. Reports App. 29 (Crl.) a ruling is given to the effect that when a criminal appeal has been rejected without hearing the appellant's pleader under the corresponding S. 421 of the Criminal Procedure Code and if it appears that an adequate excuse has been made for the pleader's non-appearance, the Court could restore the case to its file and hear him. In *Emperor* v. *Kallu* (9) it was held that a Judge who passed an order on a jail appeal to the effect that no appeal lay and that no sufficient ground appeared for interference in revision, was not precluded from entertaining the application for revision presented by a counsel in relation to the same matter. It has been held in some cases that a judgment or order is not complete until it is signed and sealed and therefore the matter could be reopened. Under S. 369 of the Criminal Procedure Code when a judgment has been signed it is final, and there is no power left in the Court to reopen the case.

The Bombay High Court in *Empress* v. *Mahomed Yashin* (10) takes a narrow view with regard to the power to rehear criminal appeals and revision petitions dismissed for default. But with great respect to the learned Judges of the Bombay High Court I consider that when a criminal appeal or revision petition is dismissed without hearing, there is no judgment at all and the learned Judge or the Bench which disposed of the matter for default of appearance could rehear the matter.

The third point argued is that the High Court has power to revise an order passed in a criminal matter. I think this is concluded by authority. The earliest case on the point is in *Queen* v. *Godai Reout* (11) A Full Bench of the Calcutta High Court presided over by Sir Barnes Peacock held that the High Court could not entertain an application to review a judgment passed by it in a criminal case. The learned Judge observed at P. 63. "The Code of Criminal Procedure does not contain any provision expressly authorising a review of judgment in a criminal case after the judgment has been recorded. The Code of Criminal Procedure was passed after the Code of Civil Procedure. The latter contoins a section expressly authorising review of judgment but the former contains no corresponding section. From this it may reasonably be inferred that the Legislature did not intend to confer in criminal cases a power similar to that which had been given in civil cases." Now the Code of Criminal Procedure has been amended a number of times, and the Legislature has not chosen to give a power of review to any Court in a criminal case. S. 369 is relied upon as showing that the High Court has power by implication to review a judgment passed in a criminal case. I think such a contention is untenable. S. 369 runs thus: No Court other than a High Court, when it has signed its judgment shall alter or review the same, except as provided in S. 395 and 484 or to correct a clerical error." The exception contained in S. 369 is with reference to the power of review in regard to cases decided by a Judge of the High Court presiding over the sessions when points are reserved for consideration by the Full Bench, or on the certificate of the Advocate-General. The cases reported in *Queen Empress* v. *Durga Charan* (3) *Queen Empress* v. *C. P. Fox* (4). *In the matter of Gibbons* (1) are all authorities for the position that a Division Bench of the High Court has no power to review its judgment pronounced in a criminal revision case or a criminal appeal.

In this case the appellant has not applied for review and I consider that this Bench which did not hear the case originally has no power to review the order. In these circumstances the order of Mr. Justice Krishnan made during the vacation on this appeal of the appellant is good and the matter cannot be reopened. That being so we cannot hear the appeal before us and it must be dismissed.

Appeal dismissed.

9. (1905) 27 All. 92=1 A. L. J. 495=(1904) A. W. N. 195.
10. (1902) 4 Bom. 101.
11. 5 W. R. Crl. 61.

* **1923 Madras 434.**

KRISHNAN, J.

Budhavaram Narasimhulu Chetti. Petitioner

v.

Noota Ibbundrum Nagaram Varu by representative Revoor Subbaroya Chetty ... Respondent.

C. R. P. No. 683 of 1921, dated 29th November 1922, under S. 25 of Act IX of 1887 praying the High Court to revise the decree of the Court of the Dt. Munsif of Chittoor in Small Cause Suit No. 107 of 1921.

(a) *Community—Promise to pay to.*

A person can make himself liable to a community by agreeing to pay a certain sum of money to it. It has been held in several cases that an indefinite body like the Vysia community of Mogarala can own property. (Case Law discussed.)

(b) *Contract Act S. 2—Consideration.*

It is not necessary that consideration should move from the person to whom the promise is made.

T. K. Srinivasathatha Chariar and R. Thirumalaithatha Chariar for the petitioner.

S. Jagadisa Iyer—for the Respondent.

JUDGMENT :—This is an application to revise the decree of the District Munsif of Chittoor in Small Cause Suit No. 107 of 1921. The suit was brought for a sum of Rs. 28-0-0 and interest thereon Rs. 9-10-0 in all for Rs. 37-10-0 alleged to be due on account by the defendants to the Vysia community of Mogarala village in Chandragiri Taluk, as evidenced by a deed executed by the 1st defendant. It says "On 3rd March 1918, I, Budhavaram Narasimhulu Chetti said at the time of the death of Budhavaram Chengalroya Chetty that I would pay Rs. 28-0-0 to Mogarala Nootayibandum Nagaramvaru as charity. Interest should be charged hereon at the rate of Re. 1-0-0 per cent per mensem. I shall pay the amount of principal and interest thereon to the aforesaid Nootayibandam Nagaramvaru on 15—10—1918." There is clear evidence that the 1st defendant did undertake to pay Rs 28-0-0 and interest to the Vysia community of the village in question.

The main objection taken by the 1st defendant before me is that such a claim as this could not be enforced at all as no promise to pay any money to a fluctuating body like the Vysia community of Mogarala is legally enforceable. I may say at once that I do not look upon the document executed by the 1st defendant as a promissory note or negotiable instrument; it is really only a memorandum of what he orally promised to pay at the time of the death of the deceased. Therefore the question whether a promissory note can be executed in the name of a community does not arise for decision. The only question is whether a person can make himself liable to a community by agreeing to pay a certain sum of money to it. The frame of the suit in the present case cannot be objected to, because leave was obtained by the plaintiff Subbaraya Chetti to sue on behalf of the Vysia community of Mogarala under O. 1, R. 8, C. P. C. It has been held in several cases that an indefinite body like the Vysia community of Mogarala can own property; vide *Navroji Manekji Wadia* v. *Dastur Khursedji Mancherji* (1), *The Secretary of State for India* v. *Haibat Rao Hari* (2), and *Periyava Nadar* v. *Velumuruga Nadar* (3), and the position has also been recognised by the Privy Council in *Idris* v. *Mrs. Jane Skinner* (4); where a right of pre-emption was allowed to be enforced in favour of an indefinite body like the occupancy tenants in an estate in the Punjab.

The petitioner has cited some cases from the Allahabad Reports on the authority of which he contends that the present suit should be dismissed as improperly laid. The cases cited are *Yusuf Beg* v. *The Board of Foreign Missions of the Presbyterian Church of New York in America through the Revd. W. F. Johnson, Principal Officer*, (5), *Panchaiti Akhara* v. *Garukuar* (6), and *The Mahomedan Association of Meerut* v. *Bakhshi Ram* (7). Now all these cases deal with suits which are brought in the name of a community or indefinite body of persons by some one individual or more without any authority being obtained by that individual or those individuals either under O. 1, R. 8, Civil Procedure Code

1. (1903) 28 Bom. 20 (49) 5 Bom. L. R. 745.
2. (1903) 28 Bom. 276=6 Bom. L. R. 43.
3. (1921) 30 M. L. T. 47 (H. C.)=64 I. C. 618.
4. (1920) 82 P. R. 1919=45 P. W. R. 1919 56 I C. 723.
5. (1894) 16 All. 420=(1894) A. W. N. 154.
6. (1897) 20 All. 167=(1898) A. W. N. 7.
7. (1884) 6 All. 284.

or by getting the body registered under the Societies Registration Act or any other Act, and it was held that such suits were not properly instituted. But these decisions do not apply to the present case, as in this case leave has been obtained from the Court by the plaintiff to sue on behalf of the community. The petitioner has also cited the case in *Maharaj Bahadur Singh* v. *Gandauri Singh*. (8) That case does not seem to have any direct bearing on the present case. What was held there was that a right to hunt in a certain jungle for a day in the year cannot be acquired as an easement by 20 years' enjoyment, under S. 26 of the Limitation Act of 1908, by the members of a tribe such as the Sonthals or Gharwalis. It is not necessary to consider whether that is rightly decided, because here no such question is raised. The only question here is whether a body like the Vysia community of Magarala which I understand consists of a very few individuals can enter into a contract to receive money from a third party. I have no doubt that as they can own property they can do so just as they can enter into contracts to pay money for work done for them. I therefore overrule the first objection.

Another objection has been taken in this case, namely, that on the face of the document, Ex. A (I) the promise to pay is not supported by consideration, because it was only intended as a charity as the document says. The District Munsif has considered this point and has found on the evidence given in this case that although Ex. A speaks of the payment as a matter of charity, there was consideration for the payment inasmuch as the members of the Vysia community of Mogarala helped 1st defendant in carrying the corpse of the deceased brother and in having the cremation of the dead body carried out and that instead of bargaining for payment to themselves they asked that payment should be made to the community as a whole. I think the District Munsif is right in his view that this would form sufficient consideration for the promise to pay R. 28-0-0 to the community. It is not necessary that consideration should move from the person to whom the promise is made. The fact that the document does not mention this is only a matter to be taken into consideration in weighing the evidence; it does not prevent such evidence as has been given in this case from being given. This objection also fails.

As both the points taken in the Revision Petition fail, the Revision petition itself fails, and is dismissed with costs.

Petition dismissed.

8. (1917) 2 Pat. L.J. 323=2 Pat. L. W. 252=39 I. C. 868.

1923 Madras. 435

SPENCER AND VENKATASUBBA RAO, JJ.

The British India Steam Navigation Co. ... Petitioner (Defendant).

v.

H. M. Sharafally, Merchant, by his Agent H. S. Mahomed Bhoy ... Respondent (Plaintiff).

C. R. P. No. 799 of 1921, dated 23rd November 1922, under S. 115 of Act V of 1908, praying the High Court to revise the order of the Full Bench of the Court of Small Causes Madras, dated the 16th August 1921.

(a) *Civil P. C. S. 115—Limitation.*

If the erroneous decision of a Subordinate Court involves a refusal to deal with a petition made to it, its action amounts to a failure to exercise a jurisdiction vested in it by law. [P 436]

(b) *Presidency Sm. C. C. Act* (15 *of* 1882) *S.* 92 *and* 38—*What is closing of Court.*

When a Court is adjourned for the vacation but the notification states that the Court will be open on certain days for the reception of plaints, petitions and other papers, the Court cannot be treated as closed on those days when it was open for the above purpose. As a matter of practice, it is well understood that plaints, which are not presented in the Presidency Small Cause Court on the days when the office is open for receiving them during the vacation, become time-barred after the expiration of the period of limitation appropriate to such suits and plaintiffs cannot claim to exclude the whole of the Small Cause Court's vacation. The words "other papers" are very wide and must include applications for retrial of the suit

[P. 435, Col. 2, P. 437, Col. 1.]

Sydney Smith instructed by Brightwell and Moresby—for Petitioners.

A. Venkatarayaliah and L. Venkatanarasiah—for Respondents.

SPENCER, J.:—This is a petition under S. 115, C. P. C. to revise the order of two Judges of the Presidency Small Cause Court rejecting as being out of time an application for retrial of a Small Cause Suit tried by a single Judge of that Court,

A preliminary objection is raised that the High Court has no power of revision over an erroneous decision of a Small Cause Court on a question of limitation. It was held by a single Judge of this Court in *Kuppuswami Iyengar* v. *Narayana Iyengar* (1) that an alleged erroneous decision of a Small Cause Court on a question of limitation was not liable to be revised under S. 115, C. P. C., and in Letters Patent Appeal *Kuppuswami Iyengar* v. *Narayana Iyengar* (2) this view was upheld. In the present case, however, the result of the two Judges' decision on the question of limitation has been that if they were wrong in so deciding, there was a failure on their part to exercise a jurisdiction vested in them and this will be within the scope of S. 115. In *Sundaram* v. *Mausa Mavuthar* 3, it appears from the judgments of the learned Chief Justice and Kumaraswami Sastri, J., that, if the erroneous decision of a Subordinate Court involves a refusal to deal with a petition made to it its action amounts to a failure to exercise a jurisdiction vested in it by law. This distinguishes the present case from cases where no question of jurisdiction is involved by the decision on a point of limitation. The objection, therefore, fails.

The judgment in the Small Cause Court which occasioned the application for retrial was pronounced on 10th May 1921. The application under S. 38 of the Presidency Small Cause Courts Act was made on July 15th. That section provides eight days within which to make an application for a new trial or for reversal of the decree or order of a Judge who has disposed of a contested suit. The Presidency Small Cause Court was closed for the vacation from May 16th to July 16th inclusive. S. 10 of the General Clauses Act provides that if a Court is closed on a day upon which an act is allowed to be done the action shall be considered as done in due time if it is done on the next day afterwards on which the Court is open. It is clear then that, if the applicant was entitled to exclude the whole vacation of the Small Cause Court, his application made on the 15th of July was in time, but not otherwise. Under S. 92 of Act XV of 1882, the Small Cause Court is bound to draw up a list of holidays and vacations and to obtain the approval of the Local Government to it. The notification for the mid-summer vacation of 1921 provides that "plaints, execution applications and other papers will be received *only* on the days on which the Judge sits." Those are the words of para. 5 of the notification. Para. 2 deals with the sitting of the Vacation Judge on Wednesdays and Thursdays for the disposal of emergent work. Para. 3 deals with cases which require immediate attention for which the party concerned has to give 24 hours of notice to the Registrar. Para. 4 deals with the receipt of monies and urgent applications referred to in para. 3. It is conceded that the present application was not an urgent application. Urgent applications may include applications, for attachment before judgment, applications for injunctions, stay of execution and such like matters; but the fact that a plaint or petition is about to become time-barred will not of itself make the presentation of it an urgent matter, provided that it will be in time, if presented on some later date owing to the exclusion of days when the Court is closed. If the present application was capable of being received on the next day on which the Vacation Judge sat after the expiration of 8 days from the date of the order sought to be set aside, then the Court cannot be regarded as closed upon that date when the application might have been made. When a Court is adjourned for the vacation but the notification states that the Court will be open on certain days for the reception of plaints, petitions and other papers, the Court cannot be treated as closed on those days when it was open for the above purpose. This is the effect of the Full Bench decision in *Nachiyappa* v. *Ayyasami* (4), in which four out of five Judges concurred. This principle was followed in another Full Bench of this Court in *Receiver of the N. & M. Estates* v. *Suraparaju* (5). In *Parvatheesam* v. *Bapanna* (6), it is implied that a Court cannot be regarded as closed on dates when arrangements were made and notified for the reception of plaints. The note

1. (1913) 16 M. L. T. 438=1 L. W. 855=25 I. C. 647.
2. (1916) 19 M. L. T. 24=3 L. W. 36=32 I. C. 3.
3. (1922) 44 Mad. 554=40 M. L. J. 497=29 M. L. T. 269=13 L.W. 499=63 I.C. 937 (F.B).
4. (1882) 5 Mad. 189 (F. B.)
5. (1915) 29 M. L. J. 125=(1915) M. W. N. 408=29 I. C. 449.
6. (1890) 13 Mad. 447.

in Mr. Rustomji's Law of Limitation under S. 4 of the Limitation Act suggests that a different view has prevailed in the Calcutta, Bombay and Punjab Courts on the question whether a Court is closed when the office is open for the reception of plaints and petitions. I have referred to the cases in *Rani Venkata Ramnia* v. *Kherode Mull* (7), *Maharajah Raveneswar Prasad Singh* v. *Baji Nath Ram Goenka* (8) and *Ranchoradas* v. *Pestonji* (9). These cases turn upon the terms of the notification for the closure of the Court and the practice prevailing in those Courts. They do not diminish the authority of the Full Bench decision of our Court by which we are bound. As a matter of practice, it is well understood that plaints, which are not presented in the Presidency Small Cause Court on the days when the office is open for receiving them during the vacation, become time barred after the expiration of the period of limitation appropriate to such suits and the plaintiffs cannot claim to exclude the whole of the Small Cause Court's vacation.

It is however, argued that applications under S. 38 of the Act are applications of a special nature and are not plaints, execution applications or other papers," within the meaning of para. 5 of the notification, and secondly that the notification is not in conformity with S. 92 of the Act which requires the list of holidays *and vacation* to be notified. It is contended that a vacation means a continuous holiday which cannot be whittled down by an announcement that the Court will be open for the receipt of plaints and other papers. On the first point I am of opinion that the words "other papers" are very wide and must include applications of this nature, unless there is anything to indicate the contrary. Secondly in the Full Bench decision in *Nachiyappa* v. *Ayyasami* (4), it was not considered llegal or irregular that the District Judge should have appointed certain days for the presentation of plaints and petitions to the ministerial officer in charge during his absence. O. 41, R. 1 of the rules of the Small Cause Court (1912) in force in the Presidency Small Cause Court provides for applications under S. 38 being presented to the Registrar or such other officer as the Chief Judge appoints. There is nothing to show that during the days on which the Vacation Judge sat there was nobody authorized to receive plaints and applications presented on those days. I am therefore not prepared to hold that the notification was illegal or contravened the provisions of S. 92 of the Act, although I consider that future notifications should be more precisely worded, so as to leave no doubt as to when applications under S. 38 will be received. The order against which this petition is preferred thus appears to be right and does not need to be revised by us.

The petition is, therefore, dismissed with costs.

VENKATASUBBA RAO, J.:—The decree of the Small Cause Court is dated the 10th May 1921. On the 16th May, the Small Cause Court adjourned for the long vacation. The defendant filed an application for new trial under S. 38 of the Presidency Small Cause Courts Act (XV of 1882) on the day when the Court re-opened after the annual recess. The Full Bench of the Court of Small Causes rejected the application as being out of time. Under S. 38 the application for new trial should be presented within 8 days from the date of the decree.

It has been argued before us that, as the Court was closed from the 16th May to the 16th July, the application should be held to have been filed in time as it was filed on the re-opening day.

The question turns on the construction of the notification published under S. 92 of the Act, which enacts that the Small Cause Court shall draw up a list of holidays and vacations to be observed in the Court and shall submit it for the approval of the Local Government, and that such list, when it has received such approval, shall be published in the local official Gazette. The wording of the notification has led to this difficulty and though it must be said that it is somewhat obscure, there can be no reasonable doubt in regard to its interpretation. The notification runs as follows :—

"Except as hereunder mentioned, the Madras Court of Small Causes will be closed for the midsummer vacation from Monday the 16th May 1921 to Saturday the 16th July 1921, both days inclusive.

7 (1898) 10 C. L. J. 118=3 I. C. 400.
8 (1909) 10 C. L. J. 120=3 I. C. 401.
9 (1907) 9 Bom. L. R. 1329.

2. His Honour the third Judge Mr. Zyn-ud-din, Bar-at-Law will sit as Vacation Judge on Wednesdays and Thursdays for the disposal of emergent work.

3. In any case which requires immediate attention, the party concerned or his Vakil may give 24 hours' notice of the same to the Registrar, when the papers will be sent to the Vacation Judge for disposal, after hearing the party, if necessary.

4. The office of the Registrar will be open from Wednesday to Friday in each week from 12 noon to 4 p. m. for the receipt of moneys and of urgent applications referred to in para. 3 *supra*.

5. Plaints, execution applications and other papers will be received *only* on the days on which the Judge sits."

It will be observed that the very first clause, while stating that the Court will be closed for the midsummer vacation, mentions the qualification, "except as hereunder mentioned." The material clause is Cl. 5. It means that the Court will be open on Wednesdays and Thursdays for the reception of plaints, execution applications and other papers; pleadings or proceedings referred to in Cl. 5 are not intended to be disposed of by the Vacation Judge. It is therefore curious that, instead of providing that plaints, etc., will be received only on Wednesdays and Thursdays, the clause refers to "the days on which the Judge sits." Those days are Wednesdays and Thursdays, as Cl. 2 shows; but there was no reason to refer to them in the manner in which they have been referred to in Cl. 5. It has been argued by Mr. Sydney Smith on behalf of the defendant that Cl. 5 must be regarded as referring to "urgent applications" mentioned in Cl. 4. I do not think that, on a careful reading of this notification, this contention can be accepted.

Cls. 2, 3 and 4 deal with "emergent work" or "urgent applications" but cl. 5 deals with quite a different subject. This clause is of the first importance and one would naturally expect that the matter contained in it would be clearly expressed and in the forefront of the notification, whereas its actual position and wording are apt to mislead.

The fourth clause says that "the office of the Registrar will be open." This implies that it is *otherwise* closed, but there are no words to indicate that the office of the Registrar will remain closed except as provided for by Cl. 4. What is really meant is, that the Small Cause Court and the office of the Registrar will be closed during the recess, except as provided for in the notification.

Mr Sydney Smith has next argued that the notification is *ultra vires*, because the word "vacation" used in S. 92 is different from holidays and that the Court was not justified in making rules providing for work to be done during the vacation. It is not necessary to deal with this matter at great length because the point is concluded by authority. In *Nachippa Mudali* v. *Ayyasami Ayyar* (4) a Full Bench of this Court had to consider a similar notification and the publication of such rules was treated as a matter having the sanction of general usage. In the judgment it was observed that the judicial sittings of the Court may be adjourned but the office of the Court might still remain open for the presentation of the pleadings. *Parvateesam* v. *Bappanna* (6) also recognises this practice. There the Court was closed for the annual recess from the 23rd April and the plaint was presented on the 26th April. Arrangement had been made and duly notified for the reception of plaints on every Monday and Thursday during the recess. The 23rd April happened to be a Monday. It was contended that the suit was barred and the plaintiff's answer was that the 23rd April was a "local holiday,' that he was therefore entitled to present the plaint on Thursday the 26th. The learned Judges remanded the case for ascertaining whether the 23rd was a "local holiday" and whether the Court was closed on that day. This of course implies that, if the 23rd was not a "local holiday" the suit would have been barred notwithstanding the fact that the 23rd fell during the recess. *Nachiyappa Mudali* v. *Ayyasami Aiyar* (4) was referred to by a Bench of this Court with approval in *Komuru Appalaswami* v. *Palli Narayanaswamy* (10).

Even if in any other province a different view had been taken we would be bound by the authority of the decisions mentioned above, but I do not think that a different rule has been enunciated in any case decided by any other Court. In *Ranchordas Tribhowandas* v. *Pestonji Jeghangir* (9) the notification seems to have

10. (1918) 36 M. L. J. 62=49 I. C. 626.

provided only for "urgent" work during the vacation and it was held that the filing of a plaint or the filing of an appeal could not be considered as work of an urgent nature.

Rani Venkataramania v. *Kherodee Mull* (7) and *Maharaja Rameswar Prasad Singh* v. *Baij Nath Ram Goenka* (8) afford us no assistance whatsoever because the terms of the notification have not been set out in the reports of the cases.

There remains another objection to be dealt with. It has been argued that applications for new trial are not explicitly mentioned in Cl. 5. But the words "others papers" are comprehensive enough, although a more apt expression might have been used. It is not denied that Cl. 5 was always treated as applicable also to applications for new trial. I am of the opinion that this contention also must fail. *Petition dismissed.*

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* **1923 Madras. 439**

WALLACE, J.

Venkatarama Iyer ... Petitioner—(Complainant).

v.

Sundaram Pillai and others ... Respondents (Accused).

Cr. R. C. No. 204 of 1922, dated 15th November, 1922, under Ss. 435 and 439 of the Code of Criminal Procedure, 1898 praying the High Court to revise the order dated 16th January, 1922.

Criminal P. C., S. 247—Trial as a warrant case but charge with summons case offence.

S 247 seems to be intended to lay down a general principle that a person charged with a summons case offence is entitled in law to an acquittal if the complainant is absent; and this right should not be denied to him simply because the Magistrate has adopted a warrant case procedure in the trial of the case.

[P. 439, Col. 2.]

The general principle must be that the right of the accused to benefit under S. 247 of the Code of Criminal Procedure does not depend on the procedure which the Magistrate chose to adopt and was constrained to adopt by the complaint as laid, but on the nature and class of the offence for which he is being tried, at the time of the complainant's failure to appear in Court. The plea that the date of hearing was a holiday is not a sound excuse for complainant appearing to prosecute his case, and a legal reason for the Magistrate refusing to act under the peremptory provisions of S. 247.

[P. 440, Cols. 1, 2.]

S. Swaminathan—for Petitioner.

The Public Prosecutor—for Government and *V. L. Ethiraj* for 1st Accused.

ORDER :—The first point for decision in this case is whether the lower Court had any jurisdiction to acquit the accused under S. 247 of the Code of Criminal Procedure. Perusal of the lower Court's proceeding shows clearly that the accused was charged under S. 430, I. P. C., a warrant case offence, that the lower Court tried the accused under the procedure laid down for the trial of warrant cases, but eventually framed a charge under S. 426, I. P. C., a summons case offence, but still proceeded with the trial under warrant case procedure, recalling the prosecution witnesses for further cross-examination and then eventually acquitted accused under S. 247 of the Code of Criminal Procedure on the ground that the complainant (petitioner) was absent on the adjourned date of hearing. Petitioner's case is that the lower Court having elected to try the case by warrant case procedure, had no power to act under S. 247 of the Code of Criminal Procedure, which applies only to cases tried under summons case procedure.

No doubt S. 247 appears in the Chapter headed "Of the trial of summons cases" and not in the Chapter headed "Of the trial of warrant cases," but in my opinion that does not settle the point at issue. S. 247 seems to me intended to lay down a general principle that a person charged with a summons case offence is entitled in law to an acquittal if the complainant is absent; and I cannot see why this right should be denied to him simply because the Magistrate has adopted a particular procedure in the trial of the case. *Ex hypothesi* in such contingency, the complainant has so exaggerated his case that the Magistrate had to try it as a warrant case, whereas, if the complainant had not exaggerated it, and the Magistrate had tried it as a summons case *ab initio*, the acquittal on the ground of complainant's absence, could have been perfectly legal. I cannot see any justification either in law or in reason why accused should lose this right to demand an acquittal merely because the complainant exaggerated the case against him. To hold otherwise would be to allow a pure technicality to negative a substantial legal right. If any

conflict arises between technicalities and the legal rights of an accused person, undoubtedly the latter must prevail.

I find no reported cases directly in point. That reported at *Rajnarain Koonwar* v. *Lala Tamoli Raut* (1) was a case in which the Magistrate purported to pass an order under S. 247 of the Code of Criminal Procedure in respect of a warrant case offence, which was clearly illegal. The case reported in *Queen-Empress* v. *Papadu* (2), lays down that when a Magistrate finds that a warrant case charge fails, he is not prevented from then and there trying the accused for a summons case offence, which he finds to have been made out, under the procedure for trying summons cases. I take it that this means that, when running through the trial of a warrant case, the Magistrate is satisfied that only a summons case charge will stand, the rest of the trial though technically a continuation of the warrant case trial is really a summons case trial. In the case reported in *Gangasaran* v. *Emperor* (3) the question decided was that a case begun under warrant case procedure should be continued under that procedure and the applicability of S. 247 of the Code of Criminal Procedure to cases so tried was not considered.

The general principle must be that the right of the accused to benefit under S. 247 of the Code of Criminal Procedure does not depend on the procedure which the Magistrate chose to adopt and was constrained to adopt the complaint as laid, but on the nature and class of the offence for which he is being tried, at the time of the complainant's failure to appear in Court. I find therefore nothing illegal in the lower Court's procedure.

The next point taken is that the petitioner had good reasons for not appearing at the hearing of 16—1—1922. Petitioner was well aware that the hearing was going on on that day at Abhiramam since he was served with summons for that day and place. His plea that he could not find the Magistrate at Abhiramam is disingenuous, since the Magistrate was holding his Court at the usual place where he used to hold it when camping at Abhiramam. The plea that 16—1—1922 was a holiday was not a sound excuse for petitioner not appearing to prosecute his case, and a legal reason for the Magistrate refusing to act under the peremptory provisions of S. 247 of the Code of Criminal Procedure.

I am not prepared to interfere in this case and dismiss the petition.

Petition dismissed.

1. (1884) 11 C. 91.
2. (1884) 7 Mad. 454=2 Weir 551.
3. (1921) 19 A. I. J. 6=22 Cr. L. J. 146=59 I. C. 850.

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* **1923 Madras. 440**

RAMESAM, J.

A. Rarichan ... Petitioner—Defendant.

v.

Elambilakad Vazhayil Damayanti and another ... Plaintiffs—Respondents.

Civ. Rev. No. 131 of 1922, dated 21st November 1922, under S. 25 of Act IX of 1887, from Munsif of Calicut in Sm. C. Suit No. 248 of 1921 dated 29th September 1921.

Mortgage—Sub-Mortgagee's rights against stranger.

A sub-mortgagee, after redemption of the original mortgage, has no further rights against the mortgaged property and his remedy, if any, is against the sub-mortgagor. 20 Cal. 241 F. But the sub-mortgagee can still pursue his rights against any property in the hands of the sub-mortgagor into which the security was converted. The plaintiff as sub-mortgagee can, as against a stranger, subrogate himself only to such rights as his sub-mortgagor can have as against the stranger and is bound by the decree between his sub-mortgagor and the stranger and cannot get rid of it by showing that it was erroneous unless the decree was obtained by fraud and collusion and unless really what was decreed in favour of the stranger in fact belonged to the sub-mortgagor.

K. P. Ramakrishna Iyer—for Petitioner.

K. Kutikrishna Menon—for Counter-Petitioner.

JUDGMENT :—The facts of the Small Cause Suit out of which this revision petition arises may be briefly stated as follows :—Certain properties were mortgaged jointly to Chandan (the 1st defendant) and Bapputi (now represented by the 3rd defendant). Chandan sub-mortgaged his interest to Damayanti (the plaintiff) and Bapputi, his interest to Rarichan (the 2nd defendant). The jenmi (Ayyapan) brought a suit to redeem the mortgage in O. S. No. 145 of 1916. In that suit Damayanti was not a party ; but Rarichan

was impleaded as 4th defendant and claimed compensation for a shop on the footing that it was in the portion sub-mortgaged to him by Baputti, and in appeal this question was decided in his favour. A. S. No. 183 of 1917 of the Temporary Subordinate Court of Palghat.

Damayanti filed the present suit on the ground that the shop was in the portion sub-mortgaged to her and not in the portion sub-mortgaged to Rarichan, that O. S. No. 145 of 1916 was wrongly decided on account of the collusion and fraud of Chandan and Rarichan, that the amount of compensation ought to have been awarded to Chandan and that she is now entitled to it as his sub-mortgagee. The District Munsif found there was no collusion but also found that the shop was in the portion belonging to the 1st defendant and gave plaintiff a decree. The 2nd defendant (Rarichan) filed this revision petition.

Before me it is contended by the petitioner (1) that after the decree in O. S. No. 145 of 1916, the rights of the sub-mortgagee were extinguished (2) even if they were not, the plaintiff's remedy is against the 1st defendant.

In support of the 1st proposition, the petitioner relied on *Singaravelu Udayan* v. *Ramiyer* (1) and in *Poosarla Chinaswamy* v. *Katta Moori Venkata Ramakrisnaya.* (2) The former decision was dissented from in *Venkatarama Iyer* v. *Esumsa Rowthan* (3) which followed *Gosto Behary Pyne* v. *Shib Nath Dutt.* (4) As to the latter case, all that was meant by it is that the sub-mortgagee after redemption of the mortgage, has no further rights against the mortgaged property and his remedy, if any, is against the sub-mortgagor. It is clear from 20 Cal. 241, that the sub-mortgagee can still pursue his rights against any property in the hands of the sub-mortgagor into which the security was converted.

But, does it follow from this that the plaintiff is entitled to a decree against the 2nd defendant on the ground that he obtained the compensation which ought to have been paid to the 1st defendant? There is no privity of any kind between plaintiff and 2nd defendant. It is true that the findings in O. S. No. 145 of 1916 do not bind plaintiff. But the decree therein binds 1st defendant. While it may be open to the plaintiff to show against Chandan that the findings in O. S. 145 of 1916 are erroneous and that he got in redemption a much smaller amount than he was entitled to, (assuming that it serves any useful purpose), I do not think she can earmark the compensation in the hands of 2nd defendant as money still belonging to 1st defendant and still available to plaintiff as security for her sub-mortgage, by reason of such error. The facts in 20 Cal. 241 are distinguishable. There the money decree-holders of the patnidars drew out the sale-proceeds in execution of their decrees against the patnidars to whom they were considered to belong, apart from the decrees. In the present case, it cannot be said that the compensation originally belonged to the 1st defendant and that the 2nd defendant drew the money on account of some decree or other right he was seeking to enforce. It was held, as between the 1st and 2nd defendants, that the amount did not belong to the 1st defendant and this decision is binding on the 1st defendant. Except on the ground of fraud or collusion, which the District Munsif has found against, the plaintiff cannot regard the amount in the hands of the 2nd defendant as money belonging to the 1st defendant so as to be available as security for her sub-mortgage. The plaintiff as sub-mortgagee can, as against a stranger, subrogate herself only to such rights as her sub-mortgagor can have as against the stranger and is bound by the decree between her sub-mortgagor and the stranger and cannot get rid of it by showing it was erroneous.

The petition is allowed and plaintiff's suit is dismissed with costs throughout so far as 2nd defendant is concerned. The plaintiff will have a decree for the amount sued for against the 1st defendant with costs in the First Court.

Petition allowed.

1. (1903) 13 M. L. J. 306.
2. (1917) M. W. N. 111=4 L. W. 502=37 I. C 778.
3. (1910) 33 Mad. 429=7 M. L. T. 143=20 M. L. J. 330=5 I. C. 92.
4. (1893) 20 Cal. 241.

* **1923 Madras. 442 (1)**

SCHWABE, C. J. AND WALLACE, J.

Duraisamier ... Appellant (Plaintiff).

v.

Subbaraya Iyer and others... Respondents.

S. A. No. 1516 of 1920, dated 15th December 1922, against the decree of the Court of the Temporary Sub. J. of Salem in A. S. No. 87 of 1912.

Hindu Law—Alienation by manager—Sale-proceeds invested in money-lending.

Where at the family partition the money-lending business started by the manager with the sale proceeds of a family property was brought into account but the property alienated was not, no member can subsequently sue to set aside the sale.

V. N. Venkatavaradachari — for the Appellant.

L. S. Veeraraghava Iyer—for the Respondents.

SCHWABE, C. J. :—In this case the facts are that the 1st plaintiff the managing member of a joint Hindu family in 1903 sold some land. It is conceded that that sale was not binding on the other members of the family as not being for necessity. The plaintiff was at the date of that sale 17 years of age and he knew all about it then and thereafter. The money that was realised on the sale was invested by the managing member in a family money-lending business which he carried on. In 1915 there was a general partition of the family property between the plaintiff and the 1st defendant and other members of the family. In that partition the money-lending business was brought into account but the property alienated in 1903 was not, though the proceeds of that sale were in effect brought into the accounts of the money-lending business as it stood in 1915. After this partition plaintiff sues the other members of his family and the alienee to recover back the property alienated. It was held by the Munsif and the Subordinate Judge that the alienation was perfectly good. It was also held by the Subordinate Judge that on the partition in 1915 this property was brought into account in the way I have mentioned. In my judgment that finding, which was on admitted facts, was conclusive of the suit. It is only in his capacity as co-parcener that a member can sue for joint family property unlawfully alienated. His suit must be in the nature of a partition suit. In that suit it is open to the alienee to claim partition, so that the property in dispute may, if possible, without injustice be decreed to the alienor on partition and the alienee standing in his shoes may keep it. But once you have got a general partition in which the property in question and the sale of it has been taken into account, the parties to that partition cease to be co-parceners. If there were property left outstanding and not dealt with in that partition, they would be entitled indeed to claim that property and to have that property divided. But the property in question in this suit was taken into consideration in the partition between the parties and the plaintiff has no right, title or interest whatever to it. He cannot sue for partition there being nothing left outstanding for partition. He cannot sue his father and other members of the family. I entirly fail to see that being so, how he can sue the alienee of his father. The Second Appeal on that ground alone must be dismissed with costs.

WALLACE, J. :—I agree.

Appeal dismissed.

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* **1923 Madras. 442 (2)**

SCHWABE, C. J. AND WALLACE, J.

Venkatarama Iyer ... Appellant.

v.

Elumali Naicker and others...Respondents.

S. A. No. 1612 of 1920, dated 13th December 1922, against the decree of the Court of the Sub. J., of Chingleput in A. S. No. 112 of 1919.

T. P. Act, S. 52—Misdescription of property—Tranfer.

If certain land is the subject of the mortgage suit, although there is an error in the description of it, S. 52 of the Transfer of Property Act applies, and during the pendency of that suit, the transferee's title would be affected by the result of the suit.

L. A. Govindaraghava Iyer—for the Appellant.

SCHWABE, C. J. :—The plaintiff claims a certain land which he says he purchased at a Court-auction. The land purchased was mortgaged by the judgment-debtor, the second defendant, to the decree-holder, who obtained a mortgage decree and brought the land to Court-auction. The

land was described probably in the mortgage as 'Nanja 55' though it is not quite clear that the word 'Nanja' in the mortgage itself necessarily applied to the number 55: but it was certainly so described in the decree, in the notice of sale, and in the certificate of sale. Before the sale and after the suit, the first defendant, the appellant, bought from the judgment-debtor, his brother-in-law, the land described as No. 55 Punja. In this village, the numbers used for description of lands run consecutively irrespective of whether the land is Punja or Nanja. There is no other No. 55 in this village. The land is in fact Punja and not Nanja. In my judgment the word 'Nanja' used in the mortgage and in the decree and in the documents relating to the auction is merely an inaccurate description of the land properly described as No. 55 and thus identified and in my judgment that land was mortgaged and was the subject of the decree, and was the land that was sold. If the description of the land given is such that it identifies the land, for instance, if the description used would apply to some other land than that which it was intended to sell, then, according to the judgment of the Privy Council, in *Thakur Barmha* v. *Jiban Ram Marwari* (1), the purchaser at Court-auction can get no other land than that so identified. If on the other hand, the land is clearly identified but wrongly described, the misdescription is to be treated as an irregularity and the sale at the auction stands good. As this land was the subject of the mortgage-suit, although there was an error in the description of it, in my judgment, S. 52 of the Transfer of Property Act applies, and during the pendency of that suit, the first defendant would get no title to it. Further it was ordered in this case that the description, 'Nanja' should be altered into 'Punja' and the various documents from the mortgage-deed onwards be rectified accordingly. It was urged that, under the Specific Relief Act rectification could not be ordered where rights of third parties intervene. It is said that the purchase by the first defendant was a *bona fide* purchase for value without notice and the rectification cannot be made so as to affect the right which he has acquired. The answer given on this point by the Subordinate Judge is that the first defendant was not a *bona fide* purchaser for value. That, I think, is a question of fact and, there being evidence to support it, it is not open to this Court on Second Appeal to reconsider it, but I think it right to say that the fact of the relationship of the first and the second defendants, the suspicious circumstances, as to the consideration and the fact that the first defendant never even asked to see the title-deeds before purchasing the land, amply warrant the Subordinate Judge and the District Munsif in arriving at the conclusions which they did on this point. In view of what I have said about the application of S. 52 of the Transfer of Property Act, this point does not arise.

This appeal must be dismissed.

WALLACE, J.—I agree.

Appeal dismissed.

1. (1914) 41 Cal. 590 = 41 I. A. 38 = 18 C. W. N. 313 = 15 M. L. T. 137 = 12 A. L. J. 156 = 19 C. L. J. 161 = 26 M. L. J. 89 = (1914) M. W. N. 118 = 16 Bom. L. R. 156 = 21 I. C. 936 (P. C.)

1923 Madras. 443

KRISHNAN AND VENKATASUBBA RAO, JJ.

(Zamorin) Raja of Calicut ...Petitioner—Appellant.

v.

Kulapura Veetil Kannan Nair and others ...Respondents.

C. M. P. Nos. 1872 to 1876 of 1920 and 1535 of 1922, dated 8th December 1922.

Civil P. C., Ss. 110 & 109—Whether a custom is established is question of law—Forfeiture on alienation of Karamkari *and* Adimayavana *tenure a substantial question of law.*

The question whether the permanent tenures known as *Karamkari* and *Adimayavana* in Malabar have the incident of forfeiture on alienation attached to them by custom or not is a substantial question of law and one of general interest in Malabar. Leave may be granted in these cases under S. 109 (c) of the Civ. P. C., as the question raised is a substantial question of law of general interest in Malabar and as the same question arose in Second Appeals in which High Court had already given leave. The question whether a custom has been established or not is a question of law though it has to be inferred from the facts proved.

A. Krishnaswami Iyer and K. P. Ramkrishna Iyar—for the Petitioner.

K. Kuttikrishna Menon for *C. Madhavan Nair*—for the Respondents.

ORDER:—The Subordinate Judge has now submitted his report as to valuation

and we accept it. In three of the Second Appeals *viz.*, in 1079, 1080 and 1081 of 1917, the value of the subject-matter of the suit as well as that of the appeal to His Majesty in Council is considerably over Rs. 10,000. But in two of them, Second Appeals Nos. 1082 and 1083 of 1917, the value is in each case below Rs. 10,000.

Though we differed from the Subordinate Judge on the question whether it was an incident of the permanent tenures in suit in these Second Appeals, that an alienation would not work a forfeiture of the tenure by itself, and that a custom had not been proved attaching such an incident to those tenures, our judgment was nevertheless an affirming judgment on the whole and the Second Appeals were all dismissed. It therefore follows that even in the three Second Appeals first referred to above, there must be a substantial question of law to justify a grant of leave to appeal under S. 110, Civil Procedure Code (1908). The plaintiff had alleged that according to the custom of Malabar the tenures in question were subject to forfeiture on alienation and that the landlord was entitled to re-enter and resume the property on such alienation. The Bench hearing the Second Appeals of which one of us was a member, came to the conclusion that such a custom had not been established. The main point taken by the appellant in the appeal to the Privy Council is that the custom has been established by the evidence given. The question whether a custom has been established or not is a question of law though it has to be inferred from the facts proved. That it is a substantial question in these Second Appeals is clear for the Second Appeals failed as the result of our view on the question. The question was treated as a question of law of sufficient importance, the tenures being similar to the one here as to lead to a subsequent reference to the Full Bench whose judgment is reported in *Ayyakutti* v. *Krishna Pattar* (1). We think the question raised *viz.*, whether the permanent tenures known as *Karamkari* and *Adimayavana* in Malabar have the incident of forfeiture on alienation attached to them by custom or not is a substantial question of law and one of general interest in Malabar.

We therefore certify that the three Second Appeals mentioned above first are fit cases for appeal to His Majesty in Council under S. 109 (*a*) and 110, Civil Procedure Code, 1908.

As regards the two remaining ones we doubt whether O. 45, R. 4 will justify their consolidation as prayed for as the suits from which they arose were determined by the First Court, *viz.*, of the District Munsif by separate judgments though in deciding the questions common to all, that Court wrote a common judgment.

But we think leave may be granted in these cases under S. 109 (*c*) of the Civil Procedure Code, as the question raised as stated above is a substantial question of law of general interest in Malabar and as the same question arises in Second Appeals in which we have already given leave. We think it may be granted in these cases also.

As to these two Second Appeals we certify that they are fit cases for appeal under S. 109 (*c*) of Civil Procedure Code, the question arising being the one formulated above.

Leave granted.

** **1923 Madras. 444**

SCHWABE, C.J., AND WALLACE, J.

Sankaranarayana Pillai ... Appellant—Plaintiff.

v.

Ramaswami Pillai and others ... Respondents—Defendants.

S. A. No. 2046 of 1920, dated 14th December 1922, against the decree of the Court of the Sub. J. of Tuticorin in A.S. No. 58 of 1919.

Practice—Appeal Right to—Parties requesting the Court to have a local inspection.

A suit came before the District Munsif as to whether the defendants had unlawfully diverted some water from the land of the plaintiff and so injured his land. Certain plans and documents were put before him and then the plaintiff and some of the defendants agreed in writing and the pleader acting for the other defendants, agreed to what appeared in writing that the learned Munsif should himself go and inspect the land. The agreement ran as follows:—"We agree to the matter being decided according to the

1. (1922) Mad. 274 = 45 Mad. 394 = 43 M. L. J. 1= (1922) M. W. N. 192 = 31 M. L. T. 1=15 L. W. 650=65 I. C. 942 (F.B.)

opinion which the Court might entertain on the aforesaid local inspection without going into any further evidence." The plaintiff endorsed on that affidavit an agreement to abide by any decision which the Court may arrive at, after making a local inspection of the land and perusing certain plans and other records. The learned Munsif agreed to act on that agreement and inspected the place. The case was again before the Court when some documents were put in according to the plaintiff's statement and the judgment was given and a decree passed in the ordinary form of a decree. In due course there was an appeal to the subordinate Judge who held that no appeal lay to him by reason of the agreement referred to above. *Held*, that the Court did not act as arbitrator nor the agreement before the Court in that case amounted to an agreement that the Court should act *extra cursum curiae*. The right of appeal of the parties is not therefore barred.

T. R. Venkatarama Sastri—for the Appellant.

K. R. Rangaswami Iyengar—for the Respondents.

SCHWABE, C. J. This case is of considerable importance because circumstances of a similar nature have been before the Courts on several occasions and they have given rise to some considerable divergence of opinion.

The facts are that a suit came before the District Munsif as to whether the defendants had unlawfully diverted some water from the land of the plaintiff and so injured his land. When the case came before the District Munsif certain plans and documents were put before him and then the plainiff and some of the defendants agreed in writing and the pleader acting for the other defendants, I have no doubt, agreed to what appeared in writing that the learned Munsif should himsef go and inspect the land. The terms of the agreement signed by the plaintiff and two of the defendants are contained in an affidavit which ran as follows :—

"We agree to the matter being decided according to the opinion which the Court might entertain on the aforesaid local inspection without going into any further evidence." The plaintiff endorsed on that affidavit an agreement to abide by any decision which the Court may arrive at, after making a local inspection of the land and perusing certain plans and other records. The learned Munsif agreed to act on that agreement and went to the place some seven miles off two days later. The case was again before the Court when some documents were put in according to the plaintiff's statement and the judgment was given and a decree passed in the ordinary form of a decree.

The issues in the suit were issues of fact and issues of law. The learned Munsif found the facts in a certain way and in view of those facts gave a finding. In due course there was an appeal to the Subordinate Judge and he expressed his view that the learned Munsif was wrong in law. He held that no appeal lay to him by reason of the agreement referred to above. He purported to follow a case in *Chengalraya Chetty* v. *Raghava Ramanuja Doss* (1) where a very similar agreement was held to result in the decree being not appealable on the ground, as I understand it, that the decree was not a decree of a Judge as such but as an arbitrator. The law as I understand it is this. Where parties agree to a Court proceeding without jurisdiction *extra cursum curiae* as it has been put, the parties cannot appeal from the decision of the Court. The parties in fact may agree not to appeal from the decision of the Court and such agreement will be inferred from the fact that they agreed to the Court taking a course which is altogether outside the ordinary powers of the Court. But this does not apply to mere deviations from procedure if the Court has jurisdiction over the subject unless there is an attempt to give the Court a jurisdiction it does not possess, so that a Court of Appeal cannot properly review the decision. Such deviations do not deprive either of the parties of the right of appeal. *Pisani* v. *Attorney-General for Gibralter* (2). See also the decision of the House of Lords in *Burgess* v. *Morton* (3). So in these cases the question to be decided is whether an agreement between the parties does result in the Court assuming jurisdiction which otherwise it would not have or involves the Court in going so outside its ordinary course of procedure that it is impossible for the Appellate Court properly to review its decision.

Further, the giving up of a right of appeal is giving up a very important right possessed by all litigants and in my judgment such right of appeal can only be

1. (1918) 37 M. L. J. 100=52 I. C. 569.
2. L. R. 5 P. C. 516.
3. (1896) A. C. 136.

given up by a clear agreement. It may be that an agreement is in such terms that the Court will be driven to imply a term that the right of appeal was given up but a Court would not imply such a term unless it was driven to do so.

Turning to the agreement in this case I can find nothing in it to show an intention to give up a right of appeal. I think it merely means that the parties agreed to the evidence being taken in an irregular way or in an unusual way, *viz.*, by the Munsif going to the place and seeing for himself what had happened and what was happening and not relying on what witnesses in Court told him had happened or was happening and the parties agreed to the case being decided in that way and to abide by the decision. If an appeal had been attempted on the ground that the learned Munsif took a wrong view of the facts, that his eyes have deceived him or that the procedure of dispensing with the evidence was irregular, I can well understand the argument that the parties had agreed not to take any such point, and indeed I think that would be right. But, I can find nothing in the words used to indicate that the parties intended to give up all rights of appeal on questions of law which might arise or did arise in the case. I do not think it is right to say that, even though there was an agreement of the kind indicated, the Court becomes an arbitrator, and in my judgment in order to make a Court arbitrator, there must be a clear agreement to that effect, as indeed there was in *Sayad Zain* v. *Kalabhai* (4) A Court acting *extra cursum curiae* has been said to act as *quasi* arbitrator which may be a convenient expression but it does not involve an application of the 2nd schedule to the Code of Civil Procedure which is applicable to arbitrators. Such agreement merely involves that the parties who agree expressly or impliedly not to appeal will not be allowed by the Court to appeal. I do not think it is necessary to go in detail into the cases that have been cited but would observe that it would follow from what I have said that I do not agree with the reasoning in *Nidamarthi Mukhandi* v. *Thammana Ramayya* (5) and *Chengalvoraya Chetty* v. *Raghava Ramanuja Doss* (1). It may be that the result of those decisions is correct. *Rao Bahadur Raoji* v. *Govind* (6) is a case where the agreement stated that the decision was to be final and conclusive. I do not think it is necessary to consider whether the mere inclusion of those words is sufficient, for in this case there are no words to that effect. In *Jamnadas* v. *Gordhandas* (7) where the words were "we are not going to produce evidence, and agree to the dicision which the Court shall pass after inspection" it was held, and I think rightly, that the Munsif did not thereby become an arbitrator and that an appeal lay from his decision. In *Chengalroya Chetty* v. *Raghava Ramanuja Doss* (1) the terms of the agreement were. "We shall abide by any kind of decree passed by the Court after a personal inspection of the place in dispute." It was held that the District Munsif acted thereafter as arbitrator and that he acted illegally and with material irregularity in accepting the position of an arbitrator as all the parties had not consented.

It follows from what I have said above that I do not agree with the finding that he acted as arbitrator nor do I agree that the agreement before the Court in that case amounted to an a greement that the Court should act *extra cursum curiae.*

This appeal must be allowed with costs and the matter must go back to be disposed of on the merits.

WALLACE, J.—I agree. The respondent rests his case not on the footing that the District Munsif's decree was really an arbitration award but on the principle of estoppel. In order that there may be an estoppel prohibiting an appeal by either party there must be an agreement implicit or explicit not to appeal. I think the words of the plaintiff's and respondents' own undertakings, read together as a contract, are enough to dispel any such idea, and to show that what the parties agreed to was nothing more than that the finality of the District Munsiff's decision by which they agreed to abide was limited to the point which the District Munsif, in the absence of other evidence, was required to settle by personal inspection, that is, the point of fact necessary for the decision of the first issue; and the agreement went no further. Now it is open to the parties

4. (1899) 23 Bom. 752.
5. (1902) 26 Mad. 76.
6. (1897) P. J. 271.
7. (1896) P. J. 615.

in an ordinary suit tried by the ordinary procedure to dispense with evidence and it is open to the Judge on application by the parties to inspect the place, and what he sees on his inspection is evidence within the meaning of the Indian Evidence Act, on which he may decide issues in the suit, and this and no more is what I conceive the Original Court has in this case done. Hence I can see nothing in the agreement between the parties which puts the suit *extra cursum curiae.*

I agree therefore that no estoppel exists except on the point of fact decided by the Munsif by his inspection of the ground. As to whether on the facts he found he came to a wrong decision on the law, I cannot see how there can be any estoppel of the right of appeal. If there was no agreement not to appeal, there cannot possibly be any question of the appellant intentionally permitting the respondents to believe that he had waived that right, and to act according to that belief. I therefore agree in the order proposed by the learned Chief Justice.

Appeal allowed.

*** 1923 Madras 447.**

PHILLIPS AND DEVADOSS, JJ.

(Dronamraju) Rama Rao and others ... (Appellants)—Defendants.

v.

Kessapragada Vedayya and others ... (Respondents)—Plaintiffs.

S. A. No. 2078 of 1920, dated 29th Nobember 1922, against the decree of the Court of the Sub. J., Rajamundry in A. S. No. 89 of 1919.

Limitation Act, Art. 116—Mortgage covenant failing for fraud on registration law—Personal covenant whether enforceable.

It was found that one square yard of house site was included in the mortgage deed merely to give jurisdiction to the Peddapur Sub-Registrar who registered the document, whereas the property really intended to be mortgaged was situated in Amalapur. *Held*, following the decisions in 41 Cal. 972 P C and 48 Cal. 500 P. C. that the mortgage deed is invalid as being "in fraud of the registration law". *Held*, further that the general personal covenant to repay was not invalid and that Art 116 of the Limitation Act was applicable in accordance with the ruling of Ameer Ali, J. in 29 Cal. 654. There is nothing in the Registration Act toprevent the registration of a simple money bond in the office of any Sub-Registrar at which the parties desire to have the document registered. Where a document consists of two or more parts, or where there are two or more covenants in a document, the mere fact that one part becomes inoperative or invalid by reason of non-compliance with or violation of the provisions of the Registration Act need not necessarily make the other parts of the document invalid or inoperative. The Registration Act does not prohibit the use of a document as a registered one even if the provisions of S. 28 of the Act are contravened. If a document is otherwise properly registered, there can be no objection to the use of it as a registered one.

[P. 450, Col. 1 ; P. 451, Col. 1.]

P. Narayanamurthi—for the Appellants.

G. Laksmanna and P. Somasundaram—for the Respondonts.

PHILLIPS, J.—In this suit it has been found that one square yard of house site was included in the mortgage deed merely to give jurisdiction to the Peddapur Sub-Registrar who registered the document, whereas the property really intended to be mortgaged was situated in Amalapur. Following the decision in *Harendra Lal Roy Chowdhuri* v. *Haridasi Debi* (1) *and Biswanath Prasad* v. *Chandra Narayan Chowdhuri* (2) it has been held that the mortgage deed is invalid as being "in fraud of the registration law." The learned Subordinate Judge has however found that the general personal covenant to repay is not invalid and has given a decree for the part of the claim that is not barred by limitation, holding that Art. 116 of the Limitation Act is applicable in accordance with the ruling of Ameer Ali, J. in *Joginee Mohum Chatterjee* v.*Bhoothnath Ghoshal* (3). In appeal it is contended that that ruling is wrong, and that as the registration of the mortgage deed is invalid, the document as a whole must be treated as unregistered, and consequently the covenant to repay must also be treated as an unregistered covenant.

What was held by the Privy Council in *Harendra Lal Roy Chowdhuri* v. *Haridasi Debi* (1) and upheld in *Bisvanath Prasad* v. *Chandra Narayan Chowdhuri* (2) was that "an entry intentionally made use of by the parties for the purpose of obtaining registration in a district where no part

1. (1914) 41 Cal. 972=1 L. W. 1050=47 I. A. 910=27 M. L J. 80=(1914) M W. N. 462=16 M. L.T. 6=18 C. W. N. 817=19 C.L.J. 484=16 Bom. L. R. 400=12 A. L. J. 774=23 I. C. 637 (P.C.).
2. (1921) 48 Cal. 500=48 I. A. 127=63 I. C. 770 (P. C.)
3. (1902) 29 Cal. 654=6 C. W. N. 856.

of the property actually charged and intended to be charged in fact exists is a fraud on the registration law and no registration obtained by means thereof is valid." The principle which I take to underlie this decision is that no person shall be allowed to take advantage of his own fraud. If that principle be applied to the present case, the object obtained by the fraud was the registration of the mortgage deed as such, for had the document been merely a covenant to repay, the Peddapur Sub-Registrar would have had jurisdiction under S. 29 of the Registration Act (Act XVI of 1908), for under that section parties are at liberty to choose their own place of registration. In so far then as the document evidenced a mere covenant to repay there was no fraud upon the registration law, and to hold that such registration was invalid would be to extend the principle above mentioned so as to deprive a party of a right which he had obtained by fraud as well as of the advantage gained by his fraud. To do this appears to me to extend the principle to inequitable length and I am supported in this view not only by the direct ruling of Ameer Ali J. in *Joginee Mohan Chatterjee* v. *Bhooth Nath Ghosal* (3) but also by the action of the Privy Council in the case reported in *Biswanath Prasad* v. *Chandra Narayan Chowdhuri* (2) for that case was remitted to the Calcutta High Court for a decision as to whether the plaintiff had a valid alternative claim for a personal judgment for the mortgage debt. No doubt there was no finding that the claim for a personal decree was based upon a contract in writing registered but it would appear from a perusal of the argument in the case (reported in 25 C. W. N. 985), that a period of limitation of 6 years was contemplated, the argument being that a payment of interest in 1903 would save limitation for the suit brought in 1908. Unless it wss the opinion of the Court that the debt was secured by a registered instrument the argument would have been of no avail, for such a payment was not within 3 years of institution of the suit and the suit would have been barred if based upon the personal covenant. Had that been the case it appears to me improbable that the case would have been remitted for a consideration of the claim. I am therefore of opinion that the decision in *Joginee Mohan Chatterjee* v. *Bhooth nath Ghosal* (3) is right and that the registration of the personal covenant to repay is not procured by fraud and is consequently valid. The other cases cited *Amba* (alias) *Padmavati* v. *Srinivasa Kamath* (4) and *Rama Narayan Singh* v. *Adhinath Mukherjee* (5), do not appear to have any bearing on the present case and the facts reported in *Sham Lal* v. *Tehariya Lakshmi Chand* (6), are too vague to give that case any value here.

The second Appeal is accordingly dismissed with costs. The memo, of objections must also be dismissed with costs as the lower Court exercised its discretion in awarding a personal remedy and was entitled in so doing to reduce the rate of interest contracted for in the mortgage deed.

DEVADOSS, J.—The plaintiff brought the suit as transferee of a hypothecation bond executed by the first defendant in favour of one Seshayya impleading defendants 5 to7, the undivided sons of Seshayya and the alienees of some portions of the hypothec. Various contentions were raised by the defendants. The District Munsif of Amalapuram dismissed the suit on the ground that the registration of the document was invalid, as a parcel of land not belonging to the defendants 1 to 4 was included in the document only for the purpose of giving jurisdiction to the Sub-Registrar who registered the document and that the claim was barred by limitation. On appeal the Subordinate Judge of Rajahmundry held that the document was invalid as a mortgage deed but that the suit was not barred by limitation and gave a money decree to the plaintiff. The defendants 1, 2, 4 and 11 have preferred the Second Appeal.

It is contended by Mr. Narayanamurthi for the appellants that the registration of the document was in fraud of the registration law and that the document cannot be treated as a registered document for any purpose and therefore Art. 116 of limitation Act did not apply to the case. He relied upon *Harendra Lal Roy Chowdhury* v. *Haridasi Debi* (1) *Biswanath Prasad* v. *Chandra Narain Chowdhuri* (2) *Amba*

4. (1922) P. C. 135=26 C. W. N. 369= 68 I. C. 754 (P. C.)
5. (1917) 44 Cal. 388=44 I. A. 87= 21 M. L. T. 12=15 A. L. J. 107= (1917) M. W. N. 94=32 M.L.J. 39=25 C.L.J. 121 =21 C. W N. 383=19 Bom. L. R. 194= 38 I. C. 932 (P.C.).
6. (1920) 18 All. L. J. 476=58 I. C. 278.

(alias) *Padmavathi* v. *Srinivasa Kamath* (4) and *Kalka* v. *Mathura Das* (7). In *Harendralal Roy Chowdhuri* v. *Haridasi Debi* (1) the plaintiff brought the suit upon a mortgage deed registered in Calcutta. The defendant contended among other things that the deed had not been legally registered because no portion of the property mortgaged was situate in Calcutta. It was found that the only portion of the property alleged to be in Calcutta was described as "25—Guru Das Street." But the property so described was found to be non-existent. Their Lordships of the Privy Council held "that this parcel is in fact a fictitious entry and represents no property that the mortgagor possessed or intended to mortgage, or that the mortgagee intended to form part of his security, such an entry intentionally made use of by the parties for the purpose of obtaining registration in a district where no part of the property actually charged and intended to be charged in fact exists, is a fraud on the Registration law, and no registration obtained by means thereof is valid. To hold otherwise would amount to saying that mortgages relating solely to land in other parts of the Presidency could be validly registered by the Sub-Registrar at Calcutta if the parties merely took the precaution to add as a last parcel, Government House, Calcutta, or any similar item. In *Biswanath Prasad* v. *Chandra Narayan Chowdhuri* (2) a mortgage bond for Rs. 8,000 which purported to mortgage an anna share in a village in the Dhorbadga District and a one Kauri share in the Muzaffurpur District was registered only in the MuzaffurpurDistrict. The mortgagor had purchased the one Kauri share shortly before the execution of the mortgage and in order that he might register in Muzaffurpur. He paid Rs. 50 for the one Kauri share, but there was no registered instrument or delivery of possession as required by S. 54 of the Transfer of Property Act, 1882. Their Lordships found that none of the parties intended the Kauri share should vest in the mortgagor or pass under the mortgage. Viscount Finlay in delivering the judgment of their Lordships "In coming to the conclusion that this appeal must be dismissed, their Lordships' judgment rests on the view that none of the parties ever intended that the one Kauri share in Mauzakolhna should vest in Udih (Narayan) or should pass by the mortgage from him to the mortgagee. This case differs *tolo coelo* from the case suggested in argument of a mere failure to make a good title to property dealt with by the instrument and which both parties had intended should form part of the security." With regard to the contention that a personal decree should be passed in favour of the plaintiff the Noble Viscount observed :— "As regards the alternative claim for a personal judgment for the mortgage debt, it is to be observed that no such claim was made in the Courts in India. There is nothing in the evidence or in the judgments which would enable their Lordships to think whether it is desirable in this case that the plaintiffs should have opportunity of bringing this matter before the High Court. If any such application is made it will be for the High Court to consider whether any such claim is open upon the present pleadings and if not, whether any amendment raising it should be made and further whether under all the circumstances the claim should be entertained at this stage of the proceedings. If the High Court should think it right to enter upon the consideration of the claim, all defences on the merits or arising out of the lapse of time must be open to the defendants, and the High Court should have power to impose any terms which it thinks just and to deal with the costs. The appeal so far as it relates to the enforcement of the mortgage on the land, must in their Lordships' opinion, be dismissed." In that case the mortgage bond was dated 27th February 1902 ; the amount of the bond payable on 7-9-1902. The suit was instituted on the 14th September 1908. It may be safely assumed that the plaintiff could not have expected to get a personal decree against the mortgagor unless Art. 116 was held applicable to the case. No doubt the respondents were not represented before the Privy Council. But it is quite clear from the order of their Lordships remanding the case to the High Court to enable the plaintiff to amend his plaint and claim a personal decree that they thought that the personal remedy was not barred. Though their Lordships there did not say so in so many words in their judgment, it is quite

7. (1918) 21 O. C. 341=50 I. C. 220.

apparent what their view was from the observation of their Lordships in the course of the argument, with reference to the contention of the appellant's counsel that "in any case there is no reason why we should not have a personal decree for money."

Sir John Edge observed, "if this case was merely a suit to recover money would not limitation run" and counsel for the appellant answered "no, payment of interest saves it." Then Lord Shaw said:— "last payment of interest was in 1903."

The contention that the registration which is ineffectual to validate a document required by law to be registered cannot avail for any other purpose seems untenable.

Under S. 17 of the Registration Act, certain classes of documents :

(1) gifts of immoveable property ;

(2) non-testamentary instruments which purport to operate to create, declare, assign, limit or extinguish any title or interest in immoveable property of over Rs. 100 in value ;

(3) non-testamentary instruments which acknowledge the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extinction of any such right or interest ;

(4) leases of immoveable property from year to year, or for any term exceeding one year or reserving a yearly rent ; are required to be registered in order to be valid and if they are not registered, under S. 49 of the Act, they cannot affect the immoveable property comprised therein or shall be received as evidence of any transaction affecting such property. Other documents are registrable at the option of the parties. Under S. 28 of the Act the class of documents mentioned in S. 17, Sub-S. 1 (1) cls. (*a*), (*b*), (*c*) and (*d*) and S. 18, cls. (*a*), (*b*) and (*c*) shall be presented for registration in the office of a Sub-Registrar within whose sub-district the whole or some portion of the property to which such document relates is situate. By S. 29 every document other than those referred to in S. 28 may be presented for registration either in the office of the Sub-Registrar in whose sub-district the document is executed, or in the office of any other Sub-Registrar at which all the persons desire to register the same. There is nothing in the Registration Act therefore to prevent the registration of a simple money bond in the office of any Sub-Registrar at which the parties desire to have the document registered.

A simple mortgage usually contains a personal covenant to pay. In fact in almost all the mortgage transactions in this Presidency there is a personal covenant by the mortgagor to repay the mortgage amount personally. The portion of the document in which there is a transfer of specific immoveable property as security for money is severable from the portion in which the mortgagor undertakes to repay personally the money advanced or to be advanced to him. Where a document consists of two or more parts, or where there are two or more covenants in a document, the mere fact that one part becomes inoperative or invalid by reason of non-compliance with or violation of the provisions of the Registration Act need not necessarily make the other parts of the document invalid or inoperative. Though that portionof the document which by law is required to be registered in accordance with the rules governing registration of documents is invalid yet the portion of the document optionally registrable would be valid as the parties have consented to present it in the office of the Sub-Registrar by whom it is registered. It is clear from the observation at p. 517 in 48 Cal. 509 "the appeal so far as it relates to the enforcement of the mortgage of the land, must in their Lordships' opinion, be dismissed" that their Lordships did consider the document to be a valid one so far as the claim for a money decree was concerned.

The case in 26 C. W. N. 369 has no application to this case. Their Lordships observe: "It was not and is not disputed that those two deeds cannot be given in evidence or enforced if they have not been duly registered. Their Lordships are clearly of opinion that as the appellant was not only a minor but a married woman, her father had ceased to be her natural guardian and was not therefore her assignee or representative within the meaning of S. 3 of the Registration Act, 1877. He was not an executant of the said deeds or either of them. Neither was he within the meaning of the S. 34 of that Act, the representative, assignee or agent duly authorised on behalf of Krishna Kamathi deceased, the only executant. The presentation by him of the two deeds for registration was in

direct conflict with the express provisions of the 34th section. The deeds were consequently never legally registered. The registration of them which was procured was illegal, invalid and a nullity, and if that be so, as in their Lordships' opinion, it must be held to be, it is not disputed that the deeds would be void and unenforceable." In that case there was no valid presentation of the document and not as in the present, all the parties to the document wanted to get round the provisions of the Registration Act by recitals intended to mislead the Sub-Registrar to do what he would not otherwise have done. The registration of a document by false personation would be no registration at all, and the document being a fraudulent document becomes unenforceable against the party sought to be bound by it as he never consented to the registration being effected by a person falsely personating the executant. That class of cases differs from the present where both parties with their eyes open get a document registered with the intention of treating the document as a validly registered document, but for purposes of convenience or other reasons they violate the specific provisions of S. 28 which requires that documents of a certain class should be registered by a Sub-Registrar within whose sub-district the whole or any portion of the property comprised in the document is situate. The case in 50 I. C. 220 is of the Judicial Commissioner's Court of Oudh. No doubt the Judicial Commissioner held that where registration is invalid for one purpose it is invalid for all purposes. This view is evidently on the assumption that all the covenants in a document and all the parts of the document form one indivisible whole. A mortgage deed as I have said above contains more than one part and more than one covenant. A mortgagee can give up his security and sue on the personal covenant alone. He may choose to sue for all or any of the remedies in respect of it. To read an ordinary mortgage document as one indivisible whole is opposed to the recitals therein and the intention of the parties to the document.

Mr. Lakshmanna for the respondent relied upon *Ram Narain Singh* v. *Adhindranath Mukerjee* (5). It was a case in which a mortgage document which by law is required to be attested by two or more witnesses was not so attested. Their Lordships of the Privy Council held that the document could not be treated as a mortgage document as it contravened the provisions of law which laid down the essentials for a valid mortgage deed and the absence of the necessary requisite prevented the document taking effect as a mortgage. But it was treated as a simple money bond. The case which is directly in point is the decision of Mr. Ameer Ali (now a member of the Judicial Committee of the Privy Council) reported in *Joginee Mohan Chatterjee* v. *Bhoothnath Ghosal* (3). The learned Judge observed "I am not satisfied that there was any such property as No. 251—2 belonging to the defendant within the jurisdiction of the Sub-Registrar of Sealdah so as to give him under S. 28 of the Registration Act jurisdiction to register the document. If I am right in that conclusion, it follows that the document cannot take effect as a mortgage deed ; but as it is registered, although the suit has been brought more than three years after the date of execution the claim is not barred as was contended for by the defendant's counsel. This decision was long before the ruling of the Privy Council reported in 41 Cal. 972 which settled the law on this point. Though the learned Judge did not give reasons for holding that the document which was invalid as a mortgage on account of want of jurisdiction of the Sub-Registrar who registered the document was a valid document for purposes of limitation, yet his opinion is entitled to great weight, and it is in consonance with reason. The Registration Act does not prohibit the use of a document as a registered one if the provisions of S. 28 of the Act are contravened. If a document is otherwise properly registered there can be no objection to the use of it as a registered one. I therefore hold that the plaint document is a registered document so far as the personal covenant contained in it is concerned and therefore Act 116 Limitation Act applies to the case. The Subordinate Judge has rightly held that the suit is not barred by limitation. The second appeal fails and is dismissed with costs.

The plaintiff did not sue in the first instance on the personal covenant alone. He based his suit on the footing of a valid mortgage and prayed for a mortgage decree.

In the circumstances the rate of interest allowed to him by the lower appellate Court is fair, and there is no reason to interfere with the discretion of the lower appellate Court. The memorandum of objections is dismissed with costs.

Appeal dismissed.

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SCHWABE, C. J. AND WALLACE, J.

Vazhayil Parkum Thattan Kunhi Kutty and another ... Appellants.

v.

Vazhayil Parkum Thattan Raman and others ...Respondents.

S. A. No. 2092 of 1920, dated 30th November 1922, against the decree of the Court of the Add. Temporary Sub. J. of North Malabar in A. S. No. 28 of 1919.

(a) *Hindu Law—Partibility—Presumption—Thattan caste in Malabar—Makhattayam in law.*

The Thattans are Hindus, and therefore, the Courts have to apply to them the principles of Hindu Law, unless and until it is proved that they follow any other customary law. The rule of Hindu law is in favour of partibility and impartibility is the exception. Makhattayam Law, which the Thattan caste admittedly follows, corresponds in the main to the ordinary Hindu Law. Marumakhattayam, in which partibility is unknown is an exception to the general rule. Hence *prima facie* Makhattayam involves partibility. 40 M. L. J. 301 Foll.

(b) *Hindu Law—Impartible estate—Proof.*

The evidence based merely on the fact that the witnesses, have never known a case of partition does not afford in law sufficient proof of a valid custom, which would suffice to rebut the presumption of law that the property is partible.

K. P. Ramakrishna Iyer—for the Appellant.

C. Kunhi Raman—for the Respondents.

WALLACE, J.—The suit is one for partition by the plaintiff who is a member of the Thattan caste in North Malabar, which caste follows Makhattayam Law. Various issues were framed, but the original Court dealt with two only, issue II, whether the properties are impartible, and issue XIV, whether the plaintiff is not the legitimate son of the deceased Valia Nambi, the owner of the property sought to be partitioned. The original Court held that the property is impartible, which finding was enough to dispose of the suit, and that the plaintiff was what is known as a Veetukutti, or the son of a Sambandham wife who is not brought to her husband's house, and that such a Veetukutti is not entitled to a share in his father's property. The appellate Court agreed with the original Court on the last two points, but did not consider the first. It is urged before us by the plaintiff, who is the appellant before us, that the lower Courts have erred in law in coming to these conclusions.

To take the first issue as to partibility, we think the original Court has wrongly thrown the onus of proof on the plaintiff, though the frame of the issue threw it on the contesting defendant, and that it was wrong in holding that there is any presumption of law in favour of impartibility in the case of the Thattan caste. The Thattans are Hindus, and therefore under S. 16 of Act III of 1873, the Courts have to apply to them the principles of Hindu Law, unless and until it is proved that they follow any other customary law. The rule of Hindu Law is in favour of partibility, and impartibility is the exception. Makhattayam Law, which the Thattan caste admittedly follows, corresponds in the main to the ordinary Hindu Law. Marumakkattayam, in which partibility is unknown, is an exception to the general rule. Hence *prima facie*, Makhattayam involves partibility. The original Court has relied on various rulings of this Court to rebut that legal presumption, but in our opinion these do not justify any such inference. The case in *Rarichan* v. *Perachi* (1) merely says that those who follow Makhattayam must not be taken to be necessarily governed by the Hindu Law, that is, that it is open to them to prove a custom at variance with Hindu Law ; but it is no authority for the proposition that even if such a custom is not proved, Hindu Law will not apply. The ruling in *Raman Menon* v. *Chathunni* (2) proceeded on a definite finding that among Thiyyans there is no custom of compulsory partition. It may be noted that this ruling relates to Thiyyans and not to Thattans and that its correctness has been gravely called in question in a later ruling of a Bench of this Court in *Raman and others* v. *Muthu and others* (3). In *Imbichi Kandan-*

1. (1892) 15 M. 281.
2. (1893) 17 M. 184.
3. (1921) 40 M. L. J. 301=13 L. W. 218= (1921) M. W. N. 233=62 I. C. 534.

v. *Imbichi Penu* (4), the decision follows the general principle of Hindu Law either of impartible or of divided property. The ruling in *Kunhi Pennu* v. *Chiruda* (5) also substantially follows the ordinary Hindu Law as opposed to that of Marumakhattayam. In *Velu* v. *Chamu* (6), which deals with the caste of Illuvans, the Court refused to extend to that caste the rule of impartibility among Thiyyans as laid down in *Raman Menon* v. *Chathunni* (2), and held that the Illuvans had proved a custom of partibility. There is therefore no good ground why this Court in the case of the Thattan caste should not follow the principle laid down in 40 M. L. J. case or depart from the ordinary rule that the ordinary Hindu Law has in the first instance to be applied, unless and until proof of custom to the contrary has been established. This principle has also been adopted in two unreported cases of this Court coming from Malabar, S. A. No. 518 of 1902 and 1056 of 1919.

As to proof in this case of any custom to the contrary, we find none, no proof of the sort which is required to establish a uniform, continuous, and definite practice submitted to for so long a period that it should be accepted as an established governing rule of the caste. The original Court rejected Ex. E. perhaps with reason, but if the law of Thiyyans is to be used to prove a custom of impartibility amongst Thattans, then Ex. G, which lays down that the law among Kanichans is partibility, should be used in favour of the Thattans. But it is right that each caste should stand on the footing of its own rules and customs. Beyond the evidence noted there is only the vague evidence of three Thattans, D. W's. 2, 3 and 4, that custom sanctions no compulsory partition, as against that of P. W. 2, another Thattan, who says it does. The evidence is very vague and seems to be based merely on the fact that the witnesses, D. W's. 2,3 and 4 have never known a case of partition. We cannot hold that such evidence affords in law sufficient proof of a valid custom, which would suffice to rebut the presumption of law that the property is partible. We hold therefore that the trying Court has on this issue committed an error of law.

As to the next point, both the lower Courts have failed to address themselves to the proper legal points at issue. Assuming for the moment that there is a concurrent finding of fact that the plaintiff is illegitimate, it does not follow as a matter of course, as the lower Courts suppose, that he is not entitled to a share in the joint family property. Among Sudras, under the ordinary Hindu Law, an illegitimate son is entitled to a share, and it was therefore open to the plaintiff to contend, as he does here, either that he is a Sudra for the purposes of Hindu Law, (which *prima facie* applies to his caste), since Hindu Law brings together as Sudras all castes below the Vaisyas, or to contend that his caste follows Sudra custom in the matter of the inheritance of an illegitimate child. On the merits of these contentions we say nothing at present, but would point out only that if the Hindu Law for Sudras is to be applied to the plaintiff's caste, he will *prima facie* even if illegitimate, be entitled to a share without further proof or disproof of that custom ; while if his case is to rest on proof of a custom by which Sudra custom is applied to his caste or on proof of independent custom altogether, then such custom will have to be proved. In the former case the onus of disproving the presumption of law will rest on the defendant ; in the latter the onus of proving the custom will lie on the plaintiff.

Now the only issue on this part of the case, and the only point therefore to which the parties had to direct their attention, was whether the plaintiff is not the legitimate son of the deceased Valianambi. Instead of trying that issue, both Courts have tried an issue not framed, whether the plaintiff is a Veettukutti, apparently assuming first that a Veettukutti is illegitimate, as the word is used in Hindu Law, and secondly that to find that plaintiff is illegitimate puts him out of Court. It may be here pointed out that among the caste of Mukhavars in Malabar, also an inferior caste, it would appear that the children of a *sambandham* connection may inherit their father's property (*Vide* the Gazette of Malabar, p. 182). We think there should be definite findings on these points in the case of the Thattan caste, since the

4. (1895) 19 M. 1.
5. (1896) 19 M. 440.
6. (1898) 22 M. 297.

customs of this caste appear not yet to have been the subject of judicial decisions, and a decision in this case will affect the whole caste.

In order that the matter may be reopened and properly tried, the findings that the plaintiff is a Veettukutti and that a Veettukutti has no share in his father's property must be set aside and we do so on the ground that they were never in issue in the case. The finding of the trying Court on issue 2, as to partibility, is also set aside for reasons already given. The decisions of the lower Courts, based on these findings, are set aisde.

The whole case is remanded to the original Court with a direction to rehear the case after framing and trying the following issues in the light of the above remarks:

I. Does the ordinary Hindu Law of partibility of joint family property not apply to the Thattan caste in North Malabar, or is there any caste custom to the contrary?

II. Is the plaintiff a Veettukutti, as that word is used by the Thattan caste?

III. Is a Veettukutti illegitimate in the legal sense of that word?

IV. Does a Veettukutti have no share in the joint family property?

V. Does an illegitimate Thattan have no share in the joint family property?

VI. If the property is partible and the plaintiff is legitimate, to what share is he entitled?

VII. If the property is partible and the plaintiff is a Veettukutti, is he entitled to any share, and if so, what?

VIII. If the property is partible and the plaintiff is illegitimate, is he entitled to any share and if so what?

Fresh evidence may be taken, as offered by either party or by the Court.

If the findings are that the property is impartible or that the plaintiff is not entitled to any share, it is not of course necessary to decide the other issues as the plaintiff's suit will fail *in limine*.

Costs up to date on both lower Courts will abide the result. Appellant will get his costs in this Court.

Suit remanded.

1923 Madras 454.

OLDFIELD AND RAMESAM, JJ.

Kuppu Reddi Nookayya and others ... Appellants.

v.

Mandaluka Bheemanna and another ... Plaintiffs—Respondents.

S.A. No. 2098 of 1920, dated 15th Deceber 1922, against the decree of the Subordinate Court of Cocanada in Appeal Suit No. 29 of 1919.

(a) *Deed—Construction—Mortgage or lease.*

A deed provided that in accordance with a prior agreement, the property, which had been placed in 1st defendant's possession in 1910-11, should remain in it until the end of the year 1917-18 in consideration of a cash payment, of Rs. 160 at the date of the prior agreement and other subsequent payments on plaintiff's behalf, in all, Rs. 1280, that 1st defendant should pay all dues other than extra taxes, which might be levied hereafter, and should at the end of the term surrender without any separate relinquishment; *Held*, the document was a lease. The mortgage character is established only when there is a power of redemption reserved to the lessor either expressly or impliedly, so that it digtinctly appears that the parties themselves intended the transaction to be of the nature of a mortgage. 3 All 1 Ref.

(b) *Madras Estate Land Act S.* 3 (2) (11) (5) & 15 *'Payable' Estate—'Landholder'—Meaning.*

"Payable" means payable according to the terms of the contract between the parties to it; S. 3 cls.(11) and (15) are applicable, whatever the stage or stages at which those terms so far as they relate to payment for the use of the land, have to be or have been fulfilled. Whether plaintiff's inam is an estate within the meaning of S. 3 (2) and plaintiff is a landholder under s. 3 (5) of the Estates Land Act depends on whether the inam was created before or after the permanent settlement in 1802.

(c) *Madras Estates Land Act—Applicability—Inam a part of Pittapur estate.*

The Act applies if the inam in question is part of the Pittapur estate apart from the question whether the defendant is a ryot. 45 M. 716 F. B. Rel.

A. Krishnasawmi Iyer and N. Rama Rao—for the Appellants.

C. V. Ananthakrishna Iyer and P. Satyanarayana Rao—for the Respondents.

OLDFIELD, J:—The respondent, plaintiff, an inamdar, holds from 2nd defendant, a zamindar, under the sannad, Ex. A and has assigned an interest in his holding to 1st defendant, the appellant under Ex. V. In 1912 the Revenue Officer engaged in the preparation of a Record of Rights for 2nd defendant's estate under

Ch. XI, the Madras Estates Land Act (I of 1908), entered first defendant as occupancy ryot in respect of the holding instead of plaintiff. The question is whether he did so correctly. The anwer to this question depends on (1) whether Ex. V is a mortgage with possession or a lease, (2) whether in the latter alternative 1st defendant is a ryot, as the term is defined in S. 3, cl. (15), Estates Land Act, and (3) whether the inam is presettlement and therefore an estate and plaintiff a landholder under S. 3, cls. (2) and (5).

Ex. V dated 20-1-13, is described as a Thirmanam document and provided that in accordance with a prior agreement, Ex. H, the property, which had been placed in 1st defendant's possession in 1910-11, should remain so until the end of the year 1917-18 in consideration of a cash payment, of Rs. 160 at the date of Ex. H and other subsequent payments on plaintiff's behalf, in all, Rs. 1280, that 1st defendant should pay all dues other than extra taxes, which might be levied hereafter, and should at the end of the term surrender without any separate relinquishment. These, the essential provisions of Ex. V, are *prima facie* in accordance with the definition of a lease in S. 105 of the Transfer of Property Act, the payments referred to being the price paid or premium. Plaintiff however argues that those payments must not be so regarded because they were advances, for which either the property, the possession of which was transferred, or the right to that possession was the security and that is alleged with reference to the description of the document and the suggestion that advances prior to its execution were in question.

This argument is unsustainable. For, although etymologically a Thirmanam document may mean one executed in discharge, the term Thirmanam, as my learned brother with his extensive knowledge of the Telugu Districts agrees, has acquired a wider meaning, as importing merely a settlement; and it may be observed, although no details are in evidence, that, as Ex. H shows, the previous enjoyment of the property was under a document similarly described. There is no evidence of any advances prior to those enumerated in Ex. V and it was never alleged in the lower Courts that there were any. Those in Ex. V. and the cash payment of Rs. 160 were made after and when the agreement, Ex. H, was executed and the former after possession had been given; and they cannot be regarded as prior debts, which the transfer was intended to secure. There is no power of sale and no provision for accounting. Transfers such as this, for a premium without a periodical rent, are no doubt unusual in this Presidency. But under the description of zuripeshgee transactions, they appear to be well known in North India and are probably what the portions of the Transfer of Property Act relating to price paid and to premium, were meant to apply to. That the distinction between transactions of that kind which are leases and those which are mortgages will be difficult, is illustrated by the statement in Macpherson's Law of Mortgages, 5th Ed., P. 8. adopted in the judgments in *Basant Lal* v. *Tapeshri Rai* (1) that the mortgage character is established, only when there as a power of redemption reserved to the lessor either expressly or impliedly, so that it distinctly appears that the parties themselves intended the transaction to be of the nature of a mortgage. Plaintiff relies on the fact that, although no such power was reserved in the documents in *Bengal Indigo Co.* v. *Roghobur Das* (2) the transfers there were regarded by the Privy Council as being "not mere contracts for the cultivation of the land, but intended also to constitute and as having constituted a real and valid security to the tenant for the principal sums which he had advanced and the interest therein. The tenants' possession under those transfers was, in part at best, not that of cultivators only, but that of creditors operating repayment of the debt due to them by means of their security." But the documents there construed contained, what Ex. V, here does not, stipulations for interest on the principal sums paid by the transferees; consistently with those sums being loans there was as the judgment of the High Court shows, "provision about the satisfaction of the money" and in fact, whatever the exact intention, with which these references to security were made, the conclusion against

1. (1881) 3 All. 1.
2. (1897) 24 Cal. 272=23 I. A. 158=1 C.W.N. 83=7 Sar. 94 (P. C.).

the transferees was not based on the mortgage character of their transfers, but on a section of the Bengal Tenancy Act independently of it. In a later case, *Nidha Sah* v. *Murli Dhar* (3), in which, although the document was described as a mortgage and was given for prior advances its provisions resembled those of Ex. V more closely, the Privy Council held that there was no mortgage, but "simply a grant of land for a fixed term free of rent in consideration of a sum made up of past and present advances." In accordance with this decision and with S. 105 of the Transfer of Property Act, the application of which there is here nothing to conclude, the finding must be that Ex. V is a lease.

The question is next whether 1st defendant is a 'ryot,' within the meaning of S. 3 (15), Estates Land Act, and, as the contention that he holds as mortgagee, not for the purpose of agriculture, has been disallowed, we have to decide first whether the payments in consideration of which Ex. V was given, were "rent" within the meaning of S. 3 (11). The objection taken to their being so is that these provisions refer to rent as "payable" and to ryot as holding "on condition of paying," the implication being, it is alleged, that the only payments contemplated are those to be made in future after the beginning of and in the course of the relation between ryot and land-holder. No authority has been adduced in support of this construction and it is neither reasonable nor convenient. For it entails, even in the ordinary cases in which rent is payable periodically, that, if it has been paid on the due date, nothing more being payable for the remainder of the year, the relation of ryot and landholder will be suspended until more rent falls due. The preferable construction and that, by which such anomaly can be avoided, is that "payable" means payable according to the terms of the contract between the parties to it, and that S. 3, Cls. (11) and (15) are applicable, whatever the stage or stages at which those terms, so far as they relate to payment for the use of the land, have to be or have been fulfilled.

The remaining matter in dispute in connection with the application of S. 3 (15) is whether plaintiff's inam is an estate within the meaning of S. 3 (2) and plaintiff is a landholder under S. 3 (5) of the Estates Land Act. This it is not disputed in this Court, depends on whether the inam was created before or after the permanent settlement in 1802.

The grant, as Exs. A and B show, was in 1800; and as I agree with my learned brother's treatment of this part of the case, I need say only that no other year is suggested as that, in which the grant was really made, and that, in the absence of any such special considerations as those arising from the terms of the grantor Zamindar's sannad in *Secretary of State* v. *Rajah of Venkatagiri* (4), there is no reason for refusing effect to S. 4, Regulation XXV of 1802, and in view of its unqualified terms, no relevancy in the enquiry whether the inam was in fact included in the assets of the Zamindari, on which the peshkush was fixed with regard to the circuit committee's accounts prepared before 1786.

As the inam is not an estate and 1st defendant is therefore not a ryot, the Second Appeal fails and is dismissed with costs on that ground.

RAMESAM, J. :—The respondent, plaintiff, an inamdar within the ambit of the Pittapur estate, sues for declaration that the 1st defendant is not an occupancy tenant of his inam. The Zemindar of Pittapur was constituted a Zamindari by a sannad issued in 1802 under the Regulation XXV of 1802. See *Sri Raja Rao Venkata Surya Mahipati Rama Krishna Rao Bahadur* v. *The Court of Wards* (5). The grant of the suit inam to the plaintiff's ancestors was made by the then Zamindar of Pittapur under a sannad (Ex. A) and a *chekunama* (Ex. B) dated 22-6-1800. It was made free of *Kattubadi* and therefore purported to be *sarva dumbala* or absolute.

The first question that arises for decision is whether the Estates Land Act applies to the Inam. If the Inam is part of the Pittapur estate, the Act applies to the Inam, *Brahmayya* v. *Achiraju* (6), apart

3. (1903) 25 All. 115=30 I. A. 54=5 Bom. L. R. 111=7 C. W. N. 289=8 Sar. 435 (P. C.).

4. (1921) 44 Mad. 864=41 M. L. J. 624=48 I. A. 115 (P. C.).

5. (1899) 22 Mad. 383=26 I. A. 83= 3 C.W.N. 415=1 Bom L. R. 277= 9 M. L. J. Sup. p. 7

6. (1922) Mad. 373=45 Mad. 716=43 M. L. J. 229=31 M. L. T. 91 (F.B.).

from the question whether the 1st defendant is a ryot. The Courts below are of the opinion that the land was part of the Pittapur estate and on the question whether the 1st defendant is a ryot they differed.

On the facts found, I am of opinon that the land is not a part of the Pittapur estate, but a pre-settlement Inam excluded from the assets of that Zemindari. The question turns upon S. 4 of Regulation XXV of 1802. That section excludes from the scope of the permanent Settlement lakhiraj lands (or lands exempt from the payment of public revenue) and all other lands paying only favourable quit rents. In respect of these, the Government reserved to itself the entire exercise of discretion in continuing or abolishing them. Mr. A. Krishnaswami Aiyar who appeared for the appellant, conceded that what was meant by the words in S. 4 above quoted is lands in respect of which the Zemindars purported to make grants either absolute or subject to a small kattubadi, though, later on, he addressed arguments somewhat inconsistent with this concession and contended that where a grant, though purporting to be absolute, was not binding on the Government, the land was not excluded from the assets of the Zemindar.

If a grant, whether absolute or subject to a small kattubadi, was made under circumstances binding on the Government, there was an end of the matter and there was no meaning in the Government reserving to itself the entire exercise of discretion in continuing or abolishing it. It was because almost all such grants were not binding on Government that they reserved to themselves the exercise of discretion in continuing or abolishing them. This is clear from the preamble to Regulation XXXI of 1802 which was relied on by the appellant but which, on close examination, is really against him. The preamble to Regulation shows that it was meant to deal with lands "alienated by the unauthorised encroachments of the present possessors by the clandestine collusion of local officers, or by other fraudulent means." The preamble then proceeds to say "whereas the permanent settlement of land tax has been made exclusive of alienated lands of every description." There can be no better statement of the objects and reasons of the Regulation XXV than this, by the legislature which enacted both the Regulations in the same year. Remembering that lands granted on condition of paying rent or heavy kattubadi cannot be regarded as alienated at all, it is clear that all alienated lands were intended to be excluded from the scope of the settlement. Such lands would consist of (1) lands granted on condition of rendering public service, hereditary village service inams; (2) Saravadumbala Inams (3) Inams granted on favourable quit rent. The first class was dealt with by Regulations XXIX of 1802 and VI of 1831 and now by Madras Acts II of 1894 and III of 1895. A portion of the second class was recognised by Regulation XXXI of 1802, *i.e.*, those granted prior to 1768; but their enfranchisement was effected in the Inam Settlement of 1860. The rest of the lands in the second class as well as those in the third class were both recognised and enfranchised in the Inam Settlement of 1860. It is because these were all excluded from the scope of the settlement that karnams were required to keep lists of them with the purposes for which they were granted. *Vide* S. II of Regulation XXIX of 1802 the second clause of it dealing with the first class above mentioned, the third clause dealing with the second class above mentioned and the 8th and 10th clauses dealing with the third class above mentioned among others. The decision in *Suryanarayana* v. *Patana* (7) did not lay down that only Inams prior to 1768 could be recognished as Inams and that all Inams granted after 1768 though before 1802 should be regarded as included in the assets of a Zemindari. The Judicial Committee referred to Regulation XXXI of 1802 merely for the purpose of narrating the fact which finally led to the preparation of Oakes Register in which the subject of the grant was described and their Lordships held that grant of the village meant grant of the soil in addition to the revenue. This is also clear from *Secretary of State* v. *Rajah of Venkatagiri* (4) where their Lordships described Regulation XXXI of 1802 as one referring entirely to procedure. The main argument of the appellant that, as the accounts on which the peishcush was fixed

7. (1918) 41 Mad. 1012=45 I. A. 209=25 M. L. T. 30=(1918) M. W. N. 859=23 C. W. N. 273=9 L. W. 126=29 C. L. J. 153=36 M. L. J. 585=21 Bom. L. R. 547=(1919) M. W. N. 463=48 I. C. 689 (P. C.)

were those of the Circuit Committee appointed in 1784, all grants after that date were intended not to be recognised, shows the fallacy of the argument based on the Regulation XXXI of 1802, for if the latter argument is correct, what becomes of lands granted between 1768 and 1784 ?

As to the use of the Circuit Committee accounts, they were the accounts nearest in date, available to the State for the purpose of settlement. If the lands alienated when the accounts of the Circuit Committee were prepared, were intended to be excluded from the settlement, the Regulation would have expressly provided for it. Both the Regulation and the sannads issued under it, as they stand, speak from their dates (1802) and all grants prior to 1802 were *prima facie* excluded from the permanent settlement.

Some reference was made by the appellant to *Rajah Venkatarangayya* v. *Appalarazu* (8). That case related to an inam granted on condition of rendering private service to the Nuzvid Zemindar. The lands in the Nuzvid Zemindari held on condition of rendering private service to the Zemindar were all dealt with by Mr. Teylor at the Inam Commission and held to be included in the assets of the Zemindari. *See Sri Rajah Sobhanadri Appa Rao Bahadur* v. *Sri Rajah Venkata Narasimha Appa Rao Bahadur*, (9). It is true that the statement that they were resumable was not acted upon by the Courts (26 Mad. 403 affirmed by *Venkata Narasimha Appa Rao Bahadur* v. *Sobhanadri Appa Rao Bahadur*) (10) but, whether resumable or irresumable, that they were included in the assets of the Zemindari follows from dictum of Sir Barnes Peacock in *Rajah Nilmony Singh* v. *Government* (11) approved in *Rajah Nilmony Singh* v. *Bakranath Singh* (12). It is on these principles that the decision in 20 M. L. J. 728 rests. Obviously the land was not lakhiraj. I am not able to agree with the other reason given in it for holding that the land was not lakhiraj. The case in *Secretary of State of India* v. *Kilibas Bhupati Harichandan Mahapatra* (13) merely lays down a presumption regarding lands within the ambit of Zemindari and does not help the appellant where the facts are definitely known and rebut the presumption.

If the land was excluded from the assets of the Zemindari, it cannot fall under S. 3 (2) (d) as it is not a whole village.

It cannot be contended that, apart from the Estates Land Act the defendant has any occupancy rights. Starting with the position that there is no presumption in favour of the Inamdar (*Sivaprakasa Pandara Sannadhi* v. *Veeranna Reddi* (14) or against him (41 Mad. 1012 P.C.) it is impossible that the defendant in this case who was let into the land under Exhibit V on condition that he would give up the land at the end of the term (See 41 Mad. 1012) can have the occupancy rights, whatever the original grant might be. When the last tenant surredered the land in 1908, the land came into the possession of the plaintiff who had both *varams* at his disposal and then, the defendant entered on condition of giving up the land at the end of nine years which is a very important condition in all cases not governed by the Estate Land Act (41 Mad. 1012) and *Venkata Sastrulu* v. *Seetharamudu* (15). The case in *Sivaprakasa Pandara Sannadhi* v. *Veeranna Reddi* (14) was a case were the tenants had been holding the land continously for over 75 years at unvarying rents, were mortgaging and selling their holdings, and partitioning them among themselves and where there were no muchilikas by tenants stipulating that the land should be surrendered at the end of a particular term, the only muchilikas purporting to contain such terms being found to be forgeries and the tenants obtained compensation from Government when the holdings were acquired.

I therefore hold that the plaintiff is entitled to the declaration prayed for. In

8. (1910) 20 M. L. J. 728 (734)= 8 M. L. T. 429=8 I. C. 546.
9. (1903) 26 Mad. 404 (409).
10. (1906) 29 Mad. 52=16 M. L. J. 1= 1 M. L. T. 3=3 C. L. J. 1=3 A. L. J. 55= 8 Bom. L. R. 1=10 C. W. N. 161= 33 I. A. 46 (P. C.)
11. (1866) W. R. 121.
12. (1883) 9 Cal. 187=9 I. A. 104.
13. (1915) 42 Cal. 710=42 I. A. 30= 19 C. W. N. 65=2 L. W. 11=17 M. L. T. 1= 21 C. L. J. 31=17 Bom. L. R. 32= 28 M. L. J. 457=26 I. C. 678=(P. C.)
14. (1922) P. C. 292=45 Mad. 586=31 M.L.T. (P.C.) 54=43 M. L. J. 640=16 L. W. 102=(1922) M. W. N. 749=49 I. A. 286=68 I. C. 538 (P.C.).
15. (1920) 43 Mad 166=46 I. A. 123=17 A. L. J. 725=37 M. L. J. 42=21 Bom. L. R. 925=26 M. L. T. 175=30 C. L. J. 441=10 L. W. 633=24 C. W. N. 129=51 I. C. 304 (P.C.)

this view it is unnecessary to discuss the other questions arising in the case.

But I may add that I agree with my learned brother's construction of Ex. V. In my opinion Ex. V evidences a loan and a lease. In the sense that a simple method of recovering the loan was also provided by it, it may be said that Ex. V also furnishes some security to the creditor (lessee). But there is no security either in the sense that Ex. V amounts to a simple mortgage on which a suit for sale can be mentioned or in the sense that Ex. V amounts to a usufructuary mortgage. Any how there was certainly a lease. Probably their Lordships were using the word "Security" in this sense in *Bengal Indigo Company* v. *Raghobur Das* (3) the decision in which ultimately turned on a special definition of "ryat" in Bengal Tenancy Act.

I agree that the second appeal should be dismissed with costs.

Appeal dismissed.

1923 Madras. 459.

KRISHNAN AND RAMESAM, JJ.

(*Uppalapati*) *Suryanarayana-raju Garu* ... Appellant.

v.

Sri Sri Sri Brundavana Chandra Harischandra Jagaddeveu Rajah Bahadur Garu Rajah of Tekkali...Respondent.

F. A. Nos., 94 & 95 of 1921, dated 25th September 1922, against the decree of the Dt. Court of Ganjam at Berhampore in O. S. No. 2 of 1919.

(a) *Lease—Rent, deduction of—Extent of area.*

Where the extent did not form an item of consideration at all in fixing the rent of the lands: in other words, the lands were merely leased as villages and the rent had nothing to do with the actual extent and admittedly, no measurements were taken at the time the lands were leased nor at any time thereafter. *Held*, the lessee cannot claim more than the area first taken possession of by him under the lease nor remission of rent.

(b) *Landlord and Tenant—Rent—Non-delivery or eviction from part of leased property.*

Where the tenant is evicted from or is not secured in his possession of part of leased property. *Held* the tenant is only entitled to a remission of rent and is not entitled to refuse to pay any rent at all or to throw upon the landlord the burden of proving what rent was payable to him. Ordinarily, there will be a proportionate reduction of rent according to area unless one side or the other shows that the lands lost possession of were either of superior or inferior quality when that factor would have to be taken into consideration in ascertaining the proportion.

K. Bashyam Iyengar—for the Appellant.

C. Sambasiva Rao—for the Respondent.

KRISHNAN, J:—These are appeals against the decree of the District Judge of Ganjam in O. S. No. 2 of 1919 brought by the Rajah of Tekkali against the defendant, to recover from him the arrears of rent alleged to be due to the Rajah under a registered lease deed Ex. XIV, the muchilika Ex. A being its counterpart. The rent is claimed for Faslis 1325, 1326 and 1327. The main defence raised in the case is that possession had not been given by the plaintiff of all the lands leased to the defendant and that therefore the defendant was not bound to pay the rent fixed in Ex. XIV but only a reduced rent, abatement of rent being given for the extent of the land which he was not put in possession of. As regards this defence there are two sets of lands to consider. About some of them it is said that no possession was given at all. They consist of five plots. The second set consists of lands, which, it is said, that the extent mentioned in the lease-deed was not given possession of, but only a much smaller extent was given. The defendant's case is set out in his written statement and a list of both kinds of land is given in Sch. 3 to that statement. The District Judge held on a careful consideration of all the evidence in the case that no claim for abatement of rent was made out as regards the second set of lands, the total extent of which, it was contended, defendant was not given possession of. But as regards the Rotho lands in Ustapada, and the lands in Rukkakona and Bamsia he held that it was proved by the defendant that no part of these lands was put into his possession and that he was therefore entitled to a remission of rent as regards them, and he thus allowed a rateable reduction of rent calculated on 70 Bharanams, the extent of those three villages, from the total extent of the rent payable.

It is argued before us that the District Judge was wrong in disallowing abatement of rent as regards the second set of lands, the total extent of which according to the defendant had not been put into his pos-

session. They consist of a number of villages. Taking one of them for example Ustapada, the toal extent of this land mentioned in Ex. XIV is 1025 Bharanams approximately; the defendant's case is that he was put in possession of only 573 Bharanams and 10 nauties and that he did not get possession of the balance 451 Bharanams and 10 nauties and that there should be a proportionate reduction in rent in regard to that land. Similarly with regard to other lands such as Rampada, Saradapore, Konkoroda and so on, a list of which is as we have already said, given in Sch. 3 to the written statement. Turning to Ex. XIV which corresponds to the muchilika Ex. A it will be seen that the rent was fixed in it at a lump sum of Rs. 7,351 and that there is no mention in the body of the document of anything about the extent; the rent was not calculated with reference to the extent of the lands at all. What was leased out were the various villages identified by the boundaries given in the document. The extent no doubt is given in the schedule to that document but only approximately. We agree with the District Judge in thinking that the extent did not form an item of consideration at all in fixing the rent of the lands; in other words, that the lands were merely leased as villages and the rent had nothing to do with the actual extent. Admittedly, no measurements, were taken at the time the lands were leased nor at any time thereafter. It is the defendant's case that he found out the deficiency in extent within a month after he got the lands and he says that he went and complained to the plaintiff and the plaintiff promised that he would make some deduction from the lease amount. On the evidence on this point we are in agreement with the District Judge in thinking that no such application was made to the plaintiff. The plaintiff as his own witness denied that any application was made to him and the evidence on the defendant's side on the point is altogether unconvincing because the defendant was not likely to have rested content with a bare oral promise, if he was really going to get a remission, he would have taken care to have some writing. The witnesses on the defendant's side are not men of such credit that we can accept their evidence as reliable when it has been rejected by the learned District Judge. It, therefore, follows that although the defendant knew of the deficiency within a month he really took no steps whatever to get any remission on that ground. His conduct is thus very significant and entirely in favour of the plaintiff's case that the extent of the land was not considered as of any importance in leasing these villages to the defendant or fixing the rent.

Furthermore, we have a series of letters sent by the defendant to the plaintiff in respect of monies due under the lease and there are indications in them that the plaintiff was claiming the whole rent due to him under the lease deed Ex. XIV. In defendant's replies we only find excuses made for non-payment and offers to pay as soon as possible. Nowhere do we find any statement by the defendant that the monies claimed were excessive or that he was entitled to have any remission or deduction on account of only the shortage of the lands delivered to him. Taking all these circumstances into consideration we think that the District Judge was right in holding that the extent of the lands did not form a part of the consideration weighing with the defendant in executing this lease.

Furthermore, as pointed out by the District Judge, the amount of the deficiency of the lands as alleged by the defendant in Sch. 3 to the written statement is not really estab'ished. The evidence shows that there was no such deficiency as the defendant claims is quite unsatisfactory and unreliable. The Inam B register from which he seems to have taken his measurements are, it is well known, unreliable for the correctness of the measurements, so that even as regards that part of his case, the defendant cannot be said to have succeeded in proving it.

Turning now to the question of the defendant not getting possession of any of the lands leased to him in the three villages above-named in respect of which the plaintiff has appealed to us in Appeal No. 95 of 1921 contesting the finding of the District Judge, we think that the District Judge is right here also, for, although the evidence is not as good as it might be on the defendant's side that he was not given possession, there is evidence in his favour of witnesses like D. W. 11 and D. W. 6 who say that they are in possession of those lands and that no

possession had been given to the defendant. It is true that these witnesses have not produced their title-deeds to support their evidence. There is, however, their oral evidence and on the plaintiff's side there is no evidence of any weight to contradict that evidence. P. W. 1 says that the ryots agreed to attorn to the defendant, but he admits that he does not know all the ryots and that he does not know the lands either. Such evidence is of no value whatever and what little evidence there is in defendant's favour and we must therefore accept the District Judge's finding as regards these three items of property in Utsapada, Rukkakona and Bamsia that the defendant was not given possession of any portion of them. The learned vakil for the defendant has founded an argument on this regarding the whole case. He says that as it is established in his favour that at least some portions of the lands leased to him were not put into his possession, the burden of proof is on the plaintiff to show what lands he actually put into the possession of the defendant, and what amounts of rent of property are to be treated as payable to the landlord for such lands. He has cited to us *Gopanund Jha* v. *Lala Gobind Pershad* (1) and *Surendra Narain Roy Chowdhury* v. *Dina Nath Bose* (2) following it. The view taken in *Gopanund Jha* v. *Lala Gobind Pershad* (1) was considered by a Bench of this Court in *Meenakshi Sundara Nachiar* v. *Chidambaram Chetty* (3) where the question as to what was to be done when it was proved that a tenant was evicted from a part of the lands leased out to him by a person having a superior title, was considered at length. We follow that ruling and hold that the tenant is only entitled to a remission of rent and is not entitled to refuse to pay any rent at all or to throw upon the landlord the burden of proving what rent was payable to him. Ordinarily, there will be a proportionate reduction of rent according to area unless one side or the other shows that the lands lost possession of were either of superior or inferior quality when that factor would have to be taken into consideration in ascertaining the proportion. Here no such question arises and the learned District Judge therefore, we think, was right in saying that a reduction proportionate to the 70 Bharanams of the total extent mentioned in Ex. XIV should be granted to the defendant. [His Lordship then dealt with small items of expenditure and dismissed both the appeals with costs.]

1. 12 W. R. 109.
2. (1916) 43 Cal. 554=36 I. C. 33.
3. (1912) 23 M. L. J. 119=12 M. L. T. 124=(1912) M. W. N. 813=15 I. C. 711.

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*1923 Madras. 461.

PHILLIPS AND DEVADOSS, JJ.

(*Srimath Deivasikamani*) *Nataraja Desikar and another* ... Appellants.

v.

Govinda Rao Respondent (Plaintiff).

F. A. No. 207 of 1921, dated 10th January 1923, against the decree of the Court of the Sub. J. of Sivaganga in O. S. No. 27 of 1918.

Limitation Act, Art. 110—Same person landlord and tenant—Arrears for more than three years.

When there is no one competent to sue, there can be no cause of action, and consequently limitation cannot run, because there is no one against whom it can run. Although under art. 110 the time from which period begins to run is "when the arrears become due", that is usually the end of each fasli year, but a quite different time may in certain circumstances be the time from which limitation begins to run. In this case where the landlord and tenant were the same person till plaintiff was appointed a Receiver of the landlord's interest, the arrears became due as soon as there was some one to whom they were payable, who was capable of enforcing the obligation by suit. In such a case arrears for more than three years can be had. 12 M. I. A. 244 and 27 Mad. 143 Foll.

T. V. Gopalasami Mudaliar and A. C. Sampath Iyengar—for the appellants.

A. Krishnaswami Iyer, T. L. Venkatarama Ayer, S. Krishnaswami Iyengar and C. S. Rama Rao Sahib—for the Respondent.

JUDGMENT :—There is absolutely no evidence worth the name of the alleged custom or implied contract that the Devasthanam, the Melvaramdar, was responsible for collecting the melvaram from the sub-tenants, and that the kudivaramdar, *i.e.*, the Mutt, was not liable in any way. Failing proof of such a custom the Mutt as Kudivaramdar, is bound to pay the melvaram to the Devasthanam. This melvaram has only been paid in part, as

shown by the accounts kept by defendant himself, and consequently the balance is due from the Mutt. It does not lie with the defendant to question the *quantum* of arrears shown in his own accounts.

The only other point with which it is necessary to deal is the question of limitation. Defendant as trustee of the temple and of the Mutt united in himself the function of landlord and of tenant, and consequently could not bring a suit for rent against himself, on the principle that when the land that receives and the land that pays is the same, no suit will lie for payment. It is contended for appellant that a suit might have been brought by some of the temple worshippers, but at any rate no such suit could be brought unless sanction was obtained, and until such sanction was obtained no suit would lie, and no particular person would be in a position to sue. Uutil defendant was removed from his trusteeship, he could not sue for the rent and there was no other person who was in a position to do so. When there is no one competent to sue, there can be no cause of action, and consequently limitation cannot run, because there is no one against whom it can run; (Vide, *Murray* v. *The East India Company* (1).) Plaintiff, therefore, when he was appointed Receiver was the first person who had the right to sue and the question is whether his right is barred (except in regard to 3 years' rent) under Art. 110, Limitation Act. Under that article the time from which period begins to run is "when the arrears become due." This time is usually the end of each fasli year, but the meaning of the words has been considered by the Privy Council in *Mussumat Ranee Surno Moyee* v. *Shooshee Mokhee Burmonia* (2) and *Rangayya Appa Rao* v. *Bobba Sriramulu* (3) and it has been held that a quite different time may in certain circumstances be the time from which limitation begins to run. In this case, the arrears became due (applying the language in *Rangayya Appa Rao* v. *Bobba Sriramulu* (3), as soon as there was some one to whom they were payable, who was capable of enforcing the obligation by suit. Holding as we do, that defendant could not enforce the obligation by suit, it was not until plaintiff was appointed that there was any cause of action in existence. Plaintiff's claim is therefore not barred. The plea that the suit should have been brought in the Revenue Court is not supported by any evidence, and must be rejected. The appeal is dismissed with costs.

Appeal dismissed.

1. (1821) 5 B. and Ald. 204=106 E. R. 197.
2. 12 M. I. A. 244.
3. (1904) 27 Mad. 143=8 C. W. N. 162=14 M L. J. 1=6 Bom. L. R. 241=31 I. A. 17=8 Sar. 617 (P. C.).

1923 Madras. 462.

SPENCER AND VENKATASUBBA RAO, JJ.

Aiyapparaju alias *Ayyappa* .. Appellant.

v.

Veeva Venkatakrishnayya and others ...Respondents.

F.A.F.O. No. 320 of 1921, dated 21st November 1922, against the order of D. J. dated the 26th April 1921 of Godavari at Rajahmundry in I. P. No. 37 of 1919.

(a) *Limitation Act, Ss. 5 & 14—Insolvency proceedings—Prov. Insolv. Act,* (1907), *S.* 6 (4)—*Act V of* 1920, *S.* 78.

The original insolvency petition, was presented by a creditor under S. 6 (4) of Act III of 1907, on June 28th, 1919 to the District Munsif of Razole who had no jurisdiction to entertain it. Having been returned by that Court on September 22nd 1919 it was represented to the District Court which had jurisdiction under S. 3. on October 1st 1919, on which date more than 3 months had elapsed since the commission of the act of insolvency upon which the petition was grounded. Thus the petition was liable to be rejected as out of order. But the District Judge, on a petition to excuse delay being presented on February 21st, 1921, acted under S. 5 of Limitation Act, and holding that there was "sufficient cause" for the petition not being presented earlier, excused the delay and proceeded to enquire into the merits of the case. *Held*, that S. 78 of the new Provincial Insolvency Act, (1920) was not in force on 1st October 1919 and S. 14 of the Limitation Act does not apply to Insolvency proceedings. Hence the order of Dt. Judge excusing delay was wrong. 41 M. 169 F. B. *Rel.*

(b) *Limitation Act—Construction.*

The intention of the Law of limitation is, not to give a right where there is not one, but to interpose a bar after a certain period to a suit to enforce an existing right. 20 I. A. 183 Foll.

K. S. Ganapathi Iyer and T. S. Raghunatha Rao—for the Appellant.

G. Lakshmanna and A. Satyanarayana—for the Respondents.

SPENCER, J. :—This is an appeal against an order of adjudication under the Provin-

cial Insolvency Act. The insolvency petition, from which originated the District Judge's proceedings, was one presented by a creditor under S. 6 (4) of Act III of 1907.

It was first presented on June 28th, 1919 to the District Munsif of Razole who had no jurisdiction to entertain it. Having been returned by that Court on September 22nd, 1919, it was represented to the District Court on October 1st, 1919 which had jurisdiction under S. 3. One of the pre-requisites for the valid presentation of a creditor's petition is that contained in sub-Cl. (c) to Cl. 4 of S. 6, namely that the act of insolvency which forms the ground of the application should have occurred within 3 months of the date of presentation of the petition. The act of insolvency put forward in this case as the basis of the petition was a transaction of sale of the debtor's property on March 31st, 1919 alleged to have been made with the intent of defeating his creditors. The Razole District Munsif had been invested under S. 3 of the Act with jurisdiction only over debtor's insolvency petitions. When this creditor's petition was presented to a Court having jurisdiction more than 3 months had elapsed since the commission of the act of insolvency upon which the petition was grounded. Thus the petition was liable to be rejected as out of order. But the District Judge, on a petition to excuse delay being presented on February 21st, 1921, acted under S. 5 of the Limitation Act, and holding that there was "sufficient cause" for the petition not being presented earlier, excused the delay and proceeded to enquire into the merits of the case. In *Lingayya* v. *Chinna Narayana* (1), a Full Bench of this Court laid down that the general provisions of the Indian Limitation Act, which include S. 5, were not applicable to petitions under the Provisional Insolvency Act (III of 1907).

After the pronouncement however, a new Provincial Insolvency Act (V of 1920) was passed and came into force on February 25th, 1920, the old Act being simultaneously repealed.

The new Act contained a new provision (S. 78) which runs thus :—

"The provisions of Ss. 5 and 12 of the Indian Limitation Act, 1908, shall apply to appeals and applications under this Act, and for the purpose of the said S. 12, a decision under S. 4 shall be deemed to to be a decree."

The question of Law to be decided now is whether the District Judge acted legally in excusing the delay upon sufficient cause being shown and admitting a petition which at the date of its presentation failed to comply with one of the conditions of a legal presentation under the Act in force at the time when it was presented.

I hold for two reasons that he had no power to excuse the delay.

In the first place S. 6 of Cl. 4 of Act III of 1907, which was applicable on the date (1st October, 1919) when the Insolvency petition was presented, makes the occurrence of an act of Insolvency within three months of the date of presentation one of three conditions precedent to a lawful presentation.

If any of these conditions are unfulfilled the petition is an incompetent one.

The English Bankruptcy Act of 1914 contains a similar provision in S. 4 reproduced from the Bankruptcy Acts of 1883 and 1890.

"A creditor shall not be entitled to present a bankruptcy petition against a debtor unless,

(*a*) ... ...

(*b*) ... ...

(*c*) The act of bankruptcy on which the petition is grounded has occurred within three months before the presentation of the petition."

This provision appears to be quite independent of the Statute of Limitation in both countries and to be absolute. This view can be held consistently with what was said in *Lingayya* v. *Chinna Narayana* (1). I was one of the referring Judges in that case, and the first thing we had to decide was whether the appeal to the High Court was in time. This depended on the questions (1) whether the time occupied in obtaining a copy of the District Judge's order could be excluded under S. 12 of the Limitation Act, and (2) if not, whether we had power under S. 5 to excuse the delay.

The difficulty caused by the last date for the presentation of the creditor's application to the District Court having fallen on a date when that Court was closed for

1. (1917) 41 M. 169=33 M. L. J. 566=7 L. W. 443=44 I. C. 805 (F.B.).

the vacation could have been overcome by the application of S. 10 of the General Clauses Act, if the District Judge had not been of opinion that a question of limitation was involved.

Whether the District Judge's opinion was right or wrong did not require consideration till it was decided whether the appeal was in time.

When the amendment of the Provincial Insolvency Act was under the consideration of the Legislative Council, this High Court drew the attention of Government to the Full Bench decision in *Lingayya* v *Chinna Narayana* (1), and I feel no doubt that it was in order to meet the doubts and difficulties that had been experienced in admitting appeals against the orders of Insolvency Courts that the Legislature in passing the new Insolvency Act of 1920 introduced S. 78 which made Ss. 5 and 12 of the Limitation Act applicable to appeals and applications while omitting other general provisions of the Limitation Act such as Ss. 4 and 14.

Secondly, assuming for the purpose of argument that S. 6 purports to provide a period of limitation for the presentation of insolvency petitions, and that the sections in the body of the Limitation Act which deal with the computation period of limitation can be invoked for extending a period of this kind, under the law prevailing when this petition was presented the District Judge had no power to apply S. 5, as the Full Bench had declared it to be inapplicable to petitions and appeals under the Provincial Insolvency Act. The introduction of Act V of 1920 with its new S. 78 did not alter the law prevailing at the date of the presentation of the petition which alone governed the question of its admissibility. The law in force when the District Judge passed his order has no bearing on this question, for S. 6 of the General Clauses Act prevents the repeal of the previous Act having the effect of reviving a petition that had become barred before the later Act came into force, or affecting the rights and liabilities of creditors and debtors under the earlier Act. S. 14 of the Indian Limitation Act, which is the appropriate section for excluding time spent in prosecuting another proceeding in a Court which has no jurisdiction to entertain has not been made applicable to insolvency petitions either by the Act of 1920, or previously. Consequently the act of presenting a petition by a creditor to a District Munsif's Court which had no jurisdiction was a nullity and had no effect on the subsequent proceedings in a competent Court.

The proviso in Cl. 2 of S. 6 of the Provincial Insolvency Act of 1907, even if read with S. 21 of the Code of Civil Procedure, cannot be of any avail to the petitioner, as the jurisdiction there referred to is local jurisdiction, not inherent jurisdiction.

The appeal must therefore be allowed with costs in this Court and the Court below to be paid to appellant by 1st respondent, and the adjudication is annulled, and the petition dismissed.

VENKATASUBBA RAO, J. :—I am also of the opinion that the order of the District Judge adjudicating the 1st respondent an insolvent must be set aside.

The act of insolvency relied on occurred on the 31st March 1919, and the insolvency petition was presented on the 1st October 1919; that is, after the lapse of three months from the occurrence of the act of insolvency on which the petition was grounded. The Provincial Insolvency Act in force on the date of the presentation of the petition was Act III of 1907. It is not disputed that under that Act the creditor had no right to present the petition. It was held by a Full Bench of this Court in *Lingayya* v. *Chinna Narayana* (1), that, in dealing with the admission of petitions and appeals presented after the time prescribed under the provisions of the Provincial Insolvency Act III of 1907, recourse should not be had to the general provisions of the Limitation Act, IX of 1908.

The District Judge however purported to act under S. 78 of the Provincial Insolvency Act V of 1920 which repealed the previous Insolvency Act and excusing the delay in the presentation of the petition, held that the creditor's right subsisted and passed an order of adjudication. The District Judge made the order on the 26th April, 1921, that is, on a date subsequent to the coming into force of Act V of 1920.

S. 78 referred to, enacts *inter alia* that the provisions of S. 5 of the Indian Limitation Act 1908 shall apply to appeals

and applications under the Act (Act V of 1920). There is no corresponding section in the Repealed Act, and as pointed out above, this Court held that the general provisions of the Limitation Act of 1908 were inapplicable to applications and appeals presented under the old Provincial Insolvency Act. S. 5 of the Limitation Act is one of such general provisions. Under S. 5 the Court may extend the period of limitation on sufficient cause being shown for not making the application within the period allowed by the law.

Was the District Judge right in acting under S. 78 of the new Act? The application to excuse delay was filed on the 21st February 1921, and it was suggested that a fresh insolvency petition should be deemed to have been filed on that date, that is, after the new Act had come into force. Whether the District Judge purported to make an order excusing the delay in the course of an insolvency petition presented under the old Act or on a petition presented under the new Act, the action of the District Judge seems to be equally unjustifiable. S. 6 of the General Clauses Act, Act X of 1897, clearly provides that when any Act of the Governor-General in Council repeals any enactment, the repeal shall not revive anything not in force or existing at the time at which the repeal takes effect or affect any right or privilege acquired under any enactment so repealed. The right of the creditor became barred under the Act of 1907, and S. 78 of the new Act cannot be invoked for the purpose of reviving a right which had become barred. The right acquired by the debtor to have no insolvency petition against him grounded on the act of insolvency referred to above, cannot be affected by S. 78.

In *Hurrinath Chatterji* v. *Mohunt Methoor Mohun Goswami* (2), their Lordships of the Judicial Committee observe at page 192: "The intention of the law of limitation is, not to give a right where there is not one, but to interpose a bar after a certain period to a suit to enforce an existing right." See also *Khunni Lal* v. *Gobind Krishna Narain* (3).

2. (1894) 21 Cal. 8=20 I. A. 183.
3. (1911) 33 All. 356 (366)=21 M. L. J. 645=15 C. W. N. 545=8 A. L. J. 552=13 Bom. L. R. 427=13 C. L. J. 575=10 M. L. T. 25=(1911) 1 M. W. N. 432=10 I. C. 477 (P. C.).

I am therefore of the opinion that the order of the District Judge adjudicating the 1st respondent an insolvent cannot be supported.

In this view, it is unnecessary to decide the other question whether the provision that the presentation of a petition is not valid unless the act of insolvency has occurred within three months before it, is a rule of limitation or independent of the Statute of Limitations. The question is a difficult one, and I do not propose to express an opinion upon it.

In the result I concur in the order proposed by my learned brother.

Appeal allowed.

1923 Madras. 465.

OLDFIELD AND RAMESAM, JJ.

A. Ramaswami Chetty ... Appellant.

v.

Doraisami alias *Latchuman Chetty and others* ... Respondents.

S. A. No. 354 of 1921, dated 24th November 1922, against the decree of the Court of the 1st Addl. Sub. J. of Coimbatore in A. S. No. 66 of 1920.

(a) *C.P. Code, O. 32, R. 4 (4)—No person fit and willing—Absence of affidavit.*

The appointment of the Head Clerk of Court as guardian for the suit is not invalid, simply because of the absence of an affidavit alleging there was no other person fit and willing to act as guardian. There is no obligation imposed by the relevant portion of the Code, O. XXXII, on the Court to insist on, or on the plaintiff to produce, an affidavit to the effect that there is no other person fit and willing to act as guardian for the suit or to ascertain and exhaust the relatives of the minor defendants before appointing an officer of the Court. O. 32, R. 4, Cl. 4 says only that an officer of the Court may be appointed, where there is no other person fit and willing to act as guardian for the suit. But the fulfilment of this condition must be considered with reference to the circumstances of the case.

[P. 466, Col. 2]

(b) *C. P. Code, O. 32, R. 3 (4)—Father a party—Appointment of Court guardian—Notice.*

Where no distinct notice was given to the father of the proposal of the Court guardian, but the father was himself a a party to the proceedings at one of the hearings, at which the appointment was made, and the father had refused to act himself, a separate notice was not necessary of an incident, of which the father must have been aware. The absence of notice to the father of the appointment of the Head Clerk would in any case be an irregularity which would not affect the validity of the proceedings in the absence of proof of fraud or gross negligence on the part of the person appointed as guardian. 32 All. 287 Ref.

[P. 467, Col. 1.]

C. S. Venkatachariar—for the Appellant.

A. Krishnaswami Iyer—for the Respondents.

JUDGMENT :—This Second Appeal arises from a suit for partition by the plaintiffs against their father, the 1st defendant and the 2nd and 3rd defendants, 2nd defendant being an alienee of certain property under a decree against the 1st defendant and the plaintiffs. The question is whether that decree binds the plaintiffs, inasmuch as, it is said, that it was obtained against them, when they were minors, in circumstances which make it invalid. Those circumstances were set out in the plaint as being that the decree was obtained by fraud and was not binding on the minor plaintiffs.

The fraud in question was not further specified in the plaint. Primarily, however, we are concerned with the grounds on which the lower appellate Court has given judgment in the plaintiff's favour. Those grounds are not that there was generally any fraud in the obtaining by the 3rd defendant of the decree, or in the purchase by the 2nd defendant at the subsequent Court-sale, but that the 2 to 5 defendants then in that suit (plaintiffs) were not represented by any guardian legally appointed, the Head Clerk of the Court, who was on the record as their guardian, not having been legally appointed as such. The lower appellate Court held that the plaintiffs were not properly represented, and the proceedings were not binding on them. It therefore went on to retry the issues in the previous case on their merits.

The objection to the appointment of the Head Clerk which the lower appellate Court has sustained, was (as we understand it) that there was no affidavit alleging there was no other person fit and willing to act as the guardian of the plaintiffs, and no attempt was made to appoint the uncle of the plaintiffs as their guardian *ad litem*. "Though evidence was taken for the purpose of passing a decree against the plaintiffs also, the plaintiffs were practically undefended, for, no evidence was tendered on their behalf after 1st defendant's oath was accepted. Even the evidence then on record throws a certain amount of suspicion on the claim then made. Merely because another was appointed the guardian of the plaintiffs in the place of 1st defendant who refused to act, it cannot be said that the plaintiffs had been properly represented in that suit." This statement of the grounds of the lower appellate Court's decision is taken from its judgment. But it is a little difficult to understand the reference to the absence of any evidence adduced for the defence in the previous suit, especially in view of its finding that the guardian appointed was careful and diligent and properly conducted the defence and was not negligent. We shall however return to that point in the sequel.

At present we deal only with the objection that there was no proper appointment of the head clerk as guardian. The main grounds on which the lower appellate Court held the appointment invalid were the absence of an affidavit alleging there was no other person fit and willing to act as guardian and of any attempt to appoint the uncle of the plaintiffs. There is no obligation imposed by the relevant portion of the Code, O. XXXII, on the Court to insist on, or on the plaintiff to produce, an affidavit to the effect that there is no other person fit and willing to act as guardian for the suit or to ascertain and exhaust the relatives of the minor defendants before appointing an officer of the Court. O. 32, R. 4, Cl. 4 says only that an officer of the Court may be appointed, where there is no other person fit and willing to act as guardian for the suit. But the fulfilment of this condition must be considered with reference to the circumstances of the case. Here the plaintiff lived in a different district from that of the minors or their father, then and now 1st defendant. The plaintiff attempted first to appoint the 1st defendant as the guardian. He refused to act and apparently did not co-operate in any way. We cannot hold that a plaintiff is entitled to proceed with a Court guardian only at his own risk unless he can demonstrate affirmatively that he has made absolutely exhaustive enquiries and that there is in the words of the rule not merely no other relative but also "no other person fit and willing to act as guardian." Putting a reasonable construction on the rule, we are not prepared to say that the plaintiff in this case failed in his duty, especially as there is nothing (so far as we have

been shown) regarding the uncle of the minors, his residence, the plaintiff's knowledge of his existence, his interest in the minors' affairs or, what is more important, regarding any subsequent attempt by him to protect their interest.

Another objection made is that there was no notice to the minors themselves of the proceedings. That is based on a misapprehension. For O. 32, R. 3, Cl. 4 had been amended before the proceedings on the 19th May, 1910, by the omission of the words "to the minor" and it is also pointed out that under O. 32, R. 3, Cl. 4 notice was necessary to the father or other natural guardian, or, where there is no father or other natural guardian, to the person in whose care the minor is. In the present case there was no doubt no distinct notice to the father of the proposal of the Court guardian, but the father was himself a party to the proceedings at one of the hearings, at which the appointment was made, and the father had refused to act himself. It does not seem to us that a separate notice was necessary of an incident of which the father must have been aware. It is further material that the father never during the proceedings took the smallest objection to the conduct of the minor's case by the Head Cclerk.

As regards the law the absence of notice to the father of the appointment of the head clerk would in any case be in our opinion an irregularity which would not affect the validity of the proceedings in the absence of proof of fraud or gross negligence on the part of the person appointed, the present case not resembling *Rashid-un-nissa* v. *Muhammad Ismail Khan* (1), but *Munnu Lal* v. *Ghulam Abbas* (2).

The lower appellate Court's ground of decision that the appointment of the Head Clerk was illegal and the proceedings conducted by him therefore are not binding on the minors failing, we must consider the argument attempted here that, the appointment being an irregularity for want of notice, the proceedings were in fact fraudulently or grossly negligently conducted and the decision resulting from them must be set aside. The lower Courts have no doubt in the present case reached a decision on the merits in the plaintiff's favour. But that is not sufficient, unless it can be shown that the failure to produce the evidence, which was not produced at the first trial was the result of gross negligence and fraud. It is sufficient that there is nothing in the judgment of the lower appellate Court to justify us in finding to that effect nor, it may be added, in the judgment of the District Munsif. The lower appellate Court's characterisation of the conduct of the case by the Head Clerk as careful and diligent and not negligent has already been referred to. The fact that no evidence was given for the defence on behalf of the minors is in no way decisive, when there was no evidence, which the Head Clerk is shown to have then been able to adduce or ought to have known to be available. The new evidence now produced does not come within either of those descriptions. In those circumstances we must adopt the lower appellate Court's finding that there was neither fraud nor negligence. The result is that the decision as regards the decree in O. S. No. 738/13 and the sale to 2nd defendant must be set aside. The result of our decision sustaining the decree and sale will be that no properties are available for partition, since the properties sold are the only properties set out in the plaint schedule. We therefore, allowing the second appeal, set aside the decrees of the lower Courts and dismiss the plaintiff's suit with costs throughout of the 2nd defendant.

Appeal allowed.

1. (1909) 31 All. 572=13 C. W. N. 1182=10 C. L. J. 318=6 A. L. J. 822=11 Bom. L. R. 1225=6 M. L. T. 279=19 M. L. J. 631=36 I. A. 168=3 I. C. 864 (P. C.)

2. (1910) 32 All. 287=37 I. A. 77=11 C. L. J. 557=12 Bom. L. R. 439=14 C. W. N. 744=8 M. L. T. 57=20 M. L. T. 591=13 O. C. 123=6 I. C. 788 (P. C.)

** **1923 Madras. 467.**

SCHWABE, C. J., AND WALLACE, J.

Davud Beevi Ammal ... Appellant (Plaintiff).

Radhakrishna Iyer and others ... Respondents.

S. A. No. 817 of 1921, dated 24th November 1922, against the decree of the Court of the 2nd Add. Sub. J. of Tanjore in A. S. Nos. 68 and 70 of 1920.

Hindu Law — Partition—Suit for—Alienee—

Rights of—Shares of other members in the specific property alienated.

A purchaser from one member of a joint family of a property, can enforce the sale only by a partition of the entire family property; and if, in such partition, the property sold, can, with due regard to the interests of the other sharer, etc., be wholly allotted to the vendor's share, the purchaser will be entitled to the whole property which the vendor professed to convey to him. In other words the alienee will be decreed the possession of the specific property purchased by him, if that can be done, without substantial injustice to the other members and no co-parcener has a right to insist, in the absence of proof of such injustice, on his being given on division a share in the alienated item. 25 M. 690 Appl.

[P. 468, C. 2 ; P. 471, Col. 1.]

A. Krishnaswami Iyer and M. Muthuswami Iyer—for the Appellant.

P. J. Kuppanna Rao and N. Kunjitapadam—for the Respondents.

SCHWABE, C. J.:—By a deed of absolute sale one Ramachandra Aiyar sold certain lands to the 3rd defendant purporting to act for himself and as the guardian, protector and father of his minor son, the 2nd defendant. The rights of the 3rd defendant are now vested in the plaintiff. The 1st and 2nd defendants are members of a joint Hindu family, and the lands in question were their joint property. At the time of the sale the 3rd defendant obtained from the 1st defendant a security bond by which the 1st defendant gave him an indemnity against the loss that might arise by any claim of the minor 2nd defendant. That bond took the form of a charge to an extent of Rs. 8,000 on certain other lands which it appears also formed part of the joint family property. This suit is brought for a general partition of the joint family property and it is prayed that, in that partition, the suit lands shall be alloted to the 1st defendant, so that, whether he was entitled to alienate them or not, the plaintiff may get them as standing in the shoes of the 1st defendant.

The District Munsif of Negapatam, Mr. R. V. Krishna Aiyar, held that the sale was not binding on the 2nd defendant. He decreed a general partition and directed that all the joint properties should be divided into two equal shares between the 1st and 2nd defendants and that, in effecting such partition, the lands sold to the 3rd defendant should be allotted to the 1st defendant, and adjourned the suit to appoint a Commissioner to effect the partition. Without the appointment of a Commissioner the 1st and 2nd defendants divided the property filing lists of properties which they had agreed to take, in those lists allotting to the 1st defendant the properties sold to the 3rd defendant. It was not contended that this division of property would work any injustice to the 2nd defendant, and indeed, by the agreement between the 1st and 2nd defendants as to the division, it is clear that it was admitted that this was not the case. The District Munsif in his judgment has stated quite clearly the principle to be applied. On the case coming before the Subordinate Judge, Tanjore, he reversed the decree stating that the 2nd defendant had a *prima facie* right to a half share in the specific properties alienated and that there was no reason for depriving him of that natural right in giving effect to the equity in favour of the 3rd defendant, and he saw no paramount equity to be enforced in favour of the 3rd defendant or his vendee so as to override the natural rights of the plaintiff operating to his prejudice.

The principle of equity to be applied in such cases is well established and will be found clearly stated in the judgment of Bhashyam Ayyangar, J., in his very learned judgment in *Ayyagari Venkataramayya* v. *Aiyyagari Ramayya* (1) and in *Manjaya* v. *Shanmuga* (2) and it is that a purchaser from one member of a joint family of property which that member has no right to sell, it being the joint property, can enforce the sale only by a partition of the entire family property; and if, in such partition, the property sold, can, with due regard to the interests of the other sharers, to the debts due by the family and to an equitable allocation of the various items of family property to the shares of the several coparceners, be wholly allotted to the vendor's share, the purchaser will be entitled to the whole property which the vendor professed to convey to him. In my judgment, the learned District Munsif puts this case from the right point of view and I should content myself with saying that I have nothing to add to his excellent judgment, which is clear and well reasoned judgment, and that I do not agree with the judgment of the Subordinate Judge,

1. (1902) 25 Mad. 690 (715, 716.)

2 (1915) 38 Mad. 684=26 M. L. J. 576=15 M. L. T. 186=(1914) M. W. N. 356=22 I. C. 555.

because I do not appreciate what natural rights of the plaintiff operating to his prejudice are overridden by the District Munsif's decree. But Mr. Venkatarama Sastri has contended that it is now established as far as Madras is concerned that, where family property has been alienated by one co-parcener, the others may without any general partition either claim the whole property from the alienee or may claim back their share of that property, such share being the proportion to which they would have been entitled on a partition of that specific property, and for this proposition we are referred to the judgment of a Full Bench of this Court in *Iburamsa Rowthan* v. *Thiruvenkatasami Naick* (3). That case is, of course, binding on us sitting in Second Appeal, but I do not think that it was intended by that Court in any way to dissent from the principle of equity stated above and so well established. Nor do I think that it was meant that whether the alienee in such cases could get the property was to depend on whether a suit was first brought by him for a partition of the whole joint property or by the other co-parceners for a partition of a part. We are informed that there was pending, at the time of the hearing of this suit, another suit by the son claiming partition of the particular property and award to him of a half; so that if by chance that suit had been heard first and the principle in *Iburamsa Rowthan* v. *Theruvenkatasawmi Naick* (3) had been applied, assuming it to be consistent with the equitable principle that would otherwise apply, the son would have got half of the property in question and the plaintiff one half whereas by applying the equitable principle he would have got the whole of what had been sold. That there is no such conflict, I think, is clear from the decision of the Privy Council, in *Ramkishore Kedarnath* v. *Jainarayan Ramrachhpal* (4). There the suit was brought by members of a joint Hindu family to set aside an alienation by their father to an adopted son whose adoption was alleged to be invalid. Their Lordships in sending back the case pointed out that the adopted son might be entitled to insist that he stood in the shoes of the adoptive father and be entitled in that suit to obtain a partition in which he could get the share which would come to the father so as to give effect to any rights to which the adopted son might be entitled claiming through the father. In my view, this is authority for the proposition that if this suit had been a suit by the son for a share of the alienated property, it would be open to the Court on the application of the alienee to decree a general partition in which the principle of equity should be applied.

It is further contended that this principle has no application where the alienor purports not to sell the property as his own but purports to sell it on behalf of himself and on behalf of the other co-parcener, his infant son. I am unable to appreciate this distinction, for it is clear that, if he had sold in his own name, then the principle would apply, and I do not appreciate how the fact that he purported to sell both for himself and for his infant son in any way reduce the interest purchased by the alienee.

It was further contended that the purchaser must have known from the statement of the consideration that the 1st defendant had no right to sell the property as managing member because the consideration showed that the sale could not have been for necessities. The Subordinate Judge states that there was no necessity for the alienation so as to bind the minor's interest in the property. On an examination of the consideration, a considerable amount was paid in cash, but a large balance was secured by a hypothecation bond of some property of the purchaser. I am not satisfied that this fact must necessarily have shown to the purchaser that the sale could not be a proper alienation in the interests of the joint family; nor do I see, even if it were so, why I should deprive the purchaser of his rights against the alienor, to obtain the alienor's interest by partition, on the equitable principle which has been applied here.

It was also argued that the taking of the security bond was evidence that the purchaser knew that the 1st defendant had no right to alienate, and also that its existence prevented the application of the

3. (1911) 34 Mad. 269=20 M. L. J. 743=(1910) M. W. N. 380=8 M. L. T. 269=7 I. C. 559 (F. B.)

4. (1913) 40 Cal. 966=(1913) M. W. N. 661=14 M. L. T. 163=17 C. W. N. 1189=18 C. L. J. 237=15 Bom. L. R. 867=11 A. L. J. 865=25 M. L. J. 512=10 N. L. R. 1=40 I. A. 213=20 I. C. 958 (P. C.)

equitable principles. It is a wise precaution when purchasing from a managing member to take security against possible claims of other co-parceners, and I do not think that any such significance is to be attached to the taking of this bond. If, however, the security, if resorted to by the purchaser, would result in the son being in a better position, it may be that the Court, in applying the equitable principle, might take that into consideration. But that is not the case here as the property given as security is also joint property; and there is no evidence, nor has it been suggested, that the son would in any way benefit by that security property being allotted to the father and given to the plaintiff.

For these reasons, this appeal must be allowed and the decree of the District Munsif must be restored so far as A schedule property is concerned. The plaintiff must have costs of the appeal in the Court of the Subordinate Judge and of this appeal.

WALLACE, J.—I agree. On the important question of law raised in this appeal, I should like to say a few words.

1. The point for decision in this case is:—Can a co-parcener whose share in one item of joint family property has been wrongly alienated by another co-parcener who nevertheless had the power of alienating it, resist the delivery by the Court of that share to a *bona fide* purchaser of it from the alienating co-parcener, in the practical working out of the equity of that purchaser to have decreed to him, in his general partition suit brought for that purpose, the property purchased by him *bona fide* for value, apart from any consideration of the question whether any real unfairness or injustice would be done to the non-alienating co-parceners by granting the alienee the decree he seeks for?

2. The main and well settled principles of law necessary for consideration here as laid down in this Presidency are (*a*) that ordinarily no co-parcener can sue for partial partition of his share in any single item of joint family property; (*b*) that when a specific item of joint family property has been alienated by another co-parcener, a non-alienating co-parcener can sue for recovery of his share in the item alienated; see *Chinna Sanyasi* v. *Suriya* (5) *Subramanya Chettyar* v. *Padmanabha Chettyar* (6) or (*c*) where the alienee has been given possession of such a specific item, the whole joint family may sue to recover possession. See *Ramkishore Kedarnath* v. *Jainarayana Ramrachhpal* (4). As against these rights of co-parceners against the alienee from a co-parcener, has to be set the right of such alienee to enforce by generel partition suit his rights of purchase in and possession of the specific item purchased if that can be done without prejudice to the co-parceners who were not parties to the alienation. *Manjaya Mudali* v. *Shanmuga* (2) and *Ayyagari Venkataramayya* v. *Aiyyagari Ramayya* (1). This right will prevail against right (*c*) set out above, *vide* the Privy Council decision in *Ramkishore Kedarnath* v. *Jainarayan Ramrachhpal* (4). The present question is whether it also prevails against right (*b*). Now while it is not necessary for the non-alienating co-parcener to institute a suit for general partition in order to recover his share in the item alienated by another co-parcener, and while he may sue for partial partition of his share in that item only, I do not find any authority for holding that, when he has so recovered that share, it is, as against his fellow co-parceners his specific property, or that the effect of his suit is to cause that recovered share to cease to be the joint family property which it was before the suit. No more after the suit, than before it, can the recovering co-parcener predicate that he has himself a particular share in that item of the joint family property. He has, in my view, merely recovered that share for the joint family, or rather, prevented it passing as a specific item out of the joint family pool, prevented that hitherto undivided share of his crystallising into a specific divided item, and so separating itself from the general pool. His decree does not have the effect of dividing the alienated item by metes and bounds between himself and other non-alienating co-parceners. But of course the alienor co-parcener has lost his claim to share in that item at a general family partition. In my view the decree obtained in such a suit by a non-alienating co-parcener, while it is an exception to the general rule that no co-parcener can sue for partial partition, does not go further and form any exception to the rule that no co-parcener, can, as

5. (1882) 5 Mad. 196.

6. (1896) 19 Mad. 267.

against his co-parceners, predicate that he is entitled to hold and retain against them a particular share in any particular joint family property. By the very frame of the suit the decree in it is a decree for partial partition as against the alienee, but not as against his co-parceners, and its object is to ascertain by partition the particular property which the purchaser may retain and to separate that from the joint family property. The decree in it will no doubt bind the alienee to this extent that he cannot contend that the non-alienating co-parcener's share *must* be available for recovery by him. It does not preclude him from claiming that in working out his equity, it may be available, though no doubt the existence of the decree may in certain cases raise a strong equity in favour of the non-alienating co-parcener retaining the share he had taken so much trouble to recover.

3. It follows then that, when an alienee from a co-parcener files his suit for general partition in order to work out the equity in his favour as purchaser, a non-alienating co-parcener who has obtained a decree for his share of that item, is not ordinarily in any superior position to retain that share against the alienee than a non-alienating co-parcener who has not obtained such a decree, and cannot without proof of specific prejudice to himself, set up against the alienee a claim to a particular share in the item alienated since that share has fallen back into the general family pool, or rather, has really never left it. In working out the equities it follows that the ordinary rule will apply *viz.*, that the alienee will be decreed the possession of the specific property purchased by him, if that can be done without substantial injustice to the co-parcener and no co-parcener has a right to insist, in the absence of proof of such injustice, on his being given on division a share in the alienated item.

4. None of the rulings quoted in support of respondent seem to me to affect this result. That in *Iburamsa Rowthan* v. *Theruvenkatasami Naick* (3) deals with the equities between two alienees, each forms a separate co-parcener, in which case it was held that equity could not insist on the 2nd alienee suing for general partition but would permit him to sue for the partition of his share, corresponding to his alienor's share, in the property conveyed to the 1st alienee. This was merely an extension of the principle that the alienee shall so far as possible be decreed what he purchased. This ruling did not consider the question what the effect of a suit by one of the alienees for general partition for the purpose of working out his equity would be, and it is certainly no authority for the proposition that such an equity cannot be enforced against a non-alienating co-parcener who has recovered by suit his share in the property alienated, when no substantial injustice would be done to him.

5. So long as the alienee refrains from filing his suit for general partition, *i.e.*, from insisting on the working out of his own equity, the claims of the non-alienating co-parceners will be enforced against him, on equitable terms; see *Vadivelam Pillai* v. *Natesam Pillai* (7). The principle, as I understand it, is that until he so sues, his interest in the property is only vested and not separate, "a legal estate" not yet reduced into possession and which may never be reduced into possession. But when he has sued to carve out and reduce to possession that vested interest and has obtained a decree, then his equity to get for himself the specific property in which he purchased an interest will prevail, if no substantial injustice will be thereby caused to the co-parceners, and can be resisted by any co-parcener on no other ground than that it will do him a substantial injustice. I agree with the learned Chief Justice that in this case no substantial injustice has been proved to be likely to follow the allotment to the purchaser of the property purchased by him.

6. I have nothing to add on the other parts of the case and agree that the appellant must be allowed on the terms proposed by the learned Chief Justice.

Appeal allowed.

7. (1914) 37 Mad. 435.=12 M. L. T. 192=23 M. L. J. 256=(1912) M. W. N. 851=16 I. C. 835.

1923 Madras. 472 (1).

RAMESAM, J.

Mahalakshmi and others ... Petitioners.

v.

Subbarayadu and another ... Respondents.

Cr. Rev. No. 74 of 1922 and Cr. Rev. Petn. No. 70 of 1922 dated 3rd May 1922, under S. 435 and 439 of the Code of Cr. P., 1898 and S. 107 of the Government of India Act, praying the High Court, to revise the order of the Court of the Deputy Magistrate, Head Quarters Division, Cocanada, dated 26th October 1921.

Cr. P.C., S. 145—Jurisdiction.

Directions under S. 145 by Magistrate after finding that there was no likelihood of breach of peace are without jurisdiction.

G. Lakshmanna and Viyanna—for the Petitioners.

V. L. Ethiraj—for the Public Prosecutor for the Crown.

ORDER :—The Magistrate found that there was no likelihood of a breach of the peace and refused to take action under S. 145 of the Criminal Procedure Code. If so, he had no jurisdiction to pass the direction in para. 9 of his order. It is hereby set aside (*vide Subbarama Aiyar* v. *Mariya Pillai* (1). The proceeds realised on the sale of the crops will be restored to the persons from whose possession the crops were taken *viz.*, the petitioners in this Court who admittedly raised the crops. It appears that the right to cultivate the land was also put to auction and the land was let out to the highest bidder. If so, the rents realised also properly belong to the petitioners in this Court.

These rents will also be paid to them by the Magistrate.

Order set aside.

1. (1914) 16 M. L. T. 52=1 L W. 493=15 Cr. L.J. 559=(1914) M.W.N. 798=24 I. C. 967.

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* 1923 Madras. 472. (2).

SPENCER AND VENKATASUBBA RAO, JJ.

Swaminatha Mudaliar ... Appellant —Defendant.

v.

Kumaraswami Chettiar and others ... Respondents —Plaintiffs.

F.A.F.O. No. 113 of 1922 dated 12th December 1922, against the order, dated 27th Jan. 1922 of the Dt. Court. East Tanjore at Nagapatam, in Execution Application No. 406 of 1920 in O. S. No. 1 of 1911.

C. P. Code, O. 1 R. 10—Representative Suit—Addition of parties after decree.

It may be unusual to bring fresh plaintiffs on the record after a decree has been passed, but there is authority for doing so under O. 1, R. 10, although it might be improper and inconvenient in particular cases to add defendants after decree and to allow proceedings to be taken against them in execution. 6 Mad. 227 Ref. 32 Cal. 483 Dist. Especially in representative suits, persons interested might enforce in execution the directions in the scheme. 28 M. 319 Foll.

K. Raja Iyer—for the Appellant.

K. Bhashyam Iyengar and K. S. Desikan—for the Respondent.

JUDGMENT :—This suit was instituted under S. 14 of the Religious Endowments Act by 3 persons acting in a representative capacity. The decree obtained in the High Court on appeal was for the recovery of a certain sum of money as damages on behalf of the temple. Two out of the three plaintffs are still alive and there has been no devolution of their interest upon the respondents. The District Judge's order does not purport to be one made under O. 22, R. 10, and it is therefore not necessary for us to consider the applicability.

The District Judge has ordered the respondents to be brought on the record as decree-holders because they represent the temple in their capacity as trustees and because it is in the interests of the trust that the decree should be executed, the original decree-holders having neglected to enforce it for over five years.

It may be unusual to bring fresh plaintiffs on the record after a decree has been passed, but there is authority for doing so under O. 1, R. 10, in *Venkatchand Lakshmi Chand* v. *Advocate-General* (1) and in *Lingammal* v. *Venkatammal* (2) although it might be improper and inconvenient in particular cases to add defendants after decree and to allow proceedings to be taken against them in execution. See *Goodall* v. *Mussoorie Bank, Ltd.* (3)). On the contrary it was held in *Jotindra Mohan Tagore* v. *Bejoy Chand Mahatap* (4) that the power of the Court to add parties depends on whether the questions arising in the case

1. 8 Bom. H. C. R. 96.
2. (1883) 6 Mad. 227.
3. (1888) 10 All. 97.
4. (1905) 32 Cal. 483.

are still *sub judice*. That may be sound principle in suits where no other interests are involved but those of the individual plaintiffs and defendants.

In a representative suit however like the present, as observed in *Krishnamachariar* v. *Chinnammal* (5), all the members of the class are in effect parties to the suit and any of them is entitled to bring himself on the record as an actual party [see also *Srinivasa Ayyangar* v. *Arayar Srinivasa Ayyangar* (6)].

O. I, R. 8 expressly permits any person on whose behalf a representative suit is instituted to apply to the Court to be brought on the record, and the words of this rule are not limited, as they are by O. I, R. 10 by the purpose being expressed as that of adjudication on the questions arising in the suit. In *Prayag Dossji Varu Mahant* v. *Tirumala Sri Rangacharlavaru* (7), which was a scheme suit, it was held that persons interested might enforce in execution the directions in the Scheme.

The principle involved is the same here, and we therefore consider that the District Judge acted properly in bringing the respondents on the record.

The appeal is dismissed with costs.

Appeal dismissed.

5. (1912) 24 M. L. J. 192=13 M. L. T. 151=(1913) M. W. N. 194=18 I. C. 369.
6. (1910) 33 M. 483=20 M.L.J. 546=8 M.L.T. 33=(1910) M. W. N. 479=6 I. C. 229.
7. (1905) 28 Mad. 319=15 M. L. J. 133.

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* **1923 Madras 473.**

AYLING AND RAMESAM, JJ.

Nataraja Pillai ... Petitioner.

v.

Rangaswami Pillai and others ... Respondents—(Counter-Petitioners.)

Cr. M. P. No. 459 of 1922, dated the 17th January, 1923.

Cr. P. C., S. 144—Magistrate passing order under—Whether a Court.

A Magistrate passing an order under S. 144, Criminal Procedure Code, is not acting as a "Court" and sub-section 7 of S. 195 is inapplicable to such a case. 6 M. 203 F.B.; 14 W. R. Cr. 46 Foll. and 35 M. L. J. 454 Diss.

[P. 474, Col. 2.]

Obiter; It is impossible that while securing orders under S. 144 from interference except by the successor of the Magistrate passing them or by some superior Magistrate, the Sessions Judge should have been given the power to render the order practically nugatory by declining to allow a prosecution for disobedience to it.

[P. 474.]

K. S. Jayarama Iyer—for the Petitioner:

S. Subramania Iyer—for the Respondents.

The Public Prosecutor—on behalf of the Crown.

ORDER :—The Sub-Divisional Magistrate, Tanjore passed an order under S. 144, Criminal Procedure Code, prohibiting certain persons (respondents before us) from interference with the performance of a certain religious ceremony. Respondents are said to have disobeyed this order: and the Sub-Divisional Magistrate thereupon sanctioned their prosecution for an offence under S. 188, Indian Penal Code. The Sessions Judge, purporting to act under Sub-S. (6) of S. 195 revoked this sanction.

We are now asked to revise his order: and the first ground taken is that, as the case falls under cl. (*a*) of Sub-S. (1) of S. 195, the power of revocation lay with the District Magistrate, not with Sessions Judge, and that the latter's order was without jurisdiction.

The question has to be decided with reference to the provisions of Sub-Ss. (6) and (7) of S. 195. There is no doubt that, if the general principle of Sub-S. (6) is applied, the proper authority to revoke the sanction is the District Magistrate: *vide* S. 17 (1) and (5), Criminal Procedure Code. But it is contended that the Sub-Divisional Magistrate must be regarded as a "Court," when issuing an order under S. 144 and (consequentially) when sanctioning prosecution for breach of the same, and that it follows that the special test laid down in Sub-S. (7) for determining the subordination of "Courts" in this connection applies. If so, the proper authority to revoke is undeniably the Sessions Judge.

It is, we think, reasonable to hold that if the order under S. 144 is passed by a person acting as a Court, that person must also be treated as a Court, when he sanctions prosecution for disobedience of the same. It is also possible that the "Public servant" referred to in Ss. 172 to 188, Indian Penal Code, might in certain circumstance, be a "Court." Whether in the latter event, Sub-s. (7) should apply, or whether the application of that sub-section is confined to cases falling under Cl. (*b*) and

(c) of sub-section (1) seems to us doubtful. But we are inclined to hold that a Magistrate passing an order under S. 144, Criminal Procedure Code, does so only as a "public servant" and not as a "Court". We are aware that an opposite view has been taken by a Bench of this Court in *Arunachallam Pillai* v. *Ponnuswami* (1). We have carefully considered the judgment in that case which appears to proceed on the footing that an order under S. 144 is an order of a Court. Napier, J. says such orders "have always been treated as judical orders" which the learned Judge appears to treat as identical with orders of Court. With all respect we do not think this view is correct. A Full Bench of this Court in *Sundaram* v. *The Queen*: *Ponnuswami* v. *The Queen* (2), a leading case on orders under this section, has specifically laid down that "it should always be borne in mind that orders under S. 518 of the Code of Criminal Procedure of 1872 "corresponding with S. 144 of the present Code, are not judicial proceedings" and the same view has been taken by a Full Bench of the Calcutta High Court in *Abbas Ali Choudhry* v. *Illim Meah* (3). That section has been elaborated. and its operation in some ways restricted in the corresponding sections of subsequent codes. But we find nothing in the changes of S. 62 of the Code of 1861 which would render less applicable the considered opinions of the learned Judges in that case.

This view seems to be supported by a consideration of S. 144. This section merely empowers certain Magistrates to pass temporary orders in urgent cases. These orders need not be based on any record outside the Magistrate's own knowledge or observation; and it is not even necessary that the party against whom it is directed should first be given a chance of being heard. To take a simple instance—A Magistrate observing with his own eyes (without complaint or report) that certain property was in a condition imminently dangerous to human life, might immediately and without waiting to hear what any human being had to say, issue an order under this section: and provided his order was in writing, set out the material facts and was properly served, it would be a valid order, disobedience to which would be an offence under S. 188, Indian Penal Code. The remedy of a party injuriously affected is to get it set aside under sub-section (4). Can such an order be treated as an order of a Court? or, to use another phrase, a "judicial order"? If not, is its nature altered because the Magistrate *may* hold an enquiry, and record and consider evidence before issuing it?

Orders under S. 145, Criminal Procedure Code, which must be preceded by an enquiry in the presence of parties, who are entitled to adduce evidence, stand on a different footing though orders under both sections are withdrawn from the ordinary revisional jurisdiction of this Court (*vide* S. 435 (3), Crimininal Procedure Code.)

In our opinion, a Magistrate passing an order under S. 144, Criminal Procedure Code, is not acting as a "Court" and Sub-section (7) of S. 195 is inapplicable to such a case.

In considering the intention of the Legislature, it may not be out of place to refer to the improbability that, while securing orders under S. 144 from interference except by the successor of the Magistrate passing them or by some superior Magistrate (*vide* Cl. 4 quoted above), the Sessions Judge should have been given the power to render the order practically nugatory by declining to allow a prosecution for disobedience to it.

We would also refer to the Judgment of a Bench of this Court reported in II Weir 155, in which the learned Judges took a more extreme view than that we have expressed above, and held in effect, that all sanction orders passed under clause (a) of sub-section (1) must be taken to be passed by a public servant who was not acting as a Court.

In our opinion the order of the Sessions Judge must be held to be without jurisdiction, and accordingly set aside.

Order set aside.

1. (1919) 42 Mad. 64=35 M.L.N.J. 454=8 L. W. 422=24 M. L. T. 396=(1918) M. W. 824=20 Cr. L. J. 78=48 I. C. 878
2. (1883) 6 Mad. 203.
3. 14 W. R. (Cr.) 46.

* **1923 Madras. 475.**

SCHWABE, C. J. AND WALLACE, J.

Sarvothama Rao and others... Petitioners.

v.

The Chairman, Municipal Council, Saidapet and another ... Respondents.

Civil Rev. Petitions Nos. 705, 758 and 828 of 1922, dated 11th January, 1923.

(a) *Election—Municipal election—Rejection of nomination paper—Validity.*

Where the rejection of the nomination papers was on the ground that it did not give the number of the ward for which the candidates decided to stand; and in the other case on the ground that the thumb mark of the seconder of the candidate had not been attested. *Held*, the rejection of the nomination papers was not in law justified.

(b) *Election—Depriving of vote—Damages.*

If a man entitled to vote or to be a candidate at an election is wrongfully deprived of that right, an action for damages lies against the person so depriving him. 1 Smith's leading cases 205 Foll. But if the act by which the right is interfered with is an act done in a judicial capacity, no action lies unless the act is done maliciously which in this context really means dishonestly.

(c) *Madras District Municipalities Act* (1920) *S.* 352—*Rejection — Nomination paper — Civil Suit.*

The general right of being nominated to stand as a candidate for Municipal Election is a legal character. This legal character is itself the creation of a specific statute, the District Municipalities Act V of 1920, and it is settled law that where a statute itself sets up a proper tribunal for trying cases of the infringement of the right to such a legal character and that tribunal has functioned judicially, the Civil Court will have no jurisdiction. The Local Government, is the final arbiter for deciding what the rules mean, and the Civil Court cannot ordinarily be asked to decide whether the Local Government's interpretation of its own rules is right or wrong. But where the proper trtbunal has declined jurisdiction and the aggrieved party is thus bereft of his statutory and constitutional remedy, it is the province of the Civil Court as a Court of Equity, to fill the vacuum created and to exercise the jurisdiction which the proper tribunal has failed to exercise. It cannot be admitted that the order of the Chairman in the matter of interpretation of the rules is absolutely final. The correct principle is that when a duly constituted tribunal has refused to try the question of the right of a party to the legal character of one entitled to be nominated to stand as candidate for an election, and there is no other remedy available, the ordinary Civil Court has jurisdiction to entertain a suit for that relief and the right to grant a proper temporary injunction retaining matters in *status quo ante* until the suit is tried. Where the election has taken place the remedy of the candidate whose nomination paper had been wrongly rejected by the Chairman is to file election petition to Sub. Judge or District Judge but not a civil suit nor can he restrain the elected candidate from doing his duties as a Commissioner (Case Law Discussed.)

M. S. Venkatarama Iyer and A. K. Madhava Rao—for the Petitioners.

K. S. Krishnaswami Iyengar and T. M. Kasturi—for the Respondents.

SCHWABE, C. J.:—These are Civil Revision Petitions in three suits all arising out of the Municipal Elections for Saidapet. The first Civil Revision Petition No. 705 is in a suit which asks for declaration that a nomination paper put in on behalf of the plaintiff as a candidate for election as a Municipal Councillor was wrongly rejected by the Chairman of the Council, the defendant, and for an injunction to restrain him from holding an election without the plaintiff as duly nominated candidate, and also to compel him to hold an election with the plaintiff as a candidate.

The other two Civil Revision Petitions Nos. 758 and 828 are in suits by two persons, whose nomination papers were also rejected, against two other candidates who being the only other candidates for the wards in question were by the rules deemed to have been elected when these nomination papers were rejected. The claim in the suits is for an injunction to restrain these persons from acting as Councillors and also against the Chairman, who is made a party for this purpose, to restrain him from holding a meeting of the Council as now constituted for the purpose of electing a new Chairman.

In the first case and in one of the others the rejection of the nomination papers was on the ground that it did not give the number of the ward for which the candidates desired to stand; and in the other case on the ground that the thumb mark of the seconder of the candidate had not been attested.

The District Munsiff of Poonamalle granted *interim* injunctions in all three cases, the District Judge on appeal dissolved them all.

I am clear that the rejection of the nomination papers was not in law justified in any of the three cases, and that all three plaintiffs, ought to have been treated as duly nominated.

In the two latter suits I am however of opinion that the injunction ought not to have been granted, because the plaintiffs in them disclosed no cause of action against the defendants. The successful candidates

have done nothing wrong. They have simply found themselves elected and therefore, as their duty is, proposed to take their seats. Nor do I think that any Court can properly be asked to grant an injunction restraining the Chairman from holding a meeting of the Council as at present constituted. It is open to these plaintiffs to proceed by election petitions. In my judgment there being no cause of action against the defendants in these 2 suits, there can be no ground for granting an injunction.

Turning now to Civil Revision Petition No. 705 of 1922, if a man entitled to vote or to be a candidate at an election is wrongfully deprived of that right, an action for damages lies against the person so depriving him. This was established in England in *Ashby* v. *White* (1), which case has since been uniformly followed and in my judgment this is also the law of this country as was stated in *The Municipal Board of Agra* v. *Asharfi Lal* (2). But this statement requires qualification for if the act by which the right is interfered with is an act done in judicial capacity then therule does not apply; and no action lies unless the act is done maliciously which in this context really means dishonestly ; see *Pickering* v. *James* (3), particularly the judgment of Brett, J., at p. 509. In this case the Chairman was acting in a judicial capacity in rejecting these nominations and it was not alleged that he acted dishonestly and therefore no action would lie for damages against him. But there may still be a cause of action of different nature, not in respect of the chariman's past acts, but to prevent by injunction the carrying out of any threatened action by him which would have the effect of illegally interfering with the plaintiff's rights, and in my judgment this is such a case. The Chairman has unlawfully rejected the plaintiff's nomination paper and he has announced his intention of holding an election for Ward No. 5 without permitting the plaintiff to be a candidate. I do not think that the law is such that the plaintiff must wait until the election is held and then bring an election petition which is bound to succeed, nor indeed would that remedy give him all that he is entitled to, because after the election petition had succeeded there would have to be fresh nominations and there might be other candidates in the field that he would not now have to meet, to say nothing of the trouble and expenses that he would necessarily be put to. There is ample authority to support this view. In *Aslatt* v. *Corporation of Southampton* (4) where it was proposed to hold an election of an alderman of a borough in the place of the plaintiff who, it was wrongly held, had vacated his seat, the Court of Chancery interfered by an injunction forbidding the holding of the election. In *Richardson* v. *Melthely School Board* (5) that Court granted an injunction to prevent the holding of an election for the post of school-master in place of the plaintiff, who was wrongly alleged to be disqualified for the office, and it was laid down that where there is a legal right which can be asserted in law or equity, a Court of Equity can grant an injunction in protection of that right. I have no doubt that this Court possesses the same powers under the Specific Relief Act, 1877, and in my judgment this is a case for exercising them. Reliance is placed by the defendant on S. 352 of the Madras District Municipalities Act, 1920, which protects the chairman from suits in respect of acts done in his official capacity, but in my judgment there is nothing in that section to preclude a suit being brought to restrain him from doing a threatened wrongful act to the detriment of another. It is also contended that no action lies because the decision of the Chairman is final and conclusive. I can find nothing in the rules to make it so. Under R. 31 if any question arises as to the interpretation of the rules, otherwise than in connection with an election inquiry, the question shall be referred to the Local Government, whose decision shall be final. The plaintiff tried to refer the question of the rejection of his nomination, which was a question of the interpretation of the rules to the Local Government, but the Local Government declined jurisdiction in the matter on the grounds, as they inform us through the Government Solicitor, that the matter had not been referred to them by the Chairman or otherwise officially, and that the matter was already *sub judice*.

The result is that there has been no

1. 1 Sm. L. C. 295.
2. (1922) All. 1=44 All. 202=65 I. C. 984.
3. (1873) 8 C.P. 489.
4. (1880) 16 Ch. D. 143.
5. (1893) 3 Ch. 510.

conclusive ruling on the point and it is open to us to decide the matter.

I venture to express a hope that it may be possible for the Local Government acting under S. 36 of the Act to cancel the rejection of this nomination by the Chairman and direct the election to be held with the plaintiff as a candidate. They will no doubt also consider whether any action can be taken in the other two cases so as to avoid the necessity of an election petition.

The defendant must pay the costs of the proceedings for injunction before the District Munsif and before the District Judge and of this petition No. 705. The plaintiffs in the other two suits must pay the costs of these petitions Nos. 758 and 828.

WALLACE, J.—These petitions are all petitions to restore the order of the District Munsif granting temporary injunctions pending disposal of the petitioners' suits. Certain general features are common to all and with these I shall first deal.

The nomination papers of the three petitioners as candidates for the Municipal election were declared invalid by the Chairman. In two cases, there was only one other candidate, who was declared duly elected, and in the other case the election has not yet been held. All the three candidates are suing for declarations that their nominations were proper, and that they are entitled to stand. The original Court by injunction has in the former two cases restrained the duly elected candidates from sitting, and in the latter case, Civil Revision Petition No. 705 of 1922 before us, has restrained the holding of an election. The District Judge on appeal dissolved all the three injunctions, and we are now asked to restore them pending disposal of the petitioners' suits, framed to restore to them the right to stand as a candidate of which they have been deprived.

2. The main contention of the respondents in all the cases is that the suits themselves will not lie and therefore no injunctions can be granted. The District Munsif in his final order granting injunctions avoided deciding that question. It would have been better if he had decided the suits and the injunction petitions together. It is impossible in deciding the propriety of these injunctions to avoid deciding on the maintainability of these suits.

3. The petitioners' chief contention is that the suits are maintainable under S. 42 of the Specific Relief Act as being suits by persons entitled to a legal character for the declaration of their title. That the general right of being nominated to stand as a candidate for a Municipal Election is a legal character cannot, I think, admit of doubt; but before it follows that S. 42 will give a right of suit, we have to note that this legal character is itself the creation of a specific statute, the District Municipalities Act V of 1920, and that it is settled law that where a statute itself sets up a proper tribunal for trying cases of the infringement of the right to such a legal character and that tribunal has functioned judicially, the Civil Court will have no jurisdiction. So that we have to examine firstly, what is the nature of the infringement of the right complained of? secondly, is there a tribunal appointed by the Act or the rules under it to deal, judicially or quasi judicially with such an infringement? and thirdly, if there is one, has it functioned?

4. As I conceive the position, no one is denying the petitioners' general right to be nominated to stand as candidates in this or in other elections, provided that their nomination papers are in proper form. No one, least of all, the Chairman is concerned to deny that the petitioners were entitled to stand if their interpretation of the rules is correct and if their nomination papers were in proper form, and no one, least of all the petitioners, is concerned to deny that they were not entitled to stand if the Chairman's interpretation of the rules is correct and their nomination papers were not in proper form.

5. Therefore the only question of substance that the suits really raise is whether or not the petitioners' nomination papers were in proper form, that is, whether the rules on this matter have been properly followed. No allegation of bad faith is made against the Chairman, and there is no contention that he deliberately misinterpreted or disobeyed perfectly clear rules with the object of depriving any one of his lawful rights. Hence we must take it that the Chairman honestly considered that he was conforming to the rules when he rejected the three nominations. The position then is this: that the Chairman in good faith, although mistakenly, in my opinion, held the meaning of the

rules to be in one way while the petitioners hold it to be another. The real point at issue and the point which the District Munsif who has to try the suits must decide, therefore, is merely whether the rules have been properly interpreted, and according as his interpretation inclines towards the petitioners' view or the Chairman's view, the petitioners will or will not have a cause of action. If the petitioners get a decision, of the proper authority whose decision is final in this matter, interpreting the rules in the manner for which they contend, their rights will be once for all restored.

6. Is the Civil Court then the final authority for that purpose, and will a Civil suit lie, which in essence is merely calling upon the Civil Court, to interpret these rules regarding the nomination of candidates for election? I thing that the answer would ordinarily be in the negative for the short reason that, as I read the rules, another tribunal is set up for that very purpose. R. 31 of the election rules clearly lays down that:

"If any question arises as to the interpretation of these rules otherwise than in connection with an election enquiry, the question shall be referred to the Local Government whose decision shall be final."

That is, the Local Government, which drafted the rules, is the final arbiter for deciding what the rules mean, and the Civil Court cannot ordinarily be asked to decide whether the Local Government's interpretation of its own rules is right or wrong.

7. There is, however, in one of these cases, Civil Revision Petition No. 705, the peculiar feature, which was disclosed to us only towards the close of the argument before us, namely that the petitioner had, after the unfavourable ruling of the Chairman, made a reference to Local Government and asked it to interpret the rules and revise the Chairman's order and permit his nomination and that the Government's answer was that it declined to interfere. The answer is before us and on its face it is not clear on what grounds the Government declined to interfere, but the letter also before us produced by the Government Solicitor on 18th December, 1922, makes it clear that the refusal to interfere was on the ground that the Local Government had no jurisdiction, Government apparently holding that, while a reference can be made in such a case under R. 31, it cannot be made by a *private* party, but only by the Chairman. I am myself unable to read R. 31 so, and, so long as it is read so, so long will an aggrieved candidate be driven for his remedy to the cumbrous method of a Civil suit and an injunction. The net result, however, is that the Government conceived that it had no jurisdiction and therefore declined to function as the judicial or quasi-judicial tribunal it was intended to be, because it thought that the case had not been properly brought before it.

8. Now, if this tribunal had functioned in this case and given a decision—whether right or wrong in the opinion of the Civil Court it is immaterial—I am clear that the Civil Court would have no jurisdiction and the remedy provided by the Statute would have been used and exhausted and its decision on the matter would be final. But where the proper tribunal has declined jurisdiction and the aggrieved party is thus bereft of his statutory and constitutional remedy, it is the province of the Civil Court as a Court of Equity, to fill the vacuum created and to exercise the jurisdiction which the proper tribunal has failed to exercise.

9. It cannot be admitted that the order of the Chairman in the matter of interpretation of the rules is absolutely final, and that he can by his mere order prevent a candidate from standing for election; such a principle is not deducible from the Act or the Rules. The Rules not only do not say so, but provide a method of appeal or revision from such an order. Self Government has not progressed so far in the direction of autocracy. If Government then mis-interprets its own rules as giving it no jurisdiction so as to take away from the aggrieved party the remedy provided by the rules, and thus, in effect, declares that it never intended itself to have jurisdiction, then the Civil Court must take it either that the statute does not oust the jurisdiction of the Civil Court or that the Government nevertheless had jurisdiction but refused to exercise it. In the latter case the Civil Court may legitimately be called on to interfere in order to decide whether a particular authority has or has not jurisdiction in a particular matter, and, if that authority has jurisdiction but refused to exercise it, then to exercise it itself, and not to leave the aggrieved party with-

out any remedy. In other words, the ordinary jurisdiction of a Civil Court may, in the first instance, be barred by Statute or Rule setting up another authority, but when that Statute or Rule is not obeyed and that other authority refuses to function, then the bar is removed, and there is nothing to prevent the Civil Court itself functioning.

10. The attitude of the Government in declining jurisdiction in this case is difficult to understand. In other cognate matters a definite tribunal has been set up by it, which automatically ousts the jurisdiction of the Civil Court. In the case of an elector wrongfully excluded from electoral roll, the Rules under the Act provide for the decision of the case by a Special Tribunal. In the case of malpractices or irregular procedure at an election the rules provide for an election petition being brought before the District Court or a Sub-Court. It is difficult therefore to believe that the Government intended to leave without remedy a candidate whose nomination was improperly rejected by the Chairman, and I am fortified by this in my opinion that the Government in this case wrongly declined to exercise a jurisdiction which was intended to be exercised by it.

11. In Civil Revision Petition No. 705 of 1922, therefore, I am satisfied that the tribunal was then really set up but refused to function, and such refusal is the direct source for the petitioner's cause of action and the basis for the maintainability of his suit. On that ground the suit out of which that Civil Revision Petition has sprung is *prima facie* maintainable.

12. I shall now deal with three points urged by the respondents against the maintainability of that suit and the other two suits. The first is S. 352 of the District Municipalities Act. That is a bar to suits only in respect of acts done, but the real grievance in Civil Revision Petition No. 705 of 1922 is not that the Chairman rejected the nomination but that he intends to hold an election without allowing petitioner to stand, that is, that the chairman is *threatening* to do wrong. S. 352 is no bar to such a suit. But it will, I conceive, be a bar to the other two suits from which Civil Revision Petitions Nos. 758 and 828 have sprung, since in my view, the election in those cases has been held, there being no difference between a case where a contest has taken place and a case where a contest has taken place. If a candidate has been returned as elected the election is over and has been held. Therefore in these two cases the suits are to set aside acts *done* and not acts *threatened*. I am not at present, however, very sure of the correctness of this opinion and prefer to decide the facts of these two suits on the next ground of objection.

13. This ground is that all the three suits are barred because the petitioners have their remedy by way of election petitions. In the case of Civil Revision Petitions Nos. 758 and 828, I am clear that this is a good objection. Elections have been held and there is a tribunal set up by the Rules for the decision of petitioners to set aside the election, a tribunal whose decision under the rules is final. The Statute itself therefore provides the remedy and the statutory tribunal has not refused jurisdiction. The ordinary Civil Court therefore has at present no jurisdiction. In my opinion for this reason also these two suits are not maintainable in the Civil Court.

14. But as regards Civil Revision Petition No. 705 of 1922 the position differs radically. The election has yet to be held and I am quite clear that any post election remedy is wholly inadequate to afford the relief which the petitioner seeks namely, that this election, now published, be stayed, until it can be held with himself as a candidate. It is no consolation to tell him that he can stand for some other election. It is no remedy to tell him that he must let the election go on and then have it set aside by petition and have a fresh election ordered. The fresh election may be under altogether different conditions and may bring forward an array of fresh candidates. The petitioner can only have his proper relief if the proposed election without him is stayed until his rejected nomination is restored, and hence an injunction staying this election was absolutely necessary unless the relief asked for was to be denied him altogether *in limine*. In most cases of this kind no doubt there will be difficulty for the aggrieved party to get in his suit in time before the threatened wrong is committed ; but, when he has succeeded in so doing, the Court cannot stultify itself by allowing the wrong which it is asked to prevent to be actually

consummated while it is engaged in trying the suit.

15. The third ground of objection relates more to the grant of the injunction in Civil Revision Petition No. 705 of 1922 than to the suits themselves, and that is, that this Court or any other cannot by injunction compel the Chairman to do what he has no longer any power to do, it being urged that the Chairman has nc power under the Rule to revise or cancel his own orders and must now automatically proceed to hold an election. I am not impressed by this argument. It is tantamount to saying that the Chairman has no power to set right an admitted wrong. I should hesitate to draw any such conclusion, and in any case, the Chairman can apply for the intervention of the Local Government, which under S. 36 of the Act has ample powers to set right any blunder or mistake.

16. The cases quoted before us do not appear to me to affect these conclusions. Both sides have quoted freely from English Law, mostly from cases of *Mandamus and Quowarrant* which clearly lays down that a returning officer is acting judicially in deciding on the validity of a nomination paper and that, in respect of such judicial act, no suit for damages can be maintained against him. That is a different question. The case in *Pritchard* v. *Bangor Corporation* (6) is a case in which the Civil Court claimed jurisdiction to interfere with the order of the returning officer disqualifying a candidate as passed without jurisdiction and proceeded itself to decide of the validity of an election. That also was a case of mandamus. The only English cases really helpful are *Aslatt* v. *Corporation of Southampton* (4) and *Richardson* v. *Methley School Board* (5) which follows the former, in which injunctions similar to those now in controversy were granted in actions for an injunction by a Court of Equity, there injunctions being granted under S. 25 of the Judicature Act, 1873.

17. As regards Indian cases, apart from cases such as *In re, Surrendra Chandra Ghose* (7) and *Narendra Nath Mitter* v. *Radha Charan Pal* (8) and *In re Amulyadhan Addy* (9) founded on mandamus, the case in *Sabhapat Singh* v. *Abdul Gaffur* (10) is one in which it was declared generally that a suit by a candidate in a mofussil election will lie for a declaration of his right to vote and to stand as a candidate, and that he was duly elected. It proceeded partly on the consideration of a saving Clause in S. 15 of the Bengal Municipal Act, III of 1894, which, it was held, must be read into the previous Act of 1884, and partly on the ground that if no such suit lay, there will be no way of upholding and maintaining such civic rights in the mofussil. The grounds for this decision seem open to question since the rules under the Act of 1884, evidently provided for an election petition before the District Magistrate and the *ratio decidendi* would imply that S. 42 of the Specific Relief Act will support such a suit in the mofussil, though it cannot be called in aid in the Presidency Town, because S. 45 of the Act, which was called in aid in that case and has so often been called in aid in similar cases in Calcutta, implies, by force of Cl. (d) that there is no other remedy and therefore no remedy under S. 42. I do not think that that case is of very much assistance. In *Ataul Huq* v. *The Chairman, Manicktola Municipality* (11) the question of jurisdiction was dealt with in a very summary manner, the want of jurisdiction not being seriously pressed, probably in consequence of the earlier ruling in *Sabhapat Singh* v. *Abdul Gaffur* (10).

18. *In the Municipal Board of Agra* v. *Asharfi Lal* (2) the suit was for damages for wrongful refusal to enter the voter's name on the electoral roll, and it may be noted that in that case the party had had his name already entered on the electoral roll by the District Magistrate before he came into Court, so that it does not help us to decide whether in Allahabad a suit for entry on the electoral roll or a similar relief will lie.

19. Coming to the Madras cases, *Nataraja Mudaliar* v. *Municipal Council of Mayavaram* (12) relying on *Bhaishanker* v. *The Municipal Corporation. Bombay* (13) declares that a Civil suit will not lie to set aside an order of the Collector, (who was

6. 13 A. C. (H. L) 241.
7. (1918) 45 Cal. 950=49 I. C. 454.
8. (1919) 46 Cal. 119=22 C. W. N. 943=28 C. L. J. 289=48 I. C. 314.
9. (1919) 46 Cal. 132=50 I. C. 307.
10. (1897) 24 Cal. 107.
11. (1921) 48 Cal. 378=24 C. W. N. 969=57 I. C. 960.
12. (1912) 35 Mad. 120=14 I. C. 993.
13. (1907) 31 Bom. 604=9 Bom. L. R. 417.

the tribunal designated under the rules under Act IV of 1884 to pronounce finally on the validity or the invalidity of an election,) declaring an election invalid, when an enquiry has been held by him. That decision is clear that a Civil Court cannot, as it were, sit in appeal over a tribunal appointed by Government to decide such a question finally. No doubt the learned Judges in that case say that a suit would lie to declare that the plaintiff was a person qualified to vote and stand as a candidate and that is so far an authority for the position that such a suit is not under all circumstances wholly unmaintainable. The case in *Valli Ammal* v. *The Corporation of Madras* (14), proceeds on the general principle that the legislature would not have intended the word "final" in a particular section of the Municipal Act to be so interpreted as to leave the Municipal Council to be a final Judge in its own cause. The principle is applicable to the present case, and in so far as it declares the jurisdiction of the Civil Court to prevent such a wrong, it is in point.

20. The case in *Lakshminarasimha Somayajiyar* v. *Ramalingam Pillai* (15) was sufficiently decided by one learned Judge on the ground that the particular rules of the Local Boards Act which he was considering were *ultra vires* and could not therefore oust the jurisdiction of the Civil Court but he also held that the rules in that particular case, if valid, would oust that jurisdiction. The other learned Judge concurred in the latter opinion. This case does not deal with the particular difficulty here, which is occasioned by the rules not being carried out.

21. I therefore agree that the correct principle is that when a duly constituted tribunal has refused to try the question, the right of a party to the legal character of one entitled to be nominated to stand as candidate for an election arises and there being no other remedy available, the ordinary Civil Court has jurisdiction to entertain a suit for that relief and the right to grant a proper temporary injunction relating to matters in *status quo ante* until the suit is tried. Civil Revision Petition No. 705 of 1922 is exactly such a case, and the injunction granted by the original Court was therefore a proper one. In the other two cases, the election has been held and the petitioners have a remedy not yet employed or exhausted, namely by way of election petition and therefore their suits are at the best premature and in my view at present unmaintainable. The injunctions granted in those cases cannot therefore be upheld. In Civil Revision Petition No. 705 of 1922 the order of the District Judge should therefore be reversed and the injunction granted by the District Munsif restored. The other two Civil Revision Petitions should be dismissed.

C. R. P. No. 705 *of* 1922 *allowed.*

C. R. P. Nos. 758 *and* 828 *of* 1922 *dismissed.*

14. (1912) 38 Mad. 41=23 M. L. J. 531=12 M. L. T. 469=(1912) M. W. N. 1162=16 I. C. 971.

15. (1920) M. W. N. 519=39 M. L. J. 301=12 L. W. 202=28 M. L. T. 205=59 I. C. 245.

1923 Madras. 481

KRISHNAN AND VENKATASUBBA RAO, JJ.

(*Pokkunuri*) *Dasaratha Row* ... Petitioner.

v.

(*Chevuru*) *Subba Rao Pantulu, Secretary, Co-operative Stores, Ltd.* ... Respondent.

C. M. P. No. 2068 of 1922, dated 24th January 1923.

Co-operative Societies Act, S. 42 (2) (1)—*Touching the business of the society.*

The words of S. 42 are very general and do not merely refer to a dispute regarding the internal management of the affairs of a society or disputes in regard to the principles which would regulate the conduct of business. But a dispute arising out of any particular transaction would not be outside the scope of the section. A dispute between a member and the committee or a dispute between a member and an officer is admittedly within the purview of the section. Also a dispute between a member who happens to be an officer on the one hand and the committee or an officer on the other, does fall within the words of the section.

[P. 482, Cols. 1 & 2.]

The Advocate-General (*C. P. Ramaswami Iyer*) *and Y. Suryanarayana*—for the Respondent.

Venkatasubba Rao, J.—The question that was argued before us turns on the construction of S. 43 (2) (*l*) of the Co-operative Societies Act, II of 1912.

The dispute arose between the petitioner, P. Dasaratha Rao and the Co-operative Stores, Vizianagaram in regard to sums of money that were entrusted to the former

for purchase of certain articles. The Stores claimed a balance on the ground that after some adjustments had been made the sum was found due and that the petitioner was wrongfully withholding it from the stores. The liability was disputed and the Secretary of the Co-operative Stores made a reference in writing to the Assistant Registrar who held an enquiry and passed a decree against the petitioner.

Two contentions were raised before us by Dasaratha Rao. The first contention had reference to the interpretation of the words "touching the business of a society" in S. 43 (2) (*l*). He contended that the present dispute does not fall within the said words and that the clause refers only to disputes regarding the internal management of the affairs of a society or disputes in regard to the principles which would regulate the conduct of business; a dispute for instance whether the society should purchase and deal in a particular commodity or should take up a particular line of business would, according to this construction come within the terms of the clause; but a dispute arising out of any particular transaction would be outside the scope of the section. The words are quite general and I am unable to accept this contention. If the restricted construction contended for is to be adopted, I find great difficulty in understanding how such a dispute can arise between the past members of a society *inter se*. The words "touching the business of a society" can be understood in one sense only with reference to all classes of persons mentioned in the clause, and, as I said above, it is difficult to imagine a dispute relating to the internal management of the affairs of a society between the past members *inter se* or again between persons claiming through a past member *inter se*.

The second contention was that the petitioner was a director and that he was therefore an officer and that the words in the section exclude the case of a dispute between an officer and the committee or between officers. This contention again I am unable to accept. A dispute between a member and the committee or a dispute between a member and an officer is admittedly within the purview of the section. It was brought to our notice that under a resolution of the society a purchase committee was constituted consisting of six of whom four were directors and two were members but not directors and in his capacity as a member of this committee, the petitioner became indebted to the society. For the respondent it was argued that the dealings which the society had with the petitioner were with him *qua* member and not *qua* director. This argument, so far as it goes, seems to me correct. But I am prepared to go further and hold that on a true construction of the words of the clause, a dispute between a member who happens to be an officer on the one hand and the committee or an officer on the other, does fall within the words of the section.

I therefore reject both the contentions advanced by the petitioner and in this view it becomes unnecessary to decide the other questions argued by the learned Advocate-General before us on behalf of the respondent.

The application is therefore dismissed. In the circumstances I would make no order as to costs.

Krishnan, J.—I agree.

Application dismissed.

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KUMARASWAMI SASTRI, J.

Sundaram Iyer ... Petitioner.

v.

Muthuramalinga Sethupathi Through S. Thirumalay Iyyengar ... Respondent.

C. M. P. No. 2989 of 1922, dated 11th December 1922.

(a) *C. P. Code, O. 41, r. 1. Construction.*

O. 41, r. 1, is imperative and states that a memorandum of appeal shall be accompanied by a copy of the decree appealed against. It is a condition precedent to there being a valid memorandum of appeal that it should be accompanied by a copy of the decree appealed from.

[P. 483, Col. 1.]

(b) *Limitation Act, S. 5—Delay excused—Right of the other party.*

Where an *ex parte* order is passed excusing the delay under S. 5, Limitation Act it is open to the other party to apply to have it set aside Courts no doubt have power to excuse the delay in the presentation of a copy of the decree appealed against, if they are satisfied that the discretion vested in them under s. 5 of the Limitation Act should be exercised in favour of the appellant.

[P. 483, Col. 2.]

(c) *Limitation Act, S 5—Sufficient Cause.*

The reason for not filing the copy of the decree appealed against, along with the memorandum of appeal was that the Dewan of the appellant did not send a copy of the decree along with the papers to be filed and as the last day for filing the appeal was the 7th November 1918 the clerk of the Vakil for the appellant, filed the appeal without the copy of the decree. On the application to set aside the *ex parte* order excusing the delay, no affidavit had been filed either by the appellant or his Dewan or any other person explaining why a copy of the decree was not sent along with the other papers or why there was a delay of 53 days. *Held*, that the delay has not been properly explained.

[P. 483, Col. 2.]

K. Kesava Ayyangar—for the Petitioner.

N. Chandrasekara Iyer for A. Krishnaswami Iyer—for the Respondent.

Order :—This is an application to vacate an *ex parte* order excusing the delay in re-presentation and to dismiss the second appeal with Costs.

The Second Appeal in which the Raja of Ramnad is the appellant was filed in time but without a copy of the decree appealed against. The papers were returned for re-presentation with a copy of the decree. When the copy of the decree was filed, the appeal was 53 days out of time as the papers were returned on the 6th of December 1918 and the decree was filed on the 16th of January 1919. On the 18th of January 1919 the papers were again returned with the remark that the appeal became out of time when the copy of the decree appealed against was filed and that an affidavit explaining the cause of the delay should be filed. On the 20th January 1922 the papers were again presented with an affidavit and orders were obtained from me on the same day excusing the delay. The petitioner who was served with notice of the appeal on the 15th of April 1922 has filed this application on the 13th November 1922 for setting aside the *ex parte* order passed.

There can be little doubt that, though the second appeal was presented in time, there was no valid presentation because the memorandum of appeal was not accompanied by a copy of the decree appealed against. O. 41, R. 1 is imperative and states that a memorandum of appeal shall be accompanied by a copy of the decree appealed against. In *Sirkantha Roy* v. *Bipra Das* (1) it was held that it was a condition precedent to there being a valid memorandum of appeal that it should be accompanied by a copy of the decree appealed from. The same view was taken in *Binapani Bibi* v. *Sashibhushan* (2); *Khirodi Sundari Debi* v. *J. N. Pal Choudhuri* (3); and *Chamela Kuar* v. *Amir Khan* (4). In *Dand Bahadur Singh* v. *Deo Nandan Prosad* (5), it was held that where an *ex parte* order is passed excusing the delay, it is open to the other party to apply to have it set aside. There can be little doubt that Courts have power to excuse the delay in the presentation of a copy of the decree appealed against and I need only refer to *Binapani* v. *Sashibhusan* (2), *Hem Chandra* v. *Jadab Chandra* (6) and *Prosonno Kumari* v. *Ram Chandra* (7) where it has been held that it is open to the Court to pass an order that a certified copy of a decree be received and attached to the memorandum of appeal if it is satisfied that the discretion vested in it under S. 5 of the Limitation Act should be exercised in favour of the appellant.

The question here is whether the delay should be excused. So far as the affidavit filed on behalf of the appellant is concerned, the reason for not filing the copy of the decree appealed against along with the memorandum of appeal is that the Dewan of the appellant did not send a copy of the decree along with the papers to be filed and that as the last day for filing the appeal was the 7th November 1918, the clerk of Mr. A. Krishnaswami Aiyar Vakil for the appellant, filed the appeal without the copy of the decree. On the application to set aside the *ex parte* order excusing the delay, no affidavit has been filed either by the appellant or his Dewan or any other person explaining why a copy of the decree was not sent along with the other papers or why there was a delay of 53 days. In the absence of any explanation I am of opinion that the delay has not been properly explained. I am, after hearing the petitioner, of opinion that the long delay has not been explained so as to justify me in exercising my discretion under S. 5 of the Limitation Act and excuse the delay in the

1. (1915) 27 I. C. 447.

2. (1912) 16 C. L. J. 133=17 I. C. 119.
3. (1901) 6 C. W. N. 283.
4. (1894) 16 All. 77=(1893) A. W. N. 223.
5. (1913) 17 C. L. J. 596=20 I. C. 513.
6. (1912) 16 C. L. J. 116=17 I. C. 99.
7. (1912) 17 C. L. J. 66=17 I. C. 155.

presentation of the appeal as the authorities which have been cited to me by the petitioner's Vakil show that the second appeal itself was incompetent at the time of presentation owing to the absence of a copy of the decree appealed against.

I, therefore, set aside my order excusing the delay and direct that the Second Appeal be posted for orders before a bench.

Order set aside.

1923 Madras. 484 (1).

SCHWABE, C. J., AND WALLACE, J.

The Official Assignee of Madras ... Petitioner

v.

Doraiappa Iyer alias *Kristnasami Iyer and others* ... Respondents.

C. M. P. No. 3507 of 1922, dated 2nd January, 1923.

Madras High Court Insolvency Rules, R. 13—*High Court Fee Rules App. IV, R.* 40.

In all insolvency proceedings unless an order is made to the contrary the rule is to tax half the Attorney's fees.

[P. 484, Col. 2.]

H. D. Cornish instructed by S. G. Satagopa Mudaliar—for the Petitioner.

K. G. Srinivasa Iyer and N. Swaminatha Iyer—for the Respondents.

Schwabe, C. J.—This is an application by the Official Assignee of Madras. What he asks for is an interpretation of an order of this Court under which an appeal was dismissed 'with costs' and the order drawn up, is 'costs of the respondent'. It is clear from what took place and from the wording of the order that that order was intended to apply to the Official Assignee only. He gets his costs and the other respondents get none.

The second point raised in the case is that one half of the ordinary fees on the Original Side has been allowed under R. 136 of the Insolvency Rules. It is contended that that rule applies only to cases in which fees are payable out of the estate, and we are referred to the analogous rule in Bankruptcy in England and to authorities decided thereunder. The English rule in small insolvencies gives three-fifths of the charges ordinarily allowed in all proceedings under the Act and those rules, and it has been held that that applies directly to proceedings under the Act, and does not apply to cases in which the proceedings are between the Official Receiver and third parties. But we have to interpret the Madras Rules and R. 133 gives the Court, which is the Court which heard this case, power to direct the costs of any petition, application or matter to be paid by any party to the proceedings or to be paid out of any fund in or under the control of the Court or in the hands of the Official Assignee, and generally to deal with the costs of all proceedings in the Court as to it may seem just. That rule seems to me to cover all proceedings under the Act and it gives the Court power to deal with proper discretion, with the costs of any such proceedings; and the succeeding R. 136, which states the scale of costs, in my judgment, applies; and the legislature has thought fit to make the costs in an insolvency only half of the ordinary costs. There again, the whole position is safeguarded by Sub-Cl. (3) of R. 136, which gives the Court power, under R. 40 of Appx. IV to the High Court Fees Rules, to allow in proper cases the full fees instead of half. So that, the result is that in insolvency proceedings, unless an order is made to the contrary, the rule is half the Attorney's fees. Whether this would have been a proper case to allow the full fees is a matter which is not open to discussion now. Such application should have been made at the hearing of the appeal.

The costs of the Official Assignee and of the appellant in this application shall be paid out of the estate.

Wallace, J.—I agree.

Petition allowed.

1923 Madras. 484 (2).

OLDFIELD, J.

Atakuri Saravayya and others in re ... Petitioners.

Cr. Rev. No. 33 of 1923 and Cr. Rev. P. No. 25 of 1923, dated 17th January 1923, under Ss. 435 and 439 of the Code of Cr. P. 1898, from order of the Court of the Stationary Sub-Mag. of Gurzala, dated 19th August 1922.

Cr. P. C. S. 439—*Application when to be entertained.*

It would be improper to proceed with the revision petition when the accused's contention can properly be put forward elsewhere.

Ch. Raghava Rao.—for the Petitioners.

Order.—This is an application by accused persons for revision of an order of the Sub-Magistrate of Gurzala refusing to allow a private vakil to appear on behalf of the accused, the present petitioners. It is admitted that the trial in which the private vakil's assistance was required has ended. There is therefore no order which this Court could pass by way of revision of the Sub-Magistrate's order refusing him leave to appear which could affect that trial. It is said further that the accused petitioner was convicted and that his appeal is now pending before the District Magistrate. If so advised, he will be able to take it a ground of appeal that he was improperly deprived of legal assistance at the trial. In these circumstances it would be useless to proceed with this revision petition and it would be improper to do so when the accused's contention can properly be put forward elsewhere. The revision petition is accordingly dismissed.

Petition dismissed.

*** 1923 Madras. 485.**

SCHWABE C. J. COUTTS TROTTER AND RAMESAM, J. J.

In the matter of a Ist Grade Pleader.

6th November, 1922.

Legal Practitioners Act, S. 13—Telling a lie—Whether misconduct.

The fact that a man is going to be injured professionally if he does speak the truth is no valid excuse for telling a lie; but, it is an attitude which is not uncommon and which is not of the most serious character. It is very different from the case of a professional man telling a lie fraudulently in the sense of wishing to assist his client in deceiving the Court or even wishing to assist his client in a claim that he is making against another. In this case, the conduct of the pleader was disapproved but no action taken.

[P. 486, Col. 1.]

Dorai Raja and A. Ganesa Iyer—for the Petitioner.

Nugent Grant, and K. S. Krishnaswami Iyer—for the Respondent.

T. R. Ramachandra Iyer—on behalf of Vakils' Association.

Judgment.—This is an application under the Legal Practitioners Act against the legal practitioner in question to show cause why he should not be dealt with by the Court. The facts of the case have been put before us very fairly indeed by the learned Advocate-General and the President of the Vakils' Association and very frankly by Mr. Grant on behalf of the pleader in question, and, although very sinister charges indeed were made against the pleader, on examination, the sinister aspect of the case disappears but there remain these facts. The pleader having in his professional capacity had the custody of certain documents, put them into Court. He was acting at that time for the father of the present petitioner and his brother and on the death of the father, he continued to act for a time for the two brothers. Those documents not being required for the purpose of the then pending suit the practitioner applied to and got them back from the Court. They apparently were taken by his clerk and kept among other documents belonging to this practitioner by his clerk, and we are prepared to accept as a fact that he forgot that he had ever got them back and had not any knowledge of where they were. At a later time, the brothers having quarrelled, he was asked by one of them for the documents. He applied to the Court, believing that they were still with the Court, for those documents and then discovered that, at any rate as far as most of them were concerned and in particular the document which the practitioner was particularly anxious to get hold of, they had been returned to him. He discovered after search that those documents were in fact among the papers in the custody of his clerk. With that knowledge he wrote two letters stating in effect that he had not got the documents and concealing the fact that the Court had recently told him that he had got the documents and that he had discovered them in the hands of his clerk. Mr. Grant, appearing for him used what is appropriate language. He says that those documents contained lies. A professional man in this profession must know perfectly well that lying to his client is unprofessional conduct. We have no doubt in this case he did so, because he thought that if he spoke the truth he would get into considerable trouble with, at any rate, one of the two brothers, probably with both, and he realised especially as one document

was still missing, that the sinister suggestions which at that time apparently were already being made, that he had from the start acted fraudulently in concealing his custody of these documents, would seem to have been with some foundation, and would probably be urged against him with the result that he would lose clients, persons obviously of a very litigious nature, and no doubt very valuable clients.

There can be no justification at all for not speaking the truth. The fact that a man is going to be injured professionally if he does speak the truth is no valid excuse for telling a lie ; but, it is an attitude which is not uncommon and which is not of the most serious character. It is very different from the case of a professional man telling a lie fraudulently in the sense of wishing to assist his client in deceiving the Court or even wishing to assist his client in a claim that he is making against another. It was done recklessly, foolishly and wrongly, apparently partly from fear and partly in his own interest.

Having said so much we think there is little else to be said or done in the matter. We think it is a case where but for the circumstances to which I am about to refer, we should order the practitioner to pay the costs of the petitioner in the matter but, in this case, the petitioner has acted throughout certainly vindictively. He has put in the petition to this Court and before the District Judge in the enquiry which was directed to be held by the District Judge, a sinister view of the whole matter and made charges of a very serious fraud, *viz.*, that the petitioner had originally got these documents from the Court in order to help not his own client but the brother, and had concealed the documents with the object of hurting his client in his suit and assisting the brother in any litigation that there might be between the two brothers. Those charges have wholly failed and therefore we do not think it right in this case to order the practitioner to pay the costs. While we must express our disapproval of the conduct of the practitioner in this matter, we think that he has already been sufficiently punished by standing under the shadow of those much more serious charges, and by the expense that he has consequently been put to in having to appear in those proceedings.

Action refused to be taken.

*** 1923 Madras. 486**

OLDFIELD AND RAMESAM, JJ.

Sri Mahant Prayag Dossjee Varu ... Appellant (Defendants).

vs.

Sarangapani Chetty and others ... Respondents (Plaintiffs)

S. A. No. 686 of 1920, dated 8th November 1922, against the decree of the Court of the Addl. Sub.—J. of Chittoor in A. S. No. 40 of 1919.

Madras Estates Land Act, Ss. 146, 147—Construction—Retrospective effect.

S. 147 was intended to lay down clearly that the landlord is entitled to continue to deal with the existing pattadar until notice of transfer is given him, and is applicable to transfers made before the commencement of the Act, and does not determine any substantive right. S. 146 lays down that when there has been a transfer, whether before the commencement of the Act or after it, the transferee will be entitled to be impleaded in proceedings if he gives the notice which S. 146 prescribes ; but that, until he does so, the existing pattadar will still be the person with whom the landlord has to deal and the transferee will be bound by any decree passed against him.

[P. 487, Col. 1.]

V. Ramadoss and T. Kumaraswamiah—for the Appellant.

N. Chandrasekhara Iyer and P. S. Narayana Iyer—for the Respondents.

Judgment.—The plaintiffs in this case in 1907 brought the suit holding, from one Gurunatha Reddi. Since then it is in evidence that Gurunatha Reddi continued to pay rent ; receiving it from the plaintiffs. But Gurunatha Reddi continued to be the Pattadar. For the rent of faslies 1322 and 1323 the 2nd defendant the landlord, here the appellant, brought the holding to sale as the rent had not been paid ; and the 1st defendant was the auction-purchaser. The lower appellate Court has held that the sale was invalid because notice of it was given to Gurunatha Reddi and not to the plaintiffs.

The decision must, in our opinion, turn on the construction of Ss. 146 and 147 of the Madras Estates Land Act and on whether those sections can apply, where the transfer of a holding has occurred, as the transfer was, as in this case, before the Act. There may be some doubt as to the law before 1908 ; and there is authority in *Ekambara Aiyar* v. *Meenatchi Ammal* (1) and *Peram Narasigadu* v.

1. (1904) 27 Mad. 401.

Machireddi (2) that the landlord was bound to serve notice on the real owner of the holding or the existing pattadar or his transferee, before he could bring it to sale, and failed to serve the right person at his own risk. S. 147 was, it must be presumed, intended to terminate any doubt there was on that point and to lay down that the landlord is entitled to continue to deal with the existing pattadar until notice of transfer is given him. It seems to us, that, as the 2nd defendant contends, S. 147 is applicable to transfers made before the commencement of the Act, and does not determine any substantive right. That moreover, is not excluded, in our opinion, by the actual language of S. 146. We read the section as laying down simply that, when there has been a transfer, whether before the commencement of the Act or after it, the transferee will be entitled to be impleaded in proceedings, if he gives the notice which S. 146 prescribes; but that, until he does so, the existing pattadar will still be the person with whom the landlord has to deal.

The Second Appeal is allowed, and the suit is dismissed with costs, throughout.

Appeal allowed.

2. (1910) M. W. N. 563=8 M. L. T. 284=20 M. L. J. 732=8 I. C. 387.

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* **1923 Madras. 487 (1).**

SPENCER AND VENKATASUBBA RAO, JJ.

Natesa Chettiar ... Appellant (Defendant.)

v.

Annamalai Chettiar ... Respondent (Plaintiff.)

Appeal from order No. 329 of 1922, dated 21st November 1922, against the order of the Dt. Court of East Tanjore at Negapatam, dated 30th August 1922.

(a) *Decree—Execution—Objection to executability.*

The omission to take objection to assignment of the decree and to its transmission to another Court for execution does not preclude the judgment-debtor from raising the question in the executing Court that the decree was not then executable in the manner proposed by the decree-holder.

[P. 487, Col. 2.]

(b) *Provincial Insolvency Act* (1920) *S.* 28—(1907) *S.* 16 (2)—*Right of insolvent to plead inexecutability of a decree.*

Cl. 2 (b) of S. 16 absolutely prohibits execution proceedings being taken against the person and property of adjudicated insolvents except with the leave of the Court and the introduction of Act V of 1920 which repealed Act III of 1907 cannot take away the right of the insolvent.

[P. 487, Col. 2.]

S. *Srinivasa Iyer*—for the Appellant.

C. S. Venkatachariar and N. C. Vijayaragavachariar—for the Respondent.

Judgment:—We do not agree with the opinion of the learned District Judge that the omission to take objection to the assignment of the decree being recognised and to its transmission to the Tiruvalur Court for execution precluded the judgment-debtor from raising the question in the executing Court that the decree was not then executable in the manner proposed by the decree-holder. The Small Cause Court at Madras did not adjudicate on the executability of the decree when it ordered it to be transmitted for execution.

The other distinction attempted to be made is between creditors who are on the schedule and those who are not.

At the time of an insolvent's discharge S. 45 (2) of Act III of 1907 gives a release to the insolvent from all debts entered in the schedule. But after adjudication and before discharge, S. 16 treats all creditors alike as to their remedy against the person and property of an insolvent during the pendency of the insolvency proceedings. This section in Cl. 2 (*b*) absolutely prohibits execution proceedings being taken against the person and property of adjudicated insolvents except with the leave of the Court and that was the law in force at the time when the appellant was adjudicated insolvent and under S. 6 of the General Clauses Act the introduction of Act V of 1920 which repealed Act III of 1907 could not take away his right.

This District Judge's order is set aside and the order of the District Munsif dismissing the execution application is restored with costs here and in the District Court.

Appeal allowed.

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* **1923 Madras. 487 (2)**

SPENCER AND VENKATASUBBA RAO, JJ.

Dhanammal ... Petitioner.

v.

Veeraraghavalu Naidu and others ... Respondents.

Civil Rev. No. 885 of 1921, dated 19th December 1922, praying the High Court to revise the order of the Dt. Court of Chingleput in Mis. A. No. 10 of 1921.

C. P. Code, O. 21, Rr. 58 and 89—Distinction between—Object of R. 58.

The purpose of a petitioner who makes a claim under O. XXI, R. 58 to a property attached is to have the attachment set aside. Even where the right is negatived, there is nothing to prevent the same person coming forward and applying unconditionally to have the sale set aside under R. 89 for the reason that he holds an interest in the suit property. The effect of the dismissal of the petitioner's claim petition is not to decide finally that the petitioner had no interest to ask that the sale should be set aside on payment of the decree amount plus five per cent. into Court but only to decide that he has no right to have the attachment raised. These are two very different things. The first (that under R. 89) may imply the existence of an interest from the same source as the owner's or an interest paramount to the judgment-debtor's; the second (that under R. 58) implies the existence of a right independent from and antagonistic to the judgment-debtor's. The dismissal of the claim petition could not therefore operate as *res judicata* to prevent the admission of an application to pay the decree amount and to get the property released after the sale. Even if the applicant's right is based upon a title paramount to that of the judgment-debtor, R. 89 is applicable and to hold that it is not, will in many cases defeat its object. 15 C. L. J. 83 *Not Foll.*

[P 488, Col. 1; P. 489, Cols. 1 & 2.]

K. Rajah Iyer—for the Petitioner.

K. P. Ramakrishna Iyer—for the Respondents.

Spencer, J.:—The petitioner applied under O. XXI, R. 89, C. P. C. to have the sale of certain properties set aside on depositing the amount specified in the proclamation of sale *plus* 5 per cent. of the purchase money. The District Munsif and the District Judge to whom she appealed both allowed her application but on different grounds. The District Munsif's reasons for dismissing her application was that she had previously applied to pay the amount due to the decree-holder before the sale was held and that he then rejected her application because she had no *locus standi* to pay the amount. The District Judge dismissed the appeal on the ground that the petitioner having claimed the property previously in a claim petition under O. XXI, R. 58 and that claim petition having been dismissed, her only right was to bring a suit within one year to establish her title.

The property sold in Court auction originally belonged to Swaminadha Mudali. The petitioner claims as a legatee under a will of Papammal, who purchased the property from Swaminadha Mudali in 1907. In 1911 when the property was attached by another creditor of Swaminadha Mudali, Papammal put in a claim petition and having failed therein, instituted a suit and established her title in second appeal. Again the property was attached in 1915 by another creditor and upon a further claim petition put in by her in 1915 being dismissed, she brought a second suit which was dismissed for default. The appellant also preferred a claim petition in 1920 which was dismissed as too late, and upon the sale being adjourned, she filed a second application on 9—2—1921 which was dismissed on 23—3—1921.

That being the history of the case, we must see whether, the orders of the lower Courts can be supported for the reasons given therein. The District Munsif observed that the order passed on the petitioner's application before the sale was binding on her. He describes the petition as a similar one. The earlier application was one made under no definite provision of law, to have the sale stopped on payment of the decree amount. It may have been treated as an application under O. XXI, R. 2 for adjustment of the decree. The Court held that the petitioner had no *locus standi* to make the application and that the money could not be received from her. There is no connection between her application made after the sale had taken place as a person holding an interest in the property sold to have the sale set aside under O. XXI, R. 89 and the application to pay the decree amount before the sale took place. The District Munsif has not decided that the petitioner is a person not holding any interest in the property either in his previous order or in the present order and so the previous order cannot operate as *res judicata* to prevent her making the present application.

The District Judge has misconceived the effect of the claim petition. The purpose of a petitioner who makes a claim under O. XXI, R. 58 to a property attached is to have the attachment set aside. Granting that the right was negatived, there is nothing to prevent the same person coming forward and applying unconditionally to have the sale set aside under R. 89 for the reason that he holds an interest in

the suit property. The learned Judge went on to observe that the petitioner's only remedy was to set aside the sale by a regular suit. At the time when the application under R. 89 was made, the right to bring a suit under R. 63 had not become barred. That remedy was still open to her. But so also was this other remedy. The effect of the dismissal of the petitioner's claim petition was not to decide finally that the petitioner had no interest to ask that the sale should be set aside on payment of the decree amount *plus* five per cent. into Court but only to decide that she had no right to have the attachment raised. These are two very different things. The first (that under R. 89) may imply the existence of an interest from the same source as the owner's or an interest paramount to the judgment-debtor's; the second (that under R. 58) implies the existence of a right independent from and antagonistic to the judgment-debtor's. It is impossible to conceive how the dismissal of the claim petition could operate as *res judicata* to prevent the admission of an application to pay the decree amount and get the property released after the sale. As the Courts below have not decided whether the petitioner owns or holds any interest in the property sold by virtue of a title acquired before the sale, that question must now be remitted to the District Munsif for decision upon the merits and for the disposal of the application made to him. The petitioner is entitled to recover costs of this Civil Revision Petition. Costs of the subsequent proceedings will be provided for in the final order.

Venkatasubba Rao, J. :—I agree.

I would like to add just a word. It has been argued that the applicant's right is based upon a title paramount to that of the judgment-debtor, and that R. 89 is not therefore applicable and in support of the proposition, *Dulhin* v. *Bangoldhari* 15 C. L. J. 83 has been cited. With great respect I am unable to follow that decision. It seems to me that to take this narrow view of R. 89 will in many cases defeat its object. Let me take an example. Supposing B sold a property worth Rs. 10,000 to A, that long subsequent thereto, a decree was passed against him for the trifling sum of Rs. 10 and the decree-holder attached the property and brought it to sale; why should A not be entitled to make the deposit and apply under R. 89, if in his opinion it would not be worth his while to put himself to the trouble and expense of preferring a claim before sale under R. 58 or establishing after sale his right to the property in other legal proceedings? I am entirely opposed to unduly restricting the scope of the beneficent provision enacted in R. 89 when there are no words indicating that a narrow interpretation should be placed upon it.

Petition allowed.

1923 Madras. 489.

OLDFIELD, J.

Kaliyanasundarappa Aiyer ... Petitioner.

v.

Chinnaswami Servai ...Respondent.

Civil Rev. No. 597 of 1921, D. 16—1—1923, praying the High Court to revise the order dated 1—4—1921 of the Court of Small Causes at Kumbakonam in interlocutory Application No. 283 of 1921.

Limitation Act, S. 5 - Sufficient cause—Ignorance of a special order.

The last day for filing an application (19-2-21,) was a holiday as a penultimate Saturday. But the Court sat and the day was treated as not a public holiday with the special permission of the High Court given in its order dated 4-2-21. But the Court's order permitting the lower Court to sit on 19-2-21, though passed on 4-2-21, was despatched to the Lower Court only on 8-2-21, and was presumably received there next day. *Held* that it not being shown what publication of the order there was or that the petitioner who was a resident of mofusil could reasonably be expected to take notice of it, he had sufficient cause for assuming that the Court would as usual be closed on 19-2-21, the penultimate Saturday, and for postponing the presentation of his petition to the next Court day, 24-2-21.

[P. 490, Col. 1.]

T. R. Srinivasarajagopala Iyengar—for the Appellants.

S. R. Muthuswami Iyer—for the Respondent.

Judgment :—In this case the petitioner's suit was dismissed for default on 20—1—21. On 24—2—21 he applied for its restoration. That application should *prima facie* have been made not later than 19—2—21. But it was contended before the lower Court and is contended here that the time available was extended with reference to the occurrence of holidays on 19, 20, 21 and 22—2—21.

As regards 21 and 22—2—21 there is no doubt that the lower Court was closed under Government Notification for the

Mahamakam festival. 20—2—21 was a Sunday. The only question is then whether the Court was closed on 19—2—21. That day was a holiday as a penultimate Saturday. But the Court sat and the day was treated as not a public holiday with the special permission of the High Court given in its order dated 4—2—21.

It is urged first that the lower Court should have held that the petition to it was in time with reference to S. 4 of the Limitation Act. S. 4 is applicable, only when the period of limitation expires on a day when the Court is closed. It cannot be said that in the present case the Court was closed on 19—2—21.

This failing, it has been suggested that the petitioner had sufficient cause for not making his application to the lower Court within the period allowed and that the delay in making it should be excused with reference to S. 5, Limitation Act; and in the circumstances of the case the petitioner has been allowed to amend his petition in this Court accordingly. It is material that this Court's order permitting the lower Court to sit on 19—2—21, though passed on 4—2—21, was despatched to the lower Court only on 8—2—21 and was presumably received there next day. It is not shown what publication of the order there was or that the petitioner, who does not live in Kumbakonam itself, could reasonably be expected to take notice of it. This being so he had, in my opinion, sufficient cause for assuming that the Court would, as usual be closed on 19-2-21, the penultimate Saturday, and for postponing the presentation of his petition to the next Court day, 24-2-21.

The result is the lower Court's order must be set aside with a direction to it to restore the petition and deal with it on the merits in accordance with law. Costs in this Court will follow the result of the proceedings on the restoration petition and be provided for by the lower Court in its order thereon. *Order set aside.*

1923 Madras. 490.

KRISHNAN, J.

Krishnaji Reddiar ... Petitioner.

v.

Muthuveera and another ...Respondents.

C. R. P. No. 673 of 1922, dated 13th December 1922, praying the High Court to revise the order of the Court of Sub. J. of Cuddalore, dated 3rd October 1922.

(a) *Maxims—Actus curiae neminem gravabit.*

To apply the maxim that act of Court should not prejudice any party, it must be possible to hold that the failure to comply with the rule of law was due to the action of the Court and not to any default of the party. 13 C. L. J. 467; 37 All. 591; 21 M. 385; 52 I. C. 161 Ref.

[P. 491, Col. 2]

(b) *Madras Local Board Act* (14 *of* 1920) *Rules under R.* 4 (1) *&* (2)—*Failure to deposit in time.*

The Act expressly lays down that unless the deposit is made at the time of the presentation of the petition, it shall be dismissed and that only on compliance with the provisions of sub rule the Judge shall proceed to enquire into the petition. The language is very clear and mandatory in its character and unless the condition is complied with, the petition must be rejected.

[P. 492, Col. 1.]

(c) *C. P. Code, S.* 115—*Lower Court taking wrong view of law.*

Where the Subordinate Judge assumed jurisdiction to enquire into a petition on a wrong view of the law that a certain maxim *Actus curiae neminem gravabit* applied, where in fact it did not, an application in revision is maintainable.

[P. 492, Col. 2.]

C. Padmanaba Iyengar and T. D. Srinivasachari—for the Petitioner.

E. V. Sundra Reddiar—for the Respondents.

Judgment :—This revision petition is based upon R. 4 of the rules framed by the Local Government for the conduct of enquiries with reference to elections to District Boards, etc., under the Madras Local Boards Act, XIV of 1920, published in the *Fort St. George Gazette*, dated 14th June, 1921. It is contended that R. 4, Sub-R. 1, was not complied with inasmuch as the deposit of Rs. 200 required under it was not made within time and that under Sub-R. 2 the Court was bound to dismiss the petition and Sub-R. 3 did not apply as the provisions of Sub-R. 1 were not complied with.

The facts on which this question arises are as follows:—The petitioner before me was elected as a member of the Taluk Board of Cuddalore. An objection petition was filed to his election by the counter-petitioner urging certain grounds against its validity. The election was held on the 12th of May and the result published on 15th of May. According to R. 2 of the abovementioned rules, 14 days were allowed for an objection petition to be presented against the validity of the election. The 14 days in this case having

elapsed during the time the Court was closed, the petition was actually put in on the re-opening date, 17th July. It is not contended that the petition was not in time; but on the 17th of July, no deposit of 200 rupees was actually made. It would appear from the judgment of the Subordinate Judge and from the affidavits filed before him that the Vakil who was entrusted with the filing of this petition had with him a sum of Rs. 200 to deposit. He went to the Sub-Judge in the middle of the day, 7 minutes past 2 (p. m.) as the learned Sub-Judge says and presented the petition and stated to the Sub-Judge that he had 200 rupees to pay, but he did not actually tender the money, nor did he ask the Judge to take the deposit himself. In accordance with the usual practice, he went to the Chellan clerk to obtain a chellan to pay his money into the Imperial Bank. That being the luncheon interval, the chellan clerk was not there. He returned soon after, and issued the Chellan for payment of the money into the Bank at 2-45 p. m. It is the counter-petitioner's case, and there is nothing to show that it is untrue, that the money was sent to the Bank through one Narayanaswami Reddi. But the Bank being about 2½ miles or 3 miles from the Court-house, he was not able to reach the Bank in time to make the deposit before 3 p. m. as required by the Bank's rules and the Officers of the Bank accordingly declined to accept the money that day. The money was paid into the Bank only the next day. In these circumstances, the question arises whether the Sub-Judge was right in applying the principle of *Actus curiae neminem gravabit* (the act of the Court should not prejudice any one) to this case. The Sub-Judge has applied that principle but I regret I am unable to agree with him; for it cannot be said that in this case, the failure to pay the money in time was due to any action taken by the Court.

The learned Vakil for the respondent says that as the chellan clerk was not in his seat when the petitioner's Vakil went to him at the luncheon hour, he lost time and was unable to make the payment in the Bank according to its rules and the fault is the clerk's. But this argument cannot be accepted, for the time during which the Vakil went to the chellan clerk was the time when the clerks were allowed to go for tiffin. It cannot be said that the clerk committed any fault in going away for his tiffin and being absent at the time. He seems to have granted the chellan as soon as he returned. The Vakil certainly knew that he could not expect the clerk to be in his place of work during the luncheon time.

There is nothing that the Judge did that has been pointed out to me as having prevented the respondent from complying with the rule, by making the deposit in time. It is not stated that any application was made to the Judge that he should take the money himself, under R. 133 of the Civil Rules of Practice.

The learned Subordinate Judge has referred to certain authorities as justifying his view; I shall deal with them now. The case in *Mahomed Akbar Taman Khan* v. *Satchdeo Pande* (1), is the first case cited. That was a case under O. 21, R. 89 of the Code of Civil Procedure. In that case it was found that the agent of the judgment-debtor was ready to deposit money in Court but he was not able to do so as the Judge had left the Court before time whose signature had to be obtained as the presiding officer for the chellan to be paid. That was clearly a case where owing to the action of the Judge himself by leaving the Court before the Court hours were over, the party was actually prevented from complying with the rule requiring the payment into Court within the time fixed. To that case the maxim clearly applied but that is a different case altogether from the present one. To apply the maxim it must be possible to hold that the failure to comply with the rule of law was due to the action of the Court and not to any default of the party. The other cases cited are also of a similar kind. The case in *Munna Lal* v. *Radhakishen* (2), which followed the ruling in *Mahomed Akbar Taman Khan* v. *Satchdeo Pande* (1), was a case where the Treasury officer refused to receive the money. The amount was large and though the money was tendered before 3 p. m. the hour fixed before which payment had to be made into the Treasury, according to the Treasury rules, the Treasury Officer refused to receive the money because he thought that there was

1. (1911) 13 C. L. J. 467=10 I. C. 51.
2. (1915) 37 All. 591=13 A. L. J. 793=30 I.C. 186.

a period of three days more to pay it in. In that case the 1st Court had come to the conclusion that the money was tendered after 3 p. m., but the learned Judges in appeal reversed that finding and found that the money was tendered before 3 p.m., and that it was due altogether to the Treasury Officer's fault that the money was not paid into the Treasury and therefore the principle was applied that the party should not be prejudiced by the mistaken action of the Officer. The Madras case cited, *Aravamuthu Ayyangar* v. *Samiyappa Nadan* (3) was a case where the court was actually closed on the date when the payment was to be made. Their lordships held that payment on the following day was a proper payment. That case has clearly no application to the present case. The last case cited is reported in *Gajadhar Das* v. *Ram Samirun Dube* (4). In that case, it would appear on the facts, that the money was tendered both to the Revenue Court and to the Civil Court but both Courts declined to receive it and the non-payment in time was due to the action of the Courts. Some of the observations, perhaps go a little too far but the decision is fully in consonance with the principle enunciated in the other cases cited. The learned Vakil for the respondent drew my attention to a recent decision of Mr. Justice Ramesam in C. R. P. No. 870 of 1921 but there the question was one under S. 17 of the Provincial Small Cause Courts Act and the point the learned Judge had to consider was, whether in the circumstances of the case, proper ground had been shown for excusing delay. There is no question of excusing delay in the present case. The position here is clear. The Act expressly lays down that unless the deposit is made at the time of the presentation of the petition, it shall be dismissed and again says that only on compliance with the provisions of sub-rule 1 the Judge shall proceed to enquire into the petition. The language is very clear and mandatory in its character and unless the condition is complied with, the petition must be rejected.

I would add in conclusion that when the petitioner found that he could not pay the money into the Bank on the 17th it was easy for him to have returned to the Court as he had ample time to do so and to have tendered the money to the learned Sub Judge himself under R. 133 but nothing of that sort was done. The non-payment of the money is therefore clearly not due to any action of the Court but to the default of the petitioner. Now, in these circumstances, it seems to me clear, that this is not a case to which the maxim applies. The Subordinate Judge having assumed jurisdiction to enquire into the petition on a wrong view of the law, S. 115 of the Code of Civil Procedure applies. Acting under that section I set aside the order of the Subordinate Judge and reject the 1st respondent's election petition. There will be no order as to costs.

Revision Petition allowed.

3. (1898) 21 Mad. 385.
4. (1918) 17 A. L. J. 991=52 I. C. 161.

1923 Madras. 492.

SCHWABE, C. J. AND WALLACE, J.

Venkatanarayaniah and others ... Appellants.

v.

Subramania Iyer and others ... Respondents.

O. O. C. I. A. No. 41 of 1921, dated 23rd August 1922, against the judgment and decree of Courts Trotter, J. passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C. S. No. 553 of 1919.

(a) *Limitation Act, Arts.* 120, 115—*Starting point—Failure to indemnify.*

Defendant agreed in 1907 to indemnify plaintiff by paying off the mortgage within a month but the non-payment to mortgagee within a month was not accepted by the plaintiff as a breach of the contract and indeed the contract between the parties was treated by both parties as being open and remaining open until the events which culminated in the sale in execution of mortgage decree in 1919. *Held*; The defendant undertook a liability to indemnify the plaintiff against any claim by mortgagee and the cause of action under that contract of indemnity did not arise until the plaintiff suffered a loss by being ejected from the property.

[P. 494, Col. 2.]

(b) *Contract Act, S.* 125—*Misappropriation by promisor.*

Plaintiffs were owners of a house and lands which were mortgaged. Plaintiffs sold the lands alone to defendant; the latter agreeing to pay off the mortgage. Plaintiffs also mortgaged to defendant their house for Rs. 1,000 required for the purpose of paying off the mortgage. The money was left with defendant. Defendant failed to pay

off the mortgage and the properties namely the house and the lands were brought to sale in execution of mortgage decree. Defendant freed lands by paying Rs. 4,000 to the mortgagee. The house was sold for the balance of the decretal amount and was alleged to have been purchased *benami* by defendant. Plaintiff sued defendant for his breach of contract to indemnify him; *Held*: If the house is, by *benami* transaction in the defendant's possession, he must restore it. He is not entitled to any charge for purchase money, for he had throughout in his possession money of the plaintiffs sufficient to redeem the house from the mortgage, some of which in fact he has applied for the purpose of redeeming the land, and the plaintiffs are entitled to have that house unencumbered except by a mortgage of Rs. 1,000 in favour of the defendant and that mortgage must date for the purpose of interest from the date when it became effective, that is, the date when the plaintiff in fact advanced Rs. 1,000 towards paying off. The date is the date of the Court sale. If it is found that the sale was not *benami*, then the plaintiffs would only be able to get damages and they are entitled to be put by the damages in the same position as if the defendant had carried out the contract, that is, they will get the actual value of the house they have lost as on the date of ejectment less Rs. 1,000 and by way of further damages, interest on that amount at 9 per cent. per annum since the date of ejectment till final decree. The plaintiffs are also entitled in any event as damages to all costs to which they have been put in the proceedings by mortgagee to which they were parties. Further they are entitled to a declaration tha tthey are entitled to be indemnified by the defendant against all claims by purchasers of the lands in question in respect of liabilities which they have incurred by reason of the mortgage which defendant failed to pay off as agreed.

[P. 496, Cols. 1, 2.]

A. Krishnaswami Iyer—for the Appellants.

T. Ethiraja Mudaliar, V. V. Srinivasa Iyengar, V. C. Gopalarathnam, N. Visvanatha Iyer, A. Kuppusami Iyer and N. Swaminatha Iyer,—for the Respondents.

Schwabe, C. J.—The first question to be determined in this case is what was the contract between the parties. The first plaintiff and his father owned some property in Madras consisting of a house and some lands. The father in 1907 was an old man and the first plaintiff a young man about 21. Their affairs were somewhat involved and they had borrowed money on mortgage from two persons, Veerabhadra Aiyar and Appadurai Nayakan. The mortgages covered both the house and the lands. The first defendant, a barrister's clerk and an old pupil of the 1st plaintiff's father offered to get their affairs into order and he propounded what seemed to be, and I think was, an excellent scheme. Certain lands, the subject of these mortgages, were to be sold to the first defendant, or purchasers found by him for a fixed sum of Rs. 5,000 and by means of that money and other moneys I shall refer to hereafter, the then existing mortgages were to be paid off. As far as the mortgage of Appadurai Nayakan was concerned, this was done and that mortgagee disappears from this case except that there is a matter which is the subject of issue VI about which there is still some dispute which I do not think has been disposed of. The facts seem to be that the first defendant got a judgment in the Small Cause Court in Suit No. 3938 of 1910 against the first plaintiff and his father. It seems to be clear from Ex. S. that this amount was not due. There was a promissory-note given mainly as security for the handing over certain title-deeds to Appadurai Naicken which were duly handed over. With full knowledge of this the first defendant took an endorsement of the promissory-note and then sued on it and got a judgment. Whether this transaction is fraudulent, and how he came to get this judgment, has not been investigated. I gather the judgment has not been executed. The whole matter requires looking into. On the face of it there seems to be something very suspicious about it and I propose to refer this matter for the consideration of the learned Judge. The rest of the scheme was that the first defendant should retain the Rs. 5,000, purchase money, and should advance upto a further thousand rupees on a mortgage of the house and that he should apply the total to pay off the existing mortgages, the 1st plaintiff and his father finding any small balance that there might be. In February, 1907, Veerabhadra Ayyar, stated the sum due to him to be Rs. 4,862 and by March 1917 this had gone up to Rs. 4,939. Money was found by the first plaintiff and his father to make up this mortgage amount and matters were left in the first defendant's hands, the essence of the scheme being that the Rs. 5,000, purchase money and the Rs. 1,000 advanced by the first defendant on the mortgage of the house and the small balance found by the 1st plaintiff and his father should be paid into or retained in the first defendant's hands and that he should use it for getting rid of Veerabhadra Ayyar alto-

gether so that the plaintiff would have his house unencumbered except for the newly created mortgage of Rs. 1,000 in the first defendant's favour. The terms of this arrangement were reduced to writing by a document Ex. A. The original has been lost or at any rate has not been produced and Ex. A is a copy produced by the plaintiffs. It is quite clear that in that copy there is missing a sentence at the foot of the first page after the words 'must be.' The words no doubt are to the effect that the balance not exceeding Rs. 1,000 must be advanced by the 1st defendant on a mortgage of the house and that the transfer of the property and the mortage of the house should be completed within one month and also providing that any balance required above the Rs. 1,000 was to be provided by the first plaintiff and his father. The first defendant undertook to discharge Veerabhadra Ayyar's mortgage. It is stipulated that the failure on either side to finish the transaction in time is to make the party in default liable for any damages suffered. That the missing line or lines is or are to be supplied in the manner I suggest, is strongly evidenced by the recitals in a subsequent mortgage of August 8 1907, by the 1st plaintiff to Veerabhadra Ayyar, which is Ex. F in O. S. A. No. 52 of 1916 and the terms of which, I have no doubt, were well known to the first defendant. The learned Judge has held, in the events that happened, that plaintiff's claim, which would otherwise be a good one, is barred by limitation. He interprets the agreement to mean that the first defendant undertook to discharge Veerabhadra's mortgage in a month from February 7, 1907, and holds that his failure to do so was a breach of that contract and that the time under the statute began to run from March 9, 1907. I do not agree with this interpretation because in the first place I can find no time limited for the payment of the mortgage money and indeed it is pretty clear from what happened afterwards that neither party contemplated payment in a month unless Veerabhadra Ayyar agreed to diminish his claim within that period. I think that no time was fixed and I do not think there was any breach by the first defendant, until he had communicated to the first plaintiff, or till he has done some act showing to the first plaintiff, that he was not going to carry out his contract. What he did I shall refer to later. Further if the non-payment within a month to Veerabhadra Ayyar was a breach of the contract by the first defendant it was not a breach which was accepted by the first plaintiff as a breach of the contract and indeed the contract between the parties was treated by both parties as being open and remaining open until the events which culminated in the sale in 1919. Further in my view the first defendant undertook a liability to indemnify the first plaintiff against any claim by Veerabhadra Ayyar and the cause of action under that contract of indemnity did not arise until the plaintiff suffered a loss by being ejected from the property. The first defendant was a purchaser of certain lands for Rs. 5,000 part of which he re-sold to others—I do not propose to consider whether they were benami to him or not as it is wholly immaterial—and these lands were subject to Veeradhadra Ayyar's mortgage, and as a purchaser he impliedly undertook to indemnify the first plaintiff against any claim by the mortgagee or any loss occurring through the action of the mortgagee. See the Judgment of the Privy Council in *Izzat-un-nisa Begam* v. *Partab Singh* (1). It is true that in this case the house was also subject to the same mortgage and in the absence of an agreement, there would probably have to be a *pro rata* apportionment for this purpose of the mortgage between the house and the lands, but here, by the agreement of February 7th, all difficulty of this kind is removed because the plaintiff agreed to provide the first defendant with the money necessary to pay off this mortgage so that both the house and the lands might be unencumbered, and in fact the plaintiffs supplied all the necessary money. In my judgment there is a necessary implication in the sale of the land to the first defendant coupled with the agreement of February 7th, that the first defendant will indemnify the first plaintiff and his father from all claims, or loss in respect of Veerabhadra's mortgage. Without such an implication the whole scheme would be nugatory, for it would be open to the first defendant not to settle with Veerabhadra and to leave the house charged with the

1. (1909) 31 All 583=13 C. W. N. 1143=10 C. L. J. 313=6 A. L. J. 817=11 Bom. L. R. 1220=6 M. L. T. 277=19 M. L. J. 682=36 I. A 203=3 I. C. 793 (P. C.).

mortgage while the scheme was intended primarily to free that house from the mortgage.

What happened afterwards may be stated shortly. The first defendant chose to try and fight Veerabhadra as to the amount due. He had a contention that a small part of the money, something like Rs. 140 owing by the plaintiff while purporting to be charged on the land, was not properly so charged as it was otherwise secured and that the adding of it to the mortgage money was clogging the equity of redemption as it prevented the property being redeemed by payment of the sums only which were originally advanced on the mortgage security. At least I think that that was his point, and it was an interesting point. It was a purely academical one because the plaintiffs undoubtedly owed the money, whether charged on the land or not and they had provided moneys to the first defendant which were enough to pay not only the sums originally charged on the property but also this Rs. 140. The total amount due to Veerabhadra in March 1907 was Rs. 4,939-8-0. The first defendant chose to tender a payment and paid into Court Rs. 4,300 which was susbequently increased to Rs. 4,800 odd. Veerabhadra Ayyar would not accept this amount. Thereupon the first defendant took the money out of Court and did nothing. This is the money of the plaintiffs but the first defendant was entitled to retain it for the purpose of paying off Veerabhadra and for no other purpose. He says he distributed it amongst the purchasers—I confess I do not believe it—and even though he did, he had no sort of right to do anything of the kind as they had no right to it at all. He was, as I have stated, entitled to do one thing only and that is to pay to Veerabhadra and discharge his mortgage. Time went on and compound interest on the mortgage piled up. The 1st plaintiff was living in the mortgaged house and I am convinced he had no knowledge of and did not concern himself, with what was happening as to the mortgage, treating it, as indeed it was as a matter between the first defendant and Veerabhadra Ayyar with which he was, not concerned. That this is the fact is borne out by Exs. R, S and T which show that, after the money had been obtained back by the first defendant, both he and the plaintiff were treating the contract of February 1907 as still alive, and were assuming that the first defendant had carried out or was wishing to carry out, his part of the bargain, for the 1st defendant, was claiming to enforce the mortgage for Rs. 1,000 on the mortgage of the house and that Rs. 1,000 was only to be advanced by the first defendant to be used in paying off Veerabhadra Ayyar and in fact has not been advanced at all. The inference I draw from these documents is that the first defendant was deliberately concealing from the first plaintiff that he had not paid off Veerabhadra and had in fact misappropriated the Rs. 5,000 the purchase money of the lands. Further in 1910 the first defendant purports to sell the house under the mortgage for Rs. 1,000 again showing that he was treating the contract of 1907 either as being still alive or as having been performed by him

The first defendant no doubt still relying on his point as to clogging the equity did nothing till 1915 when Veerabhadra Ayyar brought a suit against the first plaintiff and the first defendant. The defence was managed by the first defendant. He set up that he had tendered in March 1907 and had always been ready and willing to pay the right amount thus showing that as between himself and the plaintiffs he had carried out the bargain of February, 1907 and kept them indemnified, and that he still had the money which he had received under that contract, had always been and was still ready and willing to complete his duties under that contract by paying the proper amount to Veerabhadra Ayyar. The Judge who tried the case found that the first defendant was wrong and he gave a decree for Rs. 6.896. Veerabhadra was not satisfied and went to the Court of Appeal. The 1st plaintiff still apparently relying on the 1st defendant and treating it as a matter not concerning him, did not trouble to appear in appeal. The first defendant agreed to the decree being increased to something over Rs. 10,000 and in his absence the decree against the plaintiff was, by order of the Court, similarly increased. In due course Veerabhadra took proceedings to execute his decree by bringing the mortgaged property to sale by Court auction. Then the first defendant took a course which to my mind was as impertinent as it was dishonest. He paid Rs. 4,000 to Veerabhdra

to free the lands, he being the owner of the equity of redemption of the mortgage and so prevented their being sold. Be it remembered that he had not in fact paid for those lands except perhaps the small amount that he had got from some sub-purchaser, and that he had throughout nearly Rs. 5,000 of the plaintiff's money in his hands. He thus misapplies the money which was to free the house and land, to free the lands only and leaves the house to be sold for the balance of the mortgage debt. In due course this was done and on July 14, 1919, the house was sold for Rs. 5,500 and the 1st plaintiff was ejected and they at once bring this suit. The house is said to have been worth about Rs. 8,000 or 9,000 at that time. The purchaser at the Court sale was the 11th defendant, who is stated to be the concubine of the first defendant and is alleged to have been acting *benami* for him in this transaction.

If this be true in my judgment on the authority of *Nugent* v. *Nugent* (2) and many other English cases and *Ramasami Chetty* v. *Karuppan Chetty* (3) and *Deo Nandan Prashad* v. *Janki Singh* (4) such a transaction cannot be allowed to stand as the first defendant was, in my judgment, throughout in a fiduciary relatiosnhip to the first plaintiff, in the first place as an agent and in the second place as his accepted legal adviser. Whether the 11th defendant was or was not *benami* for the 1st defendant, is a question that, on the view the learned Judge took did not arise, and this case must go back to him to hear and determine that point. If the house is by this *benami* transaction in the first defendant's possession he must restore it. The terms would ordinarily be that he would be entitled to a charge on it for the Rs. 5500, purchase money, but on the facts of this case, he is not so entitled for he had throughout in his possession money of the plaintiff sufficient to redeem the house from the mortgage, some of which in fact he has applied for the purpose of redeeming his land, and the plaintiffs are entitled to have that house unencumbered except by a mortgage of Rs. 1,000 in favour of the 1st defendant and that mortgage must date for the purpose of interest from the date when it became effective, that is, the date when the plaintiff in fact advanced a Rs. 1,000 towards paying off Veerabhadra. That date is the date of the Court sale. From that date the mortgage will bear simple interest at the agreed rate 10½ per cent. The plaintiffs, having been ejected at that date, will be entitled to mesne profits until reconveyance. The trial Judge will of course ascertain the amount of mesne profits on the houses. If it is found that the sale was not *benami*, then the plaintiffs would only be able to get damages and they are entitled to be put by the damages in the same position as if the 1st defendant had carried out the contract, that is, they will get the actual value of the house they have lost as on the date of ejectment, less Rs. 1,000 and by way of further damages, interest on that amount at 9 per cent. per annum since the date of ejectment till final decree. One of the questions to be decided by the trial Judge will in this event be the value of the house. The plaintiffs are also entitled in any event as damages to all costs to which they have been put in the proceedings by Veerabhadra Ayyar to which they were parties. Further they are entitled to a declaration that they are entitled to be indemnified by the first defendant against all claims by purchasers of the lands in question in respect of liabilities which they have incurred by reason of Veerabhadra Ayyar's mortgage. We are told that two of the purchasers had had to pay Rs. 1,300, balance to Veerabhadra Ayyar. How the matter stands as between them and the 1st defendant we do not know and we are expressing no opinion on it, but if plaintiffs have to pay any damages, in my judgment, they are entitled to claim them under his right of indemnity against the first defendant.

There is the matter also of a later mortgage, Ex. E 8 in O. S. A. No. 52 of 1916 in respect of which it is stated that the plaintiffs are liable and not the first defendant. It may be that the first defendant has discharged that mortgage, and whether he is entitled to any and what charge on the property in respect of any payment made in relation to that mortgage, is one of the matters which will be open for discussion before the trial Judge

2. (1907) 2 Ch. 292 and 1908 1 Ch. 546.
3. (1915) 29 M. L. J. 551=31 I. C. 216.
4. 44 Cal. 573=5 L. W. 526=15 A. L. J. 154 =32 M. L. J. 206=21 C. W. N. 473=1 Pat. L. W. 294=(1917.) M. W. N. 254=25 C. L. J. 259=44 I. A. 30=21 M. L. T. 240=5 L. W. 526=19 Bom. L. R. 410=39 I. C. 346 (P. C.).

The 6th issue will also then be heard and determined if plaintiffs so desire.

The first defendant must pay to the plaintiffs their costs here and below. The liability as to costs as between the plaintiffs and the 11th defendant in the Court below will be decided on remand by the learned Judge. The 11th defendant will not in any event be entitled to any costs of this appeal, because in this appeal plaintiffs have succeeded in getting a new trial as between them and the 11th defendant. Plaintiffs will pay the costs of the 14th defendant which will be fixed at Rs. 150. In the Court below there will be one set of costs for the 7th defendant (6th respondent) and the 13th and 14th defendants and another set for defendants 2, 3, 8 and 10 payable by the plaintiffs.

WALLACE, J:—I entirely agree. I have really nothing to say which has not already been fully said by the learned Chief Justice and I have to add nothing to what he has said.

Appeal allowed.

1923 Madras 497.

SPENCER AND VENKATASUBBA RAO, JJ.

Varadachariar ... Appellant.

v.

Raja Ramakrishnamba Garu and others ... Respondents.

Appeal from orders Nos. 231 and 401 of 1922, dated 21st December 1922, against the orders of the Dt. Court of Chittoor, dated 8—8—1922 and 23—11—22 in C. M. P. No. 192 of 1922 and C. M. P. No. 40 of 1922.

(a) *Madras Court of Wards Act, S. 59—Guardian, powers of—property, meaning of.*

Where a guardian of minor's property is appointed under the Guardians and Wards Act, the District Court has no jurisdiction to issue directions to the Guardian in respect of the trust property of which the minor is a trustee. Upon the withdrawal of the Court of Wards Act, the guardian appointed under that Act is made subject to the same rights, duties and liabilities as if he had been appointed under the Guardians and Wards Act. The Guardians and Wards Act contains no provision empowering the Guardians appointed under that Act to deal with trust properties: and therefore the District Judge will be acting without jurisdiction in giving directions for the examination of the accounts of the trust property by a Commissioner and for the checking of the collections in the trust property.

[P. 497, Col. 2; P. 498, Col. 1.]

'Property' in S. 59 does not include trust property of which a minor is trustee but only means the property of which the minor is owner.

[P. 498, Col. 2.]

(b) *Jurisdiction—Consent of parties.*

If a Court has no power to adjudicate upon a subject matter which does not fall within its province as defined by law, and if it has no jurisdiction over the subject matter of controversy, the consent of parties cannot confer such jurisdiction. 36 Cal. 193 at 206; 36 M. 89 *Ref.*

[P. 498, Col. 2.]

(c) *Madras Court of Wards Act, S. 63—Construction.*

The object of S. 63 is to preserve the powers of the Court of Wards in regard to religious endowments in respect of which the proprietor happens to possess the character of a trustee and there is nothing to show that in other parts of the Act the word 'property' is used in this extended sense, and the words 'preservation of the property belonging to the institution, in S. 63 are very explicit and they cannot possibly refer to property belonging to the proprietor in his individual right.

[P. 499, Cols. 1, 2.]

C. V. Ananthakrishna Iyer, C. S. Venkatachariar and A. Ramachandra Iyer—for the Appellants.

A. Krishnaswami Iyer and B. Somayya—for the Respondents.

Spencer, J.—This is an appeal preferred by a guardian of minor's property appointed under the Guardians and Wards Act. The objection taken by him to the District Judge's order is that the District Court had no jurisdiction to issue directions to the appellant in respect of certain trust property of which the Karwetnagar Zamindars have been regarded as hereditary trustees. This estate was for some time under the management of the Court of Wards, and, upon the withdrawal of the Court of Wards' management, under S. 59 of the Court of Wards Act, the guardian appointed under that Act was made subject to the same rights, duties and liabilities as if he had been appointed under the Guardians and Wards Act. The Guardians and Ward's Act contains no provision empowering the Guardians appointed under that Act to deal with trust properties. S. 63 of the Court of Wards Act contains a special provision by which the Court of Wards is empowered to make arrangements for the discharge of the ward's duties as trustee of religious endowments, the Court's superintendence being restricted as far as possible to the preservation of the property belonging to the religious institution in question. There is no such provision in the Guardians and Wards Act. It is therefore contended

that the District Judge acted without jurisdiction in giving directions for the examination of the accounts of the trust property by a Commissioner and for the checking of the collections in the Tiruthani Temple.

For the proposition that the District Court has no power under the Guardians and Wards Act to appoint a guardian in respect of trust properties, there is good authority in *Obla Venkatachalapathi Aiyar* v. *Thirugnanasambanda Pandara* (1) and *Kilby* v. *Mussamat Bahuria Sheoratan Kuar* (2).

It is argued for the respondents that S. 59 of the Court of Wards Act in speaking of guardians of the person and property of minors uses the word "property" in the widest significance; but I think we should be slow to assume that any powers are vested by mere implication. Where powers are conferred under any enactment, we always find definite words clothing the appointee with powers. I am of opinion that, as soon as the wardship of a ward of Court ceases, arrangements under S. 63 also cease automatically unless there is anything in the Guardians and Wards Act to cause them to continue.

Next it was argued that the guardian appointed under the Act cannot repudiate his responsibility which was incurred as one of the conditions of his appointment and he is therefore estopped from repudiating the jurisdiction of the Court if he has accepted such liability. As a trustee *de son tort* he would no doubt be liable for acts done during his unauthorised management but that liability will be to answer to the real trustee and not to the District Court. The suggestion that the District Court though inherently incompetent to deal with the matter can acquire jurisdiction by an agreement of the parties is one that cannot be maintained in the face of the decisions in *Gurdeo Singh* v. *Chandrikah Singh* and *Chandrikah Singh* v. *Rash Behari Singh* (3) and in *Ranjit Misser* v. *Ramudar Singh* (4). No Court can arrogate to itself powers which the legislature has not conferred on it, see *Somakka* v. *Ramiah* (5) which was a case under the Guardians and Wards Act. These decisions establish the principle that a Court has no power to adjudicate upon a subject-matter which does not fall within its province as defined by law, and if it has no jurisdiction over the subject-matter of controversy, the consent of parties cannot confer such jurisdiction. Moreover it is clear from Ss. 4 and 19 and other sections of the Court of Wards Act prior to S. 63 that no power is vested in the Court of Wards to deal with property other than that belonging to the minor, and that the powers of superintendence conferred by S. 63 are peculiar to that body.

The order of the District Court so far as it purports to give directions to the guardian as to the management of trust properties must therefore be set aside. The same order will be made in C. M. A. No. 401 and C. R P. No. 795 so far as the District Court's order contains directions assuming management of trust property.

We make no order as to costs.

Venkatasubba Rao, J.—I have come to the same conclusion.

The point raised is somewhat novel but it is not difficult to decide the question and we may deliver judgment at once. When the Court of Wards released from its superintendence the property of the respondent, it appointed the appellant the guardian of his property under S. 59 of the Court of Wards Act. The Court of Wards was apparently in possession not only of the property in which the proprietor had a beneficial interest but also of the property belonging to a Devastanam of which he was a trustee. The question is: what was the property for which the appellant was appointed the guardian? Was it only the property which belonged exclusively to the Zamindar? or did it also comprise the property belonging to the trust? The answer would depend upon the interpretation of the word 'property' in S. 59. *Prima facie* the section must be regarded as dealing with only the property belonging to the minor. The words "property of a minor" in their natural sense could be interpreted only in this manner.

1. (1917) 33 M. L. J. 297=6 L. W. 637=42 I. C. 273.
2. (1922) Pat. 527=3 Pat. L. T. 805=1 Pat. 432.
3. (1907) 36 Cal. 193 (206)=5 C. L. J 611=1 I. C. 913.
4. (1912) 16 C. L. J. 77=17 C. W. N. 116=16 I. C. 940.
5. (1911) 36 Mad. 39=22 M. L. J. 193=(1911) 2 M. W. N. 519=13 I. C. 251.

S. 4 of the Act defines the term 'proprietor.' It runs thus:—" 'Proprietor' means a person who owns or has life interest in land either solely or as a co-sharer." This definition does not refer to any property possessed by a proprietor in his capacity as a trustee. S. 19, which deals with the assumption of superintendence by the Court of Wards, speaks again of the "property of a proprietor," and the second clause of that section uses the words 'immoveable and moveable property belonging to him.' S. 27 (*f*) provides that a guardian referred to in the section shall be paid such allowance out of the property of the Ward as the Courts thinks fit. It cannot be contended that the allowance to be paid to the guardian is to be out of any property belonging to a trust. Similarly in S. 32 the words used are 'the property of any ward' and the section refers *inter alia* to the liquidation of debts payable by the ward and to payment of charges for his religious observances. It is clear that, in all these sections, the property that is referred to is only the property of which the minor is the owner. If that is so, there is no reason to interpret the words 'property of the minor' in S. 59 differently. In this view, the appellant was appointed guardian only of the minor's property.

On behalf of the respondent reliance was placed upon S. 63. It provides that, if a ward is the hereditary trustee of a temple, the Court may during the wardship make such arrangements as it thinks fit for the discharge of the ward's duties as trustee. The argument was put in this way: S. 63 contemplates the Court of Wards assuming superintendence over the property in respect of which the proprietor has no beneficial interest, and, it must therefore be assumed that, in the previous sections of the Act, the word 'property' is used in the more extended sense. I do not think this argument is correct. Up till S. 63, the Act does not deal at all with any property belonging to a charitable institution. The object of S. 63 is to preserve the powers of the Court of Wards in regard to religious endowments in respect of which the proprietor happens to possess the character of a trustee and there is nothing to show that in other parts of the Act the word 'property' is used in this extended sense, and the words 'preservation of the property belonging to the institution' in S. 63 are very explicit and they cannot possibly refer to property belonging to the proprietor in his individual right.

It is conceded that the Guardians and Wards Act cannot deal with property in which the ward has no beneficial interest, and that the effect of cl. 4 of S. 59 is to incorporate by reference in the Court of Wards Act, all the provisions of the Guardians and Wards Act, and make the guardian subject to those provisions. But it is argued that he is subject to the said provisions not because they are found in the Guardians and Wards Act but because they must be considered to have been in effect enacted in the Court of Wards Act and emphasis is laid upon the words 'as if' in cl. 4 of S. 59. The next step in the argument is that we must discard the limitation that the Guardians and Wards Act does not affect what may be described as trust property and must seek for the definition of the word "property" in the sections of the Court of Wards Act itself. This argument does not help the respondent because in my opinion on a construction of the sections of the latter Act the only property in respect of which the appellant was appointed guardian was the property which belonged beneficially to the proprietor. The terms of the notification also make the point clear: "It is hereby notified that the Court of Wards has released from its superintendence the . . . property of the minor proprietor . . . . and . . . . the following gentlemen whom the Court appointed as guardians of the person and property . . . . have entered in their respective duties. . . . . Guardian of the Property of the minor proprietor M. R. Ry. Varadachariar."

This leads me to the consideration of the second argument which was advanced on behalf of the respondent. It was said that, by the terms of the appointment, the appellant undertook to be subject to the liabilities of a guardian under the Guardians and Wards Act and that the appellant having been appointed on certain terms cannot now repudiate some of those terms. The argument has for its foundation the assumption that the property in respect of which the appellant was appointed gurdian was both non-trust and

trust property and that the notification relates to both species of property. As I have pointed out, this assumption is wrong, and if it is wrong, the argument loses all its force and it is therefore unnecessary to consider the various cases quoted by Mr. A. Krishnaswami Aiyar in supprt of this argument. The appellant succeeds on a technical point but we are only deciding that the proceeding that has been instituted for obtaining the relief is not the appropriate proceeding.

In the result I agree with the order proposed by my learned brother.

Order set aside.

1923 Madras 500.

SPENCER AND VENKATASUBBA RAO, JJ.

(*Lagadapati*) *Venkata-nagabhushanam.* ... Petitioner.

v.

Karella Ramaswami ... Respondent.

Civil Mis. P. No. 316 of 1922, dated 29th November 1922, against the order of the Court of the Assistant Agent, Bhadrachalam Division in E. P. No. 35 of 1920.

(a) *Vizagapatam Agency Rules, Rr.* 28, 24 & 25 —*Order of Assistant Commissioner in execution —Appeal.*

R. 8 provides an appeal to the Court of the Agency Commissioner against the decree of an Assistant Commissioner; but the order of an Assistant Commissioner in execution proceedings is not a decree. And there is no provision in the Agency Rules for appeals against orders passed in execution or miscellaneous proceedings. The remedy of the aggrieved party lies by way of petition under R. 24 against the order in execution of the Agency Commissioner, or by moving the Agency Commissioner under R. 25 to make a reference to the Government as a case not provided for by the Rules.

[P. 500, Col. 2.]

(b) *Government of India Act, S.* 107—*Powers under, when to be exercised.*

Where the record of a case before the Court is so erroneous as to manifestly amount to an injustice, the High Court would exercise the powers of superintendence vested in them under S. 107. 56 I. C. 155 (Pat.) Ref.

[P. 501, Col. 1.]

A. Krishnaswami Ayer.—for the Petitioner.

S. Swaminathan—for the Respondent.

Spencer, J.—This is a petition under S. 107 of the Government of India Act requesting the High Court to interfere with an order passed in execution proceedings by the Assistant Agent, Bhadrachalam, directing a warrant to issue for the execution of a decree which the petitioner maintains to have been satisfied. The petitioner first applied to the Court of the Agency Commissioner, but his appeal was returned with the endorsement that no appeal lay from the Assistant Agent's order. Under R. 25 of the Agency rules the petitioner might have preferred a petition to Government against the Agency Commissioner's order, and if he had done so, and if the Government thought fit, they would have referred the petition to this Court. Instead of adopting that course he had invoked the High Court's extraordinary powers of superintendence.

In my opinion this is not a fit case for our exercise of those powers for the following reasons. R. 8 provides an appeal to the Court of the Agency Commissioner against the decree of an Assistant Commissioner. The order of an Assistant Commissioner in execution proceedings is not a decree. (See *Sri Sri Sri Vikramadeo Maharajulum Garu* v. *Sri Neladevi Pattamahadevi Garu* (1) and *Venkata Nagabushanam* v. *Mahalakshmi* (2) and there is no provision in the Agency Rules for appeals against orders passed in execution or miscellaneous proceedings. See *The Rani of Tuni* v. *The Maharajah of Jeypore* (3). The remedy lies by way of petition under R. 24 against the order in execution of the Agency Commissioner. See *Maharajah of Jeypore* v. *Sri Niladevi* v. *Pattamahadevi* (4). In that case there actually was an appeal from the Assistant Agent's order to the agent; but the decision is not an authority for the proposition that such an appeal lies. It may be that when these rules were drawn up the Government intentionally omitted to provide a right of appeal against orders of Assistant Commissioners in order to avoid encouraging litigation among the unsophisticated Agency people. If it was an unintentional oversight, it might be remedied by moving the Agency Commissioner under R. 25 to make a reference to the Government as a case not

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(1) (1903) 26 Mad. 266.

(2) (1918) 41 Mad. 325=34 M. L. J. 524=42 I. C. 555.

(3) (1922) Mad. 271=(1922) M. W. N. 314=42 M. L. J. 487=30 M. L. T. 339=16 L. W. 8=66 I. C. 115.

(4) (1904) 27 Mad. 109.

provided for by the Rules. In *Sri Pedda Vikrama Deo Garu* v. *The Maharaja of Jeypore* (5) an opinion was expressed that the old R. 31 (now R. 24) was intended to provide for cases for which no provision had been made, including orders against which no appeal was provided. It is unnecessary to say more seeing that the petitioner before us has not adopted either of these courses. The Agency Commissioner was strictly correct in observing that no appeal lay to him, though it was unnecessary for him to return the appeal to the person presenting it.

Where the record of a case before the Court is so erroneous as to manifestly amount to an injustice, the Patna High Court in *Brindaban Chandare Choubey* v. *Babu Gour Chandra Ray* (6) thought fit to exercise the powers of superintendence vested in them under S. 107 of the Government of India Act.

The present is not such an extreme case as to call for that unusual course. The Assistant Agent ordered the issue of a warrant, as the judgment-debtor's statement disclosed no valid reasons why it should not be issued. The judgment-debtor's statement contained an allegation that he had paid Rs. 4,052-2-8 which was all that was due under the decree in O. S. No. 12 of 1914.

The statement was defective in that he did not give reasons to show why he was not liable for interest amounting to Rs. 1,399-14-9 claimed in the decree-holder's execution petition.

It now appears that after the money was paid into Court it was prevented from being paid out through an injunction obtained in another suit O. S. No. 23 of 1918. The Assistant Commissioner did not appreciate the fact that payment into Court was a good legal discharge of the decree. If he thought that the judgment-debtor was responsible for the decree-holder failing to realise the fruits of his decree and to get interest on the money paid into Court, his proceedings in allowing the decree-holder to claim interest for the period when the money lay in Court may have been in accordance with the equities of the case. In any case the decree-holder was entitled to recover the costs of the previous execution petition and the costs incurred in the High Court in the Civil Miscellaneous Petition on the decree of the Agent's Court.

The Assistant Agent's order should have dealt with the claims of the parties in the execution petition and should have adjusted the equities. It did not do so, but I am unable to treat it as manifestly erroneous or unjust. We must therefore decline to interfere and dismiss this petition with costs.

Venkatasubba Rao, J.—The Assistant Agent of Bhadrachalam made an order allowing execution at the instance of the plaintiff. The defendant filed an appeal from this order to the Agency Commissioner, and the latter returned the appeal memorandum stating that no appeal lay to his Court from orders made by his subordinate in execution. The Agency Commissioner was right in the view that no appeal lay to his Court. There is no provision in the Agency Rules for appeals against orders passed in execution. See *The Rani of Tuni* v. *The Maharajah of Jeypore* (3).

Rr. 8, 9, 13 and 14 refer to decrees and not to orders passed in execution or other orders of a miscellaneous character.

The Agency Commissioner having acted properly in returning the appeal memorandum, the defendant could not present a valid petition against the proceedings of that officer under R. 24. But under R. 25 the petitioner should have requested the Agency Commissioner to make a reference to the Government as in my opinion the words "in all cases not provided for by the rules" are wide enough to cover a case of this kind. If the order in execution is one made by the Agency Commissioner himself under R. 24, the aggrieved party may submit a petition to the Government who may refer it to the High Court. It therefore follows that orders in execution or other orders of a miscellaneous character, if passed by an Agency Commissioner, are not absolutely final, but they are liable to be revised by the High Court under R. 24. Can it be said that orders of his Subordinates of similar character are entirely immune from interference by a higher authority?

(5) (1916) 4 L.W. 499=(1916) 2 M. W. N. 269 =36 I. C. 801.

(6) (1920) Pat. 56=1 Pat. L. T. 467= 56 I. C. 155.

In my opinion R. 25 provides the remedy, and the defendant was entitled to ask the Agency Commissioner to make a reference to the Government under R. 25.

Assuming, but not deciding, that the High Court can exercise its powers of superintendence to revise an order so erroneous as manifestly to amount to an injustice as held in *Brindaban Chander Choubey* v. *Babu Gour Chandra Ray* (6). I do not think that a case has been made out for our interference under that section.

On the 7th August, 1918, the defendant filed a suit against the plaintiff and made an application for the issue of a temporary injunction to restrain the plaintiff from executing the decree in question, and on the 19th August the Assistant Agent passed an order in the following terms :—

"The injunction sought for will be issued if defendant pays money into Court. 15 days' time for payment."

Having obtained this order the defendant paid into Court the full amount of the decree on the 24th August, 1918. On the 3rd September, 1918, he applied that the plaintiff should be restrained from receiving the amount that had been paid into Court, and on the same date a temporary injunction was accordingly issued pending the disposal of the suit instituted by the defendant. The temporary injunction was dissolved in 1920 when the suit filed by the defendant was finally dismissed. The defendant's present condition is that he is not liable to pay interest on the decree amount from the date he paid it into Court. The plaintiff's contention on the other hand is that the defendant made the payment after having first obtained the order dated 19th August which practically operated to prevent the plaintiff from withdrawing the amount from Court and that payment made in such circumstances is not a valid payment. It must be observed that the defendant did not put forward his case properly before the Assistant Agent, who was not in a position in consequence to direct his mind to the appropriate issue which these rival contentions would raise. The summary disposal of the Assistant Agent may be accounted for by this fact. But apart from the manner in which it has been disposed of, am not prepared to say that the order is manifestly unjust. The amount throughout lay in Court and carried no interest. The defendant's suit having been ultimately dismissed it must be assumed that he was accountable for damages to plaintiff in respect of the temporary injunction obtained by the defendant restraining the plaintiff from withdrawing the amount. In a proceeding properly constituted, the plaintiff would probably be entitled to damages and the measure of damages would be the interest which he lost; and in this view the order of the Assistant Agent is equitable. I therefore agree that this petition should be dismissed with costs.

Petition dismissed.

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* **1923 Madras 502.**

SPENCER, J.

(*Pasumarthi*) *Baghavanulu and others* ... Petitioners.

v.

Bollam Seetharamaswami and others ... Respondents.

Civil Rev. Petition No. 49 of 1920, dated 5th December 1922 praying the High Court to revise the decree, dated 10th October 1919 of the Court of the temporary Sub. Judge at Ellore.

(a) *Civil P. C., Sch. II, Para* 1.—*Parties to reference.*

All parties interested at the time of the reference to the Arbitration should join in the reference, otherwise the reference and the award would be invalid (1901) 8. A. L. J., 645, Ref.

[P. 503, Cols. 1, 2.]

(b) *Civil P. C., S.* 115—*Objection to validity of award.*

Where the objection as to non-joinder is not taken in the memorandum of objections to the award presented in the lower Court and it is not shown that the parties not joined in reference were necessary parties to the suit between the plaintiff and the petitioner, the High Court will not interfere in revision.

[P. 503, Col. 2.]

P. Narayana Murthi—for the Petitioners.

P. Somasundaram and K. Satyanarayana Murthi—for the Respondents.

Judgment.—The suit concerned in this Civil Revision Petition was instituted by a reversioner claiming the right as an adopted son to have his title declared to certain properties in Schedules A, B and C and to recover possession of them from the persons to whom the 1st male owner's wife and mother had alienated them. During the trial of the suit there were two references to arbitration under Sch. II para. 1, C. P. C. The first was on 22nd

August, 1919 by plaintiff and defendants 6 to 8 who were interested in B Schedule properties. The 2nd reference was on 27th August 1919 by plaintiff and defendants 1, 3 and 4 who were interested in A Schedule properties.

It is now urged as the sole ground of revision by defendants 6 to 8 that the entire reference to arbitration and the arbitrator's award are invalid because defendants 2 and 5 did not join in the reference. 2nd defendant is the brother of 1st defendant and 5th defendant is the undivided son of 2nd defendant. They had no interest in the B Schedule properties over which the plaintiff and these petitioners were disputing. But there was a common issue between the plaintiff and all the defendants as to plaintiff's adoption.

Under S. 506 of the Civil Procedure Code of 1882 it was necessary that all parties to a suit should join in a reference to arbitration. In *Pitam Mal* v. *Sadiq Ali* and *Sughra Fatima* (1) "all the parties to a suit" was interpreted as meaning all the parties interested, and in the present Code it was so expressed.

Here the defendants 2 and 5 were *ex parte* throughout and were exonerated on September 1st, that is, seven days before the arbitrator submitted his award. From the mere fact that they did not put in an appearance and the case proceeded *ex parte* so far as they were concerned, it cannot be assumed that they were not interested parties (vide *Palita Pavana Panda* v. *Narasinga Panda* (2) and *Laluram Nath Mal* v. *Nandalal Karuni* (3). It is more material that defendants 1, and 3 and 4 in their written statement asserted that defendants 2 and 5 had no interest in the A Schedule properties, and it has never been suggested that they had an interest in the B Schedule properties. After they were exonerated they had no further interest in the suit, even if they had an interest before. In *Hasna* v. *Mahbub* (4) it was held by a Bench of the Allahabad High Court that it was essential that all parties who were interested *at the time of the reference to arbitration* should join and that otherwise the reference and the award would be invalid. There is no finding whether the defendants 2 and 5 were interested at the time of either of the two references and, if necessary, I should call for a finding from the Subordinate Judge on this point. But I hold that in any case it is not open to the defendants 6 to 8 to ask this Court to proceed under S. 115, Civil Procedure Code. They did not raise this objection in their memorandum of objections to the award presented in the Lower Court, and they have failed to show that defendants 2 and 5 are necessary parties to the suit between the plaintiff and themselves. I therefore dismiss the Civil Revision Petition with costs.

Petition dismissed.

(1) (1902) 24 All. 229=(1902) A. W. N. 19.
(2) (1919) 42 Mad 682=36 M. L. J. 538=51 I. C. 155.
(3) (1920) 47 Cal. 555=31 C. L. J. 150=55 I. C. 747.
(4) (1910) 8 A. L. J. 645=10 I. C. 559.

1923 Madras 503.

WALLACE, J.

K. Gopala Swami Ayyar ... Petitioner.

v.

O. S. Ramachandra Ayyar ...Respondent.

Civil Rev. Petition No. 613 of 1922, dated 12th December 1922, praying the High Court to revise the order of the Dist. Court of East Tanjore, Negapatam, dated 14th July 1922.

(a) *Civil P.C., O. 22, R. 1,—Legal representative Application to bring on record—Delay—Sufficient case.*

Where an application is made to excuse delay for not bringing the legal representative in time, the Court should consider whether the ignorance of the death was justified and affords sufficient cause for the belated application.

[P. 504, Col. 1.]

(b) *Civil P. C., S. 115—Conclusion not on evidence—Omission to consider point of law.*

Where the lower Court came to its conclusion on no evidence and had omitted even to consider the one point which the law directed to be decided *held* there was material irregularity in the exercise of jurisdiction.

[P. 504, Col. 1.]

K. Rajah Ayyar—for the Petitioner.

B. Somayya—for the Respondent.

Judgment.—Petitioner seeks for revision of the order of the lower Court excusing the delay of 8 months by the Official Receiver, Tanjore, in bringing on record the legal representative of a deceased alienee from an insolvent in the matter of a petition by the Official Receiver to have that alienation set aside. The District Judge has excused the delay on the short ground that the Official Receiver

had no means of knowing about the death of the alienee, and presumably, though he does not say so, he considered that sufficient cause for the application being belated.

The evidence before him was contained only in two affidavits, one by the Official Receiver that he did not know earlier of the death, and one by the legal representative that the Official Receiver did know earlier of it from the insolvent's power of attorney. The District Judge had therefore before him no evidence whatever that the Official Receiver did not, as a matter of fact, know earlier, he has not said so. His order is, thus based on no evidence. Beyond that he has not considered the essential point whether the Official Receiver's ignorance of the death was justified and afforded sufficient cause for his belated application.

3. The next question is whether this Court is called on to interfere under section 115 of C. P. C. Respondent relies on the ruling in *Thandayuthapani* v. *Chinna* (1) holding that the order in that case in a petition to excuse delay in presenting an appeal was not open to revision. I take it that no question of gross irregularity in the exercise of jurisdiction arose in that case, *i.e.* that the trying Court had considered the point of law which it was its function to decide and had decided on the evidence before it rightly or wrongly that there was not suffcient cause for delay in presentation.

But when the Court has first of all come to its conclusion on no evidence and has even then omitted to consider the one point which the law directs it to decide, *viz.*, where there was sufficient cause for delay in presentation, I must hold that it has acted with material irregularity in the exercise of its jurisdiction, if only the aggrieved party has been seriously prejudiced thereby.

4. In the present case the Court's conclusion was based on no evidence and therefore it failed to consider properly whether sufficient cause for delay had been shown since if sufficient cause has not been shown, the Official Receiver's petition to set aside the alienation in favour of petitioner's deceased father will have to be dismissed. I consider that petitioner has been seriously prejudiced by the lower Court's irregular exercise of jurisdiction.

5. I therefore set aside the order of the District Judge and direct that the petition be reheard according to law. Petitioner will get his costs in this Court.

Order set aside.

(1) [1918] 24 I. C. 872.

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* **1923 Madras 504.**

OLDFIELD AND RAMESAM, JJ.

A.R.R. M.N. Narayanan Chettiar ... Petitioner.

v.

Kadiraya Goundan and others ...Respondents.

Civil Mis. P. No. 1418 of 1922, dated 1st December 1922, praying to set aside the order dated 20th day of October, 1921 of the Dt. Court of Madura in C.M.P. No. 191 of 1921.

Criminal P. C., S. 195—Nature of proceedings under.

Proceedings under S. 195 are not appellate proceedings though they may in some respects resemble them. For at each stage they are described as constituted by the grant or revocation of the sanction, which some inferior authority has refused or has granted, not with direct reference to the setting aside of that inferior authority's order.

[P. 505, Col. 1.]

D. Ramaswami Iyengar and V. Rajagopala Iyer—for the Petitioner.

K. S. Jayarama Iyer and V. Ramaswami Iyer—for the Responents.

Order.—This is an application for the grant of a sanction, which was originally granted by the Subordinate Judge, but was revoked by the District Judge.

The first question raised is whether the District Judge had jurisdiction to pass his order of revocation. That question must be answered with reference to the terms of S. 195 (7) (*a*) of the Criminal Procedure Code. It is argued that this provision is not applicable or, if it is applicable that the only Court competent to revoke the Subordinate Judge's sanction was the High Court. That argument is based on the consideration that the Subordinate Judge's sanction was itself given in the exercise of his appellate jurisdiction, because the matter had arisen in proceedings before the District Munsif, who had in the first instance refused sanction. We cannot see how with reference to the terms of Sect. 195 (7) (*a*), the nature of the sanction proceedings is material, the only question

under that provision being of the Court to which appeals generally lie. It is then immaterial that appeals against appellate orders would lie from the Sub-Court to the High Court, and this is consistent with *Rapaka Viyyanna* v. *Parakala Bajamma* (1). It is a futher objection to this argument that proceedings under S. 195 are not appellate proceedings, though they may in some respects resemble them. For at each stage they are described as constituted by the grant or revocation of the sanction, which some inferior authority has refused or has granted, not with direct reference to the setting aside of that inferior authority's order. We have no doubt that appeals from a Sub-Court must be regarded as ordinarily lying to the District Court and not to the High Court, because with reference to S. 195 (7) (*a*) appeals actually lie from the Sub-Court to both those Courts and of the two the District Court is the Court of inferior jurisdiction. In these circumstances we hold that the District Judge's order was passed with jurisdiction.

Turning to the merits, we find that the sanction is asked for in respect of an occurrence on 23rd December, 1919. No doubt that occurrence, as it is alleged, constituted a grave obstruction to the execution of a legal process. But we find that no application was made for sanction by the present petitioner for over 8 months after it. His explanation is that for six months of that period he did nothing, because the Police Sub-Inspector who was also concerned, had obtained sanction and he expected him to prosecute. We do not think that a sufficient explanation. For the petitioner could easily have ascertained whether the Sub-Inspector was going to prosecute and could have himself applied to the Court. For the remaining two months' delay, no particular explanation has been offered; and the Subordinate Judge in granting sanction observed with regard to it only that such delays were usual. We do not think that indulgence was justified on that ground. In these circumstances no reason for dissent from the lower Court's order has been shown, and the petition must be dismissed.

Petition dismissed.

1. (1918) 19 Cr. L. J. 264=44 I. C., 120.

** **1923 Madras 505.**

Full Bench.

SCHWABE, C. J., KRISHNAN AND WALLACE, JJ.

Nachiappa Chettiar ... Appellant.

v.

Subbier and others ... Respondents.

L. P. A. No. 10 of 1921, dated 15th Feb. 1923, against the order of the Court of the Dt. Munsif of Periyakulam, dated 31st August 1917.

(a) *C.P. Code, S.* 73—*Assets held by a Court—Meaning.*

Assets held by a Court do not include all money lying in Court to the credit of the judgment-debtor but only the assets levied in execution or paid into Court in satisfaction of the decree under execution, and there is no receipt of assets within S. 73 until the Court holding the money comes to the conclusion that no objection exists and orders the money to be transferred to the credit of the first attaching creditor's suit, the decree in which it is engaged in executing. 44 M. 100 F. B. Foll. Therefore where one creditor has filed a suit and attached before judgment some money belonging to the judgment-debtor, all creditors who apply for execution before the attaching creditor has obtained a decree, and applied for execution, are entitled to rateable distribution. None of them can get preference over the other.

[P. 507, Col. 1.]

(b) *Civil P. C.*, O. 38, *R.* 5—*Position of attaching creditors.*

SCHWABE, C. J. :—It is generally accepted as concluded that the fact that the property is attached, or the proceeds thereof are in the Court, does not make it the property of the attaching creditor; it is available for any subsequent decree holder against the same defendant. Under S. 60, Civil P. C. any property can be attached which belongs to the judgment-debtor, or over which, or the profits of which, he has a disposing power which he may exercise for his own benefit. The judgment-debtor has no power of disposing of property attached before judgment for his own benefit and it is doubtful whether such property can be said to belong to him within the meaning of S. 60 or whether it can be taken in execution so long as the Court holds it in its custody pending the decision of the suit before it. If the prevalent view of law referred to above is correct, the result is that a plaintiff, who gets an order to attach before judgment because he satisfies the Court that there is a danger of the property being made away with and that enough ought to be preserved pending his suit to satisfy any decree he may get, may find that the property he has preserved is taken away from him pending his suit by a decree-holder who is lucky enough to get a decree more quickly. Indeed it would be easy for a defendant, who wishes to take his property out of the reach of the attachment creditor, after attachment to get or even create, a friendly creditor for an amount large enough and allow him to take judgment and gets the property attached in execution while he delayed the suit of the original attaching credi-

tor whose fate seems to be entirely with the discretion of the custody Court.

[P. 507, Col. 2.]

(c) *Civil. P. C., O.* 38, R. 10—*Effect of—Position of attaching creditor.*

An attachment confers no sort of lien or charge on the attached property and is not effective to create any sort of legal right in the attaching creditor to have the property earmarked for the satisfaction of any decree he has obtained or may obtain and it is in no sense to be regarded as the inception of execution on behalf of the attacher. Much less does it enure to create any such right for the benefit of other creditors seeking for decrees or for execution of decrees or for rateable distribution under S. 73. And it then can be used for one purpose only, *viz.*, to defeat and render void any private alienation made during its continuance.

[P. 509, Col. 1.]

K. S. Jayarama Iyer—for the Appellant.

Schwabe, C. J.—Early in 1917 the 1st respondent Subbier brought a suit O. S. No. 566 of 1917 in the Court of the District Munsif of Periyakulam against Kumarasami Mudali, in March, 1917 and he attached before judgment certain piece-goods, the property of the defendant. They were sold and the proceeds deposited to the credit of this suit on 11th April, 1917. The present appellant Nachiappa Chettiar brought a suit in the same Court against the same defendant, O. S. No. 678 of 1917, and on 14th April, 1917, attached before judgment the money in deposit in Subbier's suit. He got a decree on 19th April, 1917, and on 7th June, 1917, he applied in Subbier's suit for payment out to him of the money in Court. While this application was pending Subbier got a decree on 2nd July, 1917, and on July, 3rd, applied for payment out to him, or, as it is called applied for cheque. The present 2nd and 3rd respondents, Rangaswami Aiyar and Sundara Row, brought suits in the same Court against the same defendant, O. S. Nos. 617 of 1917 and 785 of 1917 and obtained decrees and applied for payment out to them, one on 29th June that is before Subbier's application, and the other on 20th July that is after Subbier's application. Subbier first got an attachment before judgment and the money was deposited to the credit of his suit, but Nachiappa Chettiar and Rangaswami Aiyar got decrees and applied for payment out of the money to them before Subbier got his decree, while Sundara Rao got his decree and applied for payment out after Subbier got his decree and applied for payment.

The question for determination is which of these four plaintiffs is entitled to be paid. The question depends upon the interpretation of S. 73, Civil Procedure Code, which is in the following terms :—

"Where assets are held by a Court and more persons than one have, before the receipt of such assets, made application to the Court for the execution of decrees for the payment of money passed against the same judgment-debtor and have not obtained satisfaction thereof, the assets after deducting the costs of realisation, shall be rateably distributed among all such persons."

The District Munsif held that as none of the other three had applied before the receipt of the assets into the Court in Subbier's suit, that they had no right to rateable distribution under S. 73 and refused their applications and ordered that Subbier should draw the whole amount, but stated that his order did not preclude the rival decree-holders from setting up their rights, which would have to be determined in a suit. The matter then came up on Civil Revision Petition before Bakewell, J., and he held following *Umma Venkataratnam & Co.* v. *Adamji Usman & Co.* (1) that Nachiappa Chettiar being the first decree-holder to apply for payment was entitled to the money. On the Letters Patent Appeal from that order Sadasiva Aiyar, J., held following *Visvanathan Chetti* v. *Arunachalam Chetti* (2) that S. 73 applied to the first three decree-holders and awarded rateable distribution amongst them. Coutts Trotter, J., differed and proposed to follow Bakewell, J., and held that the petitioner Nachiappa Chettiar ought to be given preference. Owing to this difference of opinion the matter now comes before us under S. 15 of the Letters Patent.

In *Umma Venkataratnam & Co.* v. *Adamji Usman & Co.* (1) and in *Bisheshar Das* v. *Ambika Prasad* (3) it was decided in similar circumstances that the person entitled is the first decree-holder who applies to the Court in which the money is deposited on the same principle as is applied in the case of an ordinary judgment-debtor's property in his own posses-

1. (1919) 42 Mad. 692=26 M. L. T. 82=(1919) M. W. N. 623=50 I. C. 925.
2. (1921) 44 Mad. 100=39 M. L. J. 608=12 L. W. 744=28 M. L. T. 412=(1921) M. W. N. 14=60 I. C. 302 (F. B.).
3. (1915) 37 All. 575=13 A. L. J. 732=29 I. C. 622.

sion namely the first in order of time has the preference.

The whole matter was, however, reconsidered in *Visvanathan Chetty* v. *Arunachalam Chetty* (2) by a Full Bench of this Court and the proper interpretation of S. 73 was laid down. The Court was unanimous. It was held that "assets held by a Court" did not include all money lying in Court to the credit of the judgment-debtor but only the assets levied in execution or paid into Court in satisfaction of the decree under execution, and that there is no receipt of assets within the meaning of S. 73 until the Court holding the money comes to the conclusion that no objection exists, and orders the money to be transferred to the credit of the first attaching creditor's suit, the decree in which it is engaged in executing. This is the effect of the judgment of Wallis, C. J., with which Ayling, J., and Napier, J., agreed. Sadasiva Aiyar, J., held that the words "before receipt of such assets" must be qualified by an implication of the words:

"Levied in the course of execution and paid into Court in satisfaction of any of the decrees under execution, or transferred for purposes of execution to the credit of one or more of the decrees under execution."

Krishnan, J., put it that only when the money is transferred to the credit of the suit in which attachment takes place can the attaching Court be said to have received the assets and hold them within the meaning of S. 73 and that the decree-holders who have attached prior to that are entitled to rateable distribution. In view of this decision in my judgment *Umma Venkataratnam & Co.* v. *Adamji Usman & Co.* (1) and *Bisheshar Das* v. *Ambika Prasad* (3) cannot here be considered as good law. In this case the money in Court has never been levied in execution nor transferred to the credit of any other suit than Subbier's and did not become available as assets held by the Court under S. 73 until an order was made on the application by Subbier for execution of his decree. Under O. 38, R. 11 he having attached before judgment, was excused from applying for re-attachment in execution, and there being already other applications to the Court for attachment of this money in execution of decrees against the same judgment-debtor, the amount in Court should have been rateably distributed between these applicants. In this case the persons entitled to rateable distribution are Subbier, Nachiappa Chettiar and Rangaswami Iyer. The 4th decree-holder Sundara Row has not appealed, and it is not necessary to consider his claim and he must be excluded.

That is enough to determine this appeal; but speaking for myself I desire to say that I am not at present satisfied that the position of a person attaching property before judgment as against a subsequent decree-holder against the same defendant does not require further consideration. It has apparently been accepted as concluded that because the property attached, or the proceeds thereof being in the Court, is not the property of the attaching creditor it is available for—any subsequent decree-holder against the same defendant. Under S. 60, Civil Procedure Code any property can be attached which belongs to the judgment-debtor, or over which, or the profits of which he has a disposing power which he may exercise for his own benefit. Under O. 21, R. 52, Civil Procedure Code where the property to be attached is in the custody of any Court a request must be made to that Court that the property may be held subject to the orders of the executing Court, but the Court having custody shall determine all questions of priority and the claim of any person having an interest in such property by virtue *inter alia* of any attachment. There is no doubt that the money in one Court is available for the decree of another Court subject to the cases of the former and to its decision as to priorities. In the cases of money simply lying to the credit of the judgment-debtor no difficulty arises, as by this form of equitable execution it can be reached by a decree-holder; but there is no doubt that the judgment-debtor has no power of disposing of property attached before judgment for his own benefit, and I very much doubt whether such property can be said to belong to him within the meaning of S. 60, Civil Procedure Code or whether it can be taken in execution so long as the Court holds it in its custody pending the decision of the suit before it. If the prevalent view referred to above is correct, the result is that a plaintiff, who gets an order to attach before judgment because he

satisfies the Court that there is a danger of the property being made away with and that enough ought to be preserved pending his suit to satisfy any decree he may get, may find that the property he has preserved is taken away from him pending his suit by a decree-holder who is lucky enough to get a decree more quickly. Indeed it would be easy for a defendant, who wishes to take his property out of the reach of the attachment creditor, after attachment to get or even create, a friendly creditor for an amount large enough and allow him to take judgment and get the property attached in execution while he delayed the suit of the original attaching creditor. It seems to me that it is possible that the Court with custody of the property under attachment before judgment might properly refuse to allow it to be attached in execution until after the decision of the suit in which it was originally attached. In *Bisheshar Das* v. *Ambika Prasad* (3), O. 38, R. 10, Civil Procedure Code was considered to be conclusive in favour of the decree-holder but it is possible that the interpretation of that rule requires further consideration. I have referred to this matter here as the point was discussed before us. It may be that the solution is to be found in the exercise of discretion of the custody Court. It is however unnecessary to give a decision upon it in this case.

This appeal must be dismissed and the case sent back to the District Munsif directing him to make rateable distribution between the present appellant and the present Respondents 1 and 2. The parties will bear their respective costs throughout except of this appeal. None of the respondents appeared in this appeal and there will be no order as to their costs.

KRISHNAN, J.—I agree with the learned Chief Justice in the order proposed by him. As pointed out in his judgment the present case is really governed by the recent Full Bench ruling *Visvanathan Chetti* v. *Arunachalam Chetty* (2). In that case the money attached was lying in Court to the credit of the judgment-debtor, the custody Court and the attaching Court being the same Court. In the present case the attachment before the judgment was no doubt in the first instance of some piece-goods belonging to the judgment-debtor; but as the price was falling in the market and delay might cause loss, the goods had been sold by order of Court under O. 39, R. 6, Civil Procedure Code and the money obtained had been paid into Court in Subbier's suit in which that attachment had been made. The conversion of the piece-goods into money by sale was not however a "realization of assets" within the meaning of S. 73 Civil Procedure Code as the District Munsif held, for, the sale was not in execution of any decree. The result of the sale proceedings was only to substitute the money paid into Court for the goods and subject it to the same attachment before judgment as was levied on the goods. We have thus here also a case of money in Court being attached by the same Court as in the Full Bench case. According to the ruling in the Full Bench case that money became assets held by the Court and available for payment out in execution only after the District Munsif passed the order for payment. Till then it remained in Court as money under attachment, the attachment before judgment having become in effect an attachment after decree (under O. 38, R. 11) when the decree was passed. Prior to the order of the Munsif the other decree-holders before us had obtained decrees and had applied for execution and had attached the money in question. The case seems therefore to be clearly one to which S. 73, Civil Procedure Code, applies.

It is true that the appellant before us Nachiappa Chetty, had obtained his decree before Subbier and the other creditors had obtained theirs and his attachment before judgment of the money had thus taken effect as an attachment in execution before that of any of the others. But in applying for execution by issue of a cheque to him, he applied to the Court in Subbier's suit O. S. No. 566 of 1917. So far as he was concerned, the Court acting in that suit was the custody Court, the attaching Court being the Court acting in his own suit No. 678 of 1917. The custody Court could not pay out the money to him without an order of the attaching Court to that effect as it has to hold the money subject to the orders of the attaching Court under R. 52, Civil Procedure Code. If he wanted payment out, he should have applied in his own suit and

obtained an order from the Court as attaching Court for payment in execution before asking the custody Court to pay or he should have applied in his own suit for transferring the amount to the credit of his suit and then get that Court pay the money to him. His application to the custody Court for payment was not a proper application and was rightly disregarded by the District Munsif. In these circumstances it is not necessary to decide the question whether, if he had made a proper application according to law to have his decree amount paid out, the fact that Subbier had a prior attachment before judgment on that money would have in any way justified his application being refused. I do not propose therefore to discuss the question raised by the learned Chief Justice in the latter part of his judgment regarding the effect of an attachment before judgment; I desire to reserve my opinion of it for the present. In my view Nachiappa Chetty got no right for the payment of the whole of his decree amount as claimed before us and as was held by Bakewell, J., nor did Subbier get such a right as held by the Munsif. An order for rateable distribution is, in my view, the proper order to make in the case. The 4th decree-holder Sundara Row not having applied in revision is not entitled to the benefit of our order; he must be excluded.

Wallace, J.—I agree.

2. Appellant urges strongly that the attachment before judgment by Subbier in March, 1917 of the funds of the common debtor in the custody of the Court cannot confer on Subbier any sort of lien or charge on these funds and could not be used to defeat the right of himself as first applicant for execution to have his decree satisfied in full, when he applied for cheque on 7th June, 1917, at a time when no other creditor had obtained his decree or was entitled to apply in execution. It is well recognised law that an attachment confers no sort of lien or charge on the attached property and is not effective to create any sort of legal right in the attaching creditor to have the property earmarked for the satisfaction of any decree he has obtained or may obtain and it is in no sense to be regarded as the inception of execution on behalf of the attacher. Much less does it enure to create any such right for the benefit of other creditors seeking for decrees or for execution of decrees or for rateable distribution under S. 73. And it then can be used for one purpose only *viz.*, to defeat and render void any private alienation made during its continuance (see *Annamalai Chettiar* v. *Palamalai Pillai* (4) and *Mina Kumari Bibi* v. *Bijoy Singh Dudhuria* (5). There is in the present case no such private alienation in question and hence, for the purposes of this case, the attachment before judgment by Subbier created or maintained for him no legal right to the fund in the custody of the Court.

3. So that, on 6th July, 1917, when appellant applied for his cheque, he was in a strong position, with no legal bar to his having his decree satisfied out of this fund provided his execution application was in order and the Court chose to grant it. But his application was not in order. It was an application in his own suit, the only suit in which he had then any *locus standi*, to operate on a fund in another suit. That he could not do until he had the fund transferred to the credit of his own suit. His application did not include any request to the Court to transfer to the credit of his suit the amount at credit of Subbier's suit. Possibly the omission was intentional, as such a request would have at once raised in the custody Court the question of the priority of the first attaching creditor Subbier. In any case the appellant's application was thus not in form and the Court, either for this reason or some other, did not choose to act on it then. Had it then ordered payment, one might infer that it had, as custody Court, settled the question of priority, and had itself, as attaching Court, transferred the money at credit of Subbier's suit to the credit of appellant's suit. But it refrained, and the money remained where it was, held as before, money in the Court as custody Court held subject to the disposal of the Court as attaching Court, in suspense, as it were, until the attaching Court had before it a proper execu-

4. (1917) 41 Mad. 265=22 M. L. T. 461=33 M. L. J. 707=(1917) M. W. N. 882=7 L. W. 298=43 I. C. 538 (F. B.)

5. (1917) 44 Cal. 662=1 Pat. L. W. 425=5 L. W. 711=32 M. L. J. 425=21 C. W. N. 585=21 M. L. T. 344=15 A. L. J. 382=25 C. L. J. 508=19 Bom. L. R. 424=(1917) M. W. N. 473=44 I. A. 172=40 I. C. 242 (P. C.)

tion application, *i.e.*, an execution application in the suit in which the first attachment took place, or an execution application in another suit praying for transfer to that suit of the money from the suit in which it was. When that occurred it was then for the attaching and executing Court to decide to work out the attachment and call up the attached money for satisfying the various applicants. There was no such application until Subbier put in his application on 2nd July, 1917 for cheque. In my opinion the Court ought to have then proceeded to execute Subbier's decree with due regard to the claims of persons entitled under S. 73 to rateable distribution. There was no reason then for delaying matters further. However the Court still refrained from moving, and, so far as one can see, the fund remained in the custody Court in the same state as it had been from the beginning until on 31st August, 1917 the Court decided to distribute and determine that the whole of it should go to Subbier. Only then can it be said that the attaching Court called up the fund in the custody Court for use in execution of the pending unsatisfied decrees, and only then can it be said that the assets were received within the meaning of S. 73.

4. The same conclusion follows also from a strict examination of the terms "assets held" and "receipt of the assets" in S. 73. In the ordinary case of assets realised by Court sale under a decree, the assets are held when the whole of the sale proceeds in execution are paid into Court and it is only when the assets are actually realised that any question of the title of any one to rateable distribution will arise; see *Kristnasawmy Mudaliar* v. *Official Assignee of Madras* (1). But when the sale proceeds are already in Court prior to the decree, it must be that they cannot become assets before (1) the debtor becomes a judgment-debtor, and (2) execution is taken out against them either by a judgment creditor entitled by decree and by his position as the plaintiff in the suit to the credit of which the money lies, to put in a valid execution application; or by a judgment creditor entitled by an order of Court transferring the fund to the credit of his suit, to put in a valid execution application. It is only then at the earliest that they *can* become assets held and received in execution, but it does not follow that it is then that they *do* become so. The point of time of the conversion is the point of time at which the Court says:

> "I as attaching Court take this property of the judgment-debtor lying in this Court as custody Court and make it property available for distribution in satisfaction of decrees against him."

5. In the present case there is nothing to show that the Court made this conversion earlier than the date 31st August, 1917 on which it directed rateable distribution. It might have done it, as I have indicated, on 7th June, 1917, when appellant applied for cheque or on 29th June 1917 when the decree-holder in suit No. 617 of 1917 applied for cheque or most reasonably of all, on 3rd July, 1917 when the decree-holder in suit No. 785 of 1917 applied. The fact that on none of these dates did it make any pay order shows that on none of these dates did it effect the necessary conversion. I am not satisfied that the Court exercised its discretion judicially in withholding that conversion beyond 3rd July, 1917 which has had the effect of bringing in a fourth claimant for rateable distribution who seems, so far as we have heard, to have had no particular claims to such indulgence. But that matter is not now before us. I do not think we can hold that the Court had no power so to delay the conversion, or that this Court has power to alter the date of receipt of assets.

6. In a case like the present then S. 73 leaves a wide discretion to the Court, which is both custody Court and attaching Court, to fix the date of "receipt of assets" within the meaning of S. 73, and I am clear that we are not justified in holding that the Court exercises its discretion unjudicially when it fixes that date so as to enable the creditor who has been the first to attach the property and thus hold it, it may be, for all creditors as well as himself, to obtain his decree, provided that creditor shows all due diligence in obtaining it and that the delay is due to the complexity of the suit or the dilatoriness of the trying Court or some other cause over which he has no control, and it would certainly exercise its discretion wisely in so delaying the conversion, if the alternative was

(1) (1903) 26 Mad. 673.

to permit a later attaching creditor who obtained his decree earlier merely because his suit was simpler, or because the common debtor did not choose to contest the claim from going off with the whole fund which had been secured by the diligence and foresight of another creditor. It might no doubt be contended that, if the debtor's property had not been attached, he might have satisfied the less diligent creditor out of Court, and that such preference is not illegal, but I do not see why when a Court has custody of the debtor's property, it should be bound to imitate the debtor's personal preferences, while it would in all cases be a matter of idle speculation whether the first holder of a valid application for execution was the one whom the common debtor, if left to himself, would have preferred to pay. On the other hand it may well be argued that the object of O. 38, R. 5 was to put it out of the power of the common debtor to give such preferential treatment and thus to prepare in advance for some equitable rateable distribution. Such delay in conversion will no doubt, at times have the result that other belated and perhaps indifferent and inactive creditors may also be enabled to come in under S. 73, when the assets are received, but even so, as a rule, I think it preferable that that should happen rather than that the most diligent creditor should be wholly deprived of a share in the assets which were secured by his fore-thought and promptitude.

7. This, I think, is the logical result of the principles laid down in *Visvanadham Chetty* v. *Arunachelam Chetti* (2) as applied to a case like the present, and it will deviate from those laid down in *Umma Venkataratnam & Co.* v. *Adamji Usman & Co.* (3), in allowing the Court to exercise its discretion in favour of a diligent creditor who has attached before judgment the property of his debtor in the custody of the Court. The insistence in the latter case on the reward of diligence may be carried so much further forward. The Court will then exercise its discretion in favour of all diligent creditors, diligence being tested either (1) by promptitude in obtaining attachment before judgment, followed up by diligence in prosecuting the suit and, when decree is obtained in applying for execution, or (2) by promptitude in obtaining a decree and applying for execution.

8. I therefore agree in the order proposed by the learned Chief Justice.

Appeal dismissed.

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* **1923 Madras 511.**

SPENCER AND VENKATASUBBA RAO, JJ.

Rajagopala Pandarathar ... Appellant.

v.

Thirupathi Pillai and another ...Respondents.

Appeal from order No. 345 of 1921, dated 5th December 1922, against the order of the Court of the Sub- J., of Tanjore, dated the 25th July, 1921.

Deed -Construction—Conflicting recitals.

Where the general words *viz.*, Village of Kovilur in the body of the document were qualified by the description given at the foot of it and there was a clear enumeration of what the village of Kovilur within the four boundaries consisted of, *Held*; the words in the body of the document must be read subject to the more precise description given which must be taken as controlling general words occurring in the earlier portion. The words "the remaining lands" or porombokе and other lands attached thereto (remaining lands) cannot be regarded as including the residential building of the Zamindar. Where the words 'etc.,' follow an enumeration of specific things beginning with "all kinds of trees" having some characteristic, the words should be restricted to things of the same nature as those which have been already mentioned. In such a case the rule of *ejusdem generis* will apply and the residential building cannot be said to be *ejusdem generis*, with the things already enumerated.

[P. 512, Cols. 1 and 2.]

G. Krishnaswami Iyer—for the Appellant.

T. M. Krishnaswami Iyer and N. Sivaramakrishna Iyer—for the Respondents.

Venkatasubba Rao, J.:—The dispute turns upon the construction of the mortgage deed on which the suit was based. It has been conceded before us that the decree directs the sale of property described in the mortgage deed. The 1st defendant contends that his residence or the buildings constituting the palace are not included in the description contained in the decree, and cannot therefore be sold under it. On the other hand, the plaintiff argues that these buildings should not be excluded from the sale. To deal with these respective contentions it is necessary to have an accurate rendering of certain portions of the document which is in Tamil.

In the body of the document there is the following passage:

"We have mortgaged to you for Rs. 15,000 the village of Kovilur which is included within the four boundaries given below and which is attached to our Zamindari and which ancestrally belongs to us and is in our enjoyment...and which is capable of yielding an annual melvaram kist of Rs. 3,000." So far the description is general and no portion of the Zamindari is excluded.

At the foot of the document is given a complete description of the mortgaged property. I give below a translation of what occurs at the close of the document:

"*Description of property.*"

"The four boundaries of the village of Kovilur attached to Gandharvakota Zamin ... ...
West of ... ...
North of ... ...
East of ... ...
South of ... ...

The village of Kovilur situate within these four boundaries is: inclusive of Poromboke, Nanja 52 Velis 5 Mahs and 32 Kulies: Punja 204 Velis 2 Mahs and 92 Kulies: the total of Nanja and Punja is 256 Velis 8 Mahs and 30 Kulies.

Excluding the lands sold by auction upto date in respect of the maintenance of my mother, the remaining lands and all the rights and privileges I possess in the waste lands, poromboke and other lands attached thereto, all kinds of trees, topes, wells, ponds, tank-bunds, fruit trees, wood trees, foot paths, elevated and low portions etc., be they a little more or a little less, have been given as security."

It is admitted that the palace buildings are in the village of Kovilur and are within the four boundaries mentioned above. But the general words in the body of the document are qualified by the description given at the foot of it. There is a clear enumeration of what the village of Kovilur within the aforesaid four boundaries consists of. There is no mention of the palace buildings. Although no doubt the village of Kovilur was stated in the document to be the subject of the mortgage, the parties went further and described what according to them was the village of Kovilur which was intended to be mortgaged and it seems to me that the words in the body of the document must be read subject to the more precise description given which must be taken as controlling the general words occurring in the earlier portion.

I may state that it has not been argued on behalf of the plaintiff that the building is comprised within the total area mentioned of the Nanja and Punja lands namely 256 Velis 8 Mahs and 30 Kulies. But the only argument advanced is that the palace building must be regarded as included in the expression 'the remaining lands' or 'poromboke and other lands' or the words 'etc.' I find it impossible to hold that the words 'the remaining lands' or 'poromboke and other lands attached thereto (remaining lands)' can be regarded as including the residential building of the Zamindar.

Turning to the words 'etc.,' they follow an enumeration of specific things beginning with "all kinds of trees" having some characteristic, and the words should be restricted to things of the same nature as those which have been already mentioned. In such a case the rule of *ejusdem generis* will apply and the residential building cannot be said to be *ejusdem generis* with the things already enumerated.

A being seised of a manor and other real estate in the County of M. mortgaged the last mentioned real estate to B; by a subsequent deed he mortgaged to C "all the hereditaments and premises comprised in the previous mortgage, and all other lands, tenants and hereditaments (if any) in the County of M" of which he was seised. It was held that the manor did not pass, Vice Chancellor Wood observing as follows:

"I think the clear intent and purport must be held to be simply a sweeping in of other property *ejusdem generis* with the property which had been so conveyed, if any there should be; certainly not to include a copyhold property or manorial rights in the property of a totally different character from anything attempted to be conveyed or specified throughout the deed" *Rooke* v. *Lord Kensington* (1).

In *Abdul Hasan* v. *Ramzan Ali* (2) it was held that in the absence of proof that a building belonging to the Zamindar

1. 25 L. J. (Ch.) 795.
2. (1882) 4 All. 381.

was excluded from sale, the sale of his "rights and interests" in the village passed such building to the auction purchaser. Similarly in *Banki Lal* v. *Jagat Narain* (3) it was held that a Kothi or other building situate within a Zamindari area would be included in and pass with the Zamindari unless the contrary is shown by evidence of the circumstances from which it may properly be inferred that the building is not an appurtenance of the Zamindari. In *Asghar Reza Khan* v. *Mahomed Mehdi Hossein Khan* (4) their Lordships of the Judicial Committee held that the deed which contained no words of exception or reservation and was ample in point of language to pass the land on which the bazar was situated did pass the same in the absence of words showing an intention to exclude it.

These cases are of little assistance to the plaintiff. It is no doubt true that the palace building is an appurtenance to the Zamindari but the rule laid down in these cases is that there is the presumption in favour of the inclusion of such a building unless there is anything to show that it was excluded expressly or by implication. (*See* I. L. R. 4 All. 381 already referred to).

In *Sakhawat Ali Khan* v. *Muhammad Abdul Karim Khan* (5) it was clearly laid down that the doctrine that the sale of a Zemindari included also buildings situated whithin the Zemindari is applicable only in the absence of evidence indicating an intention to exclude them from the sale.

The determination of the question solely depends upon the right construction of the deed of mortgage, and in my opinion there is an indication of an intention to exclude the residence of the Zemindar from the security.

There was a subsidiary argument advanced before us on behalf of the 1st defendant which related to certain objections to the terms of the proclamation of sale. It has not been shown that the portion to which exception has been taken is likely to cause any prejudice to the 1st defendant; and even apart from this, he has not satisfied us that at this stage we can interfere with the portion of the order relating to the terms of the proclamation.

In the result we allow the appeal to the extent of permitting the proclamation to be amended by excluding the palace building of the Zemindar, and in other respects the appeal fails. Each party will bear his own costs of this appeal.

SPENCER J:—I agree. The specification of the mortgaged property at the foot of the mortgage deed obviously controls the words in the body of the deed "the village of Kovilur which is included within the undermentioned boundaries, which is attached to our Zamin, which belongs to us ancestrally and is in our enjoyment, and which is made liable under Nagappa Chettiar's decree and is capable of yielding an annual melvaram kist of Rs. 3,000."

If what was mortgaged was expressed as "all that lies within the 4 boundaries" given I should hold that the family residence of the Zamindar, or palace as it is called, was included; but it cannot be part of the 256 Velis 8 Mahs and 30 Kulis of wet and dry fields, and as there is a sweeping clause following the specification of cultivable lands, the other items should be taken to be *ejusdem generis* with those that are specified. I do not think such an important item as a family residence can have been intended to be covered by the description given in these words—"the rest of the lands, be they a little more or a little less, together with the waste lands, porambokе and other lands, all sorts of trees, topes, wells, ponds, tanks, embankments, fruit trees, timber trees, footpaths, hills and dales, etc." In this detailed description the omission of house sites, houses and other superstructures is conspicuous. As for the cases quoted, none of them is on all fours with this. In *Abu Hasan* v. *Ramzan Ali* (2), it was held that the killa (or fort) was part and parcel of the Zemindar's rights and interests in the village of Hajipur. There was no specification of what was meant by the village of Hajipur, as there is here of the village of Kovilur. In *Banki Lal* v. *Jagat Narain* (3), the determination of the question whether the "Kothi" (or house) passed by the sale turned principally on a consideration of what was attached in the warrant of attachment. In *Asghar Reza Khan* v. *Mahomed Mehdi Hossein*

3. (1900) 22 All. 168 (173)=(1900) A.W. N. 31.
4. (1903) 30 Cal.556=30 I.A. 71=7 C.W.N 482.
5. (1915) 38 All. 59=13 A. L. J. 1098=31 I. C. 809.

Khan (4) "bazars" were included in the operative part of the mortgage deed. So the Judicial Committee held that the interests of the defendant Zamindar in the Kutubgunge bazar passed by the sale.

Ground 4, in the Memorandum of Appeal raises a question as to the terms of the sale proclamation. On this point no appeal lies. I agree with the order proposed.

Decree modified.

*** 1923 Madras 514.**

SCHWABE, C. J. AND WALLACE, J.

Koonamvelli Unnara and others ... Appellants.

v.

Koyiparambath Perinkitayil Kunhi Raman and others... Respondents.

S. A. No. 419 of 1920, dated 11th December 1922, against the decree of the Court of the Temporary Sub. J., of Tellichery in A. S. No. 396 of 1918.

(a) *Civil P. C. S.* 11—*Ambiguous decision—Value as* Res judicata.

A judgment in a matter of *res judicata* must stand by itself. It decides what it purports to decide, no more and no less. If there is any ambiguity as to what it decided, which cannot be cleared up without further evidence, then it will not be a clear finding and therefore not a case of *res judicata* at all.

[P. 515, Col. 1.]

(b) *Civil P. C.* (1908) *O.* 21, *R.* 99 (1882) *S.* 331—*Order under, whether operates as* res judicata.

Where it is sought to give the formality of the legal effect of a decree to an order under S. 331 in order that it may be used as *res judicata*, there ought to be a formal array of parties, framing of issues and trial as laid down in S. 331 and if the petition has been wrongly treated as a merely interlocutory application in the suit, it cannot be placed on the same footing as a suit itself. Therefore the order in a miscellaneous petition would not operate as *res judicata*. 9 Bom. L. R. 936 *Foll.*

[P. 515, Col. 2.]

C. V. Ananthakrishna Iyer.—for the Appellant.

C. Madhavan Nair, K. P. Ramakrishna Iyer and B. Poker—for the Respondents.

Wallace J.—The substantive points for decision in this appeal are two—both questions of *res judicata*. The plaintiffs (contesting respondents) are the junior members of a Marumakkattayam tarwad in Malabar and they bring this suit to eject among others the appellant from the plaint property on the ground that the plaint property is the property of a Devaswom which is itself the property of their tarwad. The appellant claims under the third defendant, who was the son of one Sankaran, and claims that the plaint property was the property of Sankaran, that Sankaran followed Makkathayyam law and that the third defendant therefore succeeded to the property after his father's death and passed it on to him. On this point, the plaintiffs claim that Sankaran followed Marumakkathayam law, and therefore his successor-in-title to the property was not the third defendant but their own tarwad, of which, according to them, Sankaran was the Karnavan when he died. One of the main points for decision by the lower Courts, therefore, was whether Sankaran's property descended to his son or to the plaintiffs' tarwad, in other words, whether Sankaran followed Makkathayam or Marumakkathayam law. This very question was raised and decided in a previous suit, O. S. No. 433 of 1898 on the file of the District Munsiff of Payyoli to which the third defendant and the then Karnavan of the plaintiffs' tarwad were parties, and it was then decided that Sankaran followed Makkathayam law, and that the Karnavan of the tarwad was not his heir. This finding was upheld on appeal by the District Court of North Malabar and is a final decision binding on the parties and their successors-in-title. The plaintiffs contend that this decision is not *res judicata* against them, but we are of opinion that that contention cannot prevail and that the lower Courts have erred in holding that it is not.

2. The plaintiffs' contention, which has been upheld by the lower appellate Court, is that O. S. No. 433 of 1898 was dealing with a case of self-acquisition of Sankaran and that in such case it was not necessary for the Court to record a general finding that Sankaran followed Makkathayam law, and that therefore the finding, being unnecessary for the decision of that case, does not constitute *res judicata*. It was argued further that, even if it did not appear on the face of the record in that suit that the Court was dealing with a case of self-acquisition, it

will still be open to the plaintiffs in this suit to adduce evidence to prove that it was so. To the latter proposition we must demur. A judgment in a matter of *res judicata* must stand by itself. It decides what it purports to decide, no more and no less. If there is any ambiguity as to what it decided, which cannot be cleared up without further evidence, then it will not be a clear finding and therefore not a case of *res judicata* at all.

3. A consequential contention by the plaintiffs that Sankaran followed Makkathayam as regards his self-acquisition and Marumakkathayam as regards his tarwad property appears to us to be a pure speculation and contrary to the decision in O. S. No. 433 of 1898. Taking the judgment in that suit as it stands, we can find nothing in it to indicate that the Judge was dealing with any case of self-acquisition, but much to the contrary effect. The subject matter of the suit was an amount due to Sankaran on the redemption of a kanom which had been paid into Court pending the decision as to who was his legal representative, and the issue to be decided definitely was who was his legal representative entitled to the money. The karnavan sued on the ground that Sankaran followed Marumakkathayam and the third defendant pleaded that Sankaran followed Makkhathayam. The issue was perfectly clear, and the finding equally clear, that Sankaran followed Makkhathayam. There is no suggestion anywhere that it was a case of intestacy in the matter of self-acquired property. The lower appellate Court has assumed without giving any reasons that the suit related to self-acquisition. It was obviously strongly influenced to that assumption by its conclusions that the property in the suit before it, belonged to the plaintiffs' tarwad and not to Sankaran's son. We must dissent from its assumption and hold that the question whether Sankaran followed Marumakkathayam or Makkathayam is *res judicata* in a decision binding on the plaintiffs and their tarwad.

4. Apart from the judgment in that suit, there are three strong indications that the plaintiffs' tarwad had never dreamt that the judgment applied only to Sankaran's self-acquisition until the appeal in the lower appellate Court. The first is the grounds of appeal to the District Court against the decision in O. S. No. 433 of 1898—*Vide* Ex. II—which shows clearly that the general point as to the law governing Sankaran's property was directly raised.

5. As to the second, in order to make this clear, it is necessary to refer to a further litigation covering the very property now in the suit. In O. S. No. 195 of 1902, on the file of the District Munsif of Quilandy, the third defendant sued as heir of Sankaran a lessee under Sankaran for the recovery of the present property, and the suit was resisted by the present first defendant,(now Karnavan of plaintiffs' tarwad, but not then Karnavan), on the ground that he held the property as manager of the Perinkitayil Bhagavathi Devaswom which owned it. According to the plaintiffs' in the present suit the Devaswom belongs to the plaintiff's tarwad. So the issue in that suit again raised the question whether the successor to Sankaran's rights was his son or the plaintiff's tarwad. It was there again held that Sankaran followed Makkhathayam and not Marumakkathayam and that his son was his successor-in-title.

6. When the third defendant took out execution proceedings and attempted to get delivery through the Court the then Karnavan of the plaintiffs' tarwad obstructed the delivery and claimed the property for the tarwad. This matter was decided by the District Munsiff in M. P. No. 936 of 1903, and by his order in that he decided against the tarwad, and ordered the obstruction to be removed on the ground that the tarwad's claim had already been negatived and the third defendant got delivery of the property on 2nd May, 1903. It is significant that even in these proceedings there was no suggestion that the previous suit O. S. No. 433 of 1898, which was referred to and relied on by the third defendant throughout in O. S. No. 195 of 1902, related to Sankaran's self-acquisition. Some attempt to save the property for the tarwad was made in the execution proceedings, but even there, so far as appears from the order, the contention in the reply petition by the karnavan which has not been produced before us, was merely that the previous suit referred only to *some* property ot Sankaran apparently

not that it referred to self-acquired property. So that even so much nearer the date of the judgment in the 1898 suit as 1903, the karnavan did not plead that the 1898 suit was concerned with a case of self-acquisition. It is important to note that although in the suit O. S. No. 195 of 1902, the same claim as is now put forward, namely, that the suit property, belonged to the Devaswom, was advanced, still it was there never sought to distinguish the nature of the third defendant's title to kanom money in O. S. No. 433 of 1898 from that of his claim to the alleged Devaswom property in O. S. No. 195 of 1902. It is very unlikely that if such a distinction could, with any plausibility, have been then made, it would not have been then made.

7. The third point of significance is that the tarwad set down under this decision in the execution proceedings for 11 years and then brought the present suit, and that the present suit is one not by the karnavan but by the junior members of the tarwad, while the karnavan is made the first defendant, although he, throughout his written statement, fully supports the plaintiffs with a merely nominal plea, as an excuse for making him defendant that the plaintiffs are not entitled to possession of the property as against their Karnavan. With the question whether such a suit for ejectment by the junior members of the tarwad only, will lie at all we are not here concerned. But, apart from that, it is obvious that the position of the karnavan as a defendant instead of as a plaintiff in the suit was dictated by the strong consciousness of the plaintiffs that the karnawan was already bound by the decision in O. S. No. 433 of 1898, if not also by that in the execution proceedings, and that the present suit, is filed in a sort of desperate hope that the Court might not hold this matter *res judicata* against the junior members: and that the idea that it might be contended that the property in O. S. No. 433 was self-acquisition had not then occurred to the plaintiffs' tarwad.

8. It is therefore evident that there is not even any real probability that the property in O. S. No. 433 was self-acquisition, and that the plaintiffs were aware of that. We hold, however, for reasons already given, that the question of inheritance of the property of Sankaran, whether self-acquired or family, was directly and substantially in issue between the predecessors-in-title of the present litigants and was once for all decided betweeen the third defendant and the predecessor-in title of the plaintiffs in O. S. No. 433 of 1898, and that that finding is binding on the plaintiffs and we would uphold the decision of the Court of First Instance on this point. As remarked by that Court, this is enough to dispose of the suit, but we will deal with the other part of the appellant's argument, namely, that the decision in Execution Proceedings in M. P. No. 936 of 1903 already noted is also *res judicata* and had the force of a decree which not being set aside by appeal or otherwise still binds the plaintiffs.

9. The proceedings on the claim petition in 1903 fell under Ss. 328 to 331 of the previous Civil Procedure Code. Under S. 331 when such a claim of a third party was put in the claim had to be registered as a suit, the result being that the order passed therein would have the force of a decree. We are satisfied that in this Miscellaneous Petition, the District Munsif did not follow the procedure laid down in S. 331. He disposed of the matter merely on the petitions and on his decision in the suit itself. The appellant contends that, notwithstanding the defect in procedure, the order directing removal of the karnavan's obstruction is nevertheless a decree, and relies on *Gopala* v. *Fernandes* (1) and *Fonindro Deb Raikut* v. *Rani Jugodishwari Debi* (2). These cases do not seem to be in point. They were cases where the Court had refused altogether to act under S. 331 and the rulings were to the effect that such refusal was tantamount to rejecting a plaint. No doubt when the procedure under S. 331 has been properly followed the decision will have the force of a decree; *vide Muttammal* v. *Chinnana Gounden* (3), but we are satisfied that in this case the order has not been based upon the proper procedure and that where it is sought to give the formality of the legal effect of a decree to such an order in order that it may be used as *res judicata*, there ought to have been a formal array of parties, framing of

1. (1893) 16 Mad. 127.
2. (1887) 14 Cal. 234.
3. (1882) 4 Mad. 220.

issues and trial as laid down in S. 331 and we hold, as it was held in *Vishnu* v. *Ramachandra* (4) that if the petition has been wrongly treated as a merely interlocutory application in the suit, it cannot be placed on the same footing as a suit itself. We therefore hold that the order in the Miscellaneous Petition is no bar to the present suit and is not *res judicata* against the plaintiffs.

10. We will note very briefly one other point raised before us on behalf of the Karnavan, 1st defendant. When the appeal from the Original Court first came up to the District Court the latter remanded the case for findings on three points. On the first two of these the Original Court on remand held that the plaint property was not the exclusive property of Sankaran, but belonged to the Devaswom and was trust property owned by the plaintiffs' tarwad. In these findings the lower Appellate Court concurred. It is contended that here we have concurrent findings of fact binding upon this Court. But these concurrent findings of fact are not based on the consideration of any title in the plaintiffs' tarwad separate from their pleaded title to succeed to Sankaran. It may be that the plaint property was originally Devaswom property and that Sankaran succeeded to it as *Uralan* from his maternal uncle and not from his father. But the question whether plaintiffs are the heirs of Sankaran has, as we have held, been finally decided against them in O. S. No. 433 of 1898, and plaintiffs are not now suing on any other footing than their right to succeed to Sankaran and if the lower Courts have erred, as they have, in law in holding that the plaintiffs succeeded Sankaran, the concurrent finding of fact is also wrong in law. The plaintiffs who are the junior members of a tarwad, are not suing on the footing of trustees or *Uralans* to recover trust property. They sue,under title from Sankaran, to eject the 4th defendant from property which he holds through the son of Sankaran, and their title to succeed to Sankaran has been finally negatived by a decision which lays down in effect that Sankaran was not the karnavan of any Marumakkathayam tarwad, and therefore that his Uralanship could not descend by Marumakkathayam law to them or their tarwad.

4. (1907) 9 Bom. L. R. 936.

11. We are therefore of opinion that the lower appellate Court has erred in law in its decision. Its decision is therefore reversed and the plaintiffs' suit dismissed with costs throughout to the fourth defendant.

Appeal allowed: suit dismissed.

** **1923 Madras. 517.**

SCHWABE C. J. AND WALLACE, J.

(*Yadavalli*) *Tripuramba and another* ... (Appellant) Defendant

v.

(*Yadavalli*) *Venkataraman and another* (Respondents) Plaintiffs.

S. A. No. 1568 of 1920, dated 20th December 1922, against the decree of the Distict Court of Guntur in Appeal Suit No. 481 of 1916.

Hindu Law—Adoption—Son dying after attaining majority—Power of mother to adopt.

There is nothing in 41 M. 855, P.C. on which to find on principle that the mere attainment of majority by the son or the adopted son divests his mother of the power to adopt to her husband in the event of that son's death without heir. Under the Hindu Law a minor can marry to get legitimate sons and his widow can adopt to him, so that, even a minor may fulfil the tests laid down in that case though he has not yet come into full disposing possession of his estate. (Case law discussed). 35 M. L. J. 798 and 25 M. L. T. 204. Diss.

[P. 520 Col. 2.]

P. Narayanamurthi—for the Appellants.

P. Somasundaram—for the Respondents.

Schwabe, C. J.:—The facts of this case are, one Venkata Somayajulu died leaving a widow and a son, Subbanna Sastri. The son died 26 years ago unmarried at the age of 25. In 1913, the widow adopted the second defendant with the consent of the sapindas as the son of her late husband. The question to be decided is whether this adoption is good or bad.

That a Hindu widow can adopt a son in order to carry on the line and provide for the due performance of the obsequies of her husband, either with the authority of the husband or with the consent of the husband's sapindas, is well established in this Presidency. It is also well established that this power of adoption can be exercised

on the death of a son or adopted son, as often as occasion arises: but it is also established that there is some limit to the exercise of this power and that it can become exhausted. It is argued in this case that the limit is reached as soon as a son, natural or adopted, either marries or attains an age, which is put alternatively as that of attaining majority, that is 18, or that of attaining full legal capacity to himself adopt a son, which was held in *Tarachurn Chatterjee* v. *Sureshunder Mukerjee* (1) to be sixteen. No direct authority for this proposition can be found in any of the Indian Reports, but it is based on a dictum of the Privy Council in *Madana Mohana Deo* v. *Purushottama Deo* (2), which I will deal with more fully hereafter. The limit to the authority to adopt is stated in the judgment of the Privy Council in *Mussammat Bhoobunmoyee Debia* v. *Ramakishore Acharj Choundhury* (3), which judgment was explained and the principle re-affirmed in *Pudma Coomari Debi* v. *The Court of Wards* (4) and *Thayammal* v. *Venkatarama* (5). The principle to be deduced from these three cases is stated in the judgment of Chandravarkar, J. in the Full Bench case of *Ramakrishna* v. *Sham Rao* (6) thus: "Where a Hindu dies leaving a widow and a son, and that son himself dies leaving a natural born or adopted son or leaving no son but his own widow to continue the line by means of adoption, the power of the former widow is extinguished and can never afterwards be revived." The principle so laid down has the approval of the Privy Council in *Madana Mohana Deo* v. *Puroshothama Deo* (2). No subsequent adoption will be allowed, which will divest a right vested by inheritance in some person other than the son or the mother herself as representing the son. So, if a son dies leaving either a son or a widow, the mother can no longer adopt as the estate is vested in the son's son or if there be no sons, in his widow, she having a right to adopt a son to her husband. There is direct authority that the limit is not reached when the son dies though of age without leaving a son or widow in *Venkappa Bapu* v. *Jivaji Krishna* (7) where a son had attained the age of 30 before his death and had married but left no widow, and in *Sangappa* v. *Vyasappa* (8), where he attained the age of 30 and died unmarried. This very point was also mentioned in *Mussammat Bhoobun Moyee Debia* v. *Ram Kishore Acharji Choudhury* (3) in the Judgment of Lord Kingsdown, where he stated, "If Bhowanee Kishore (that is, the son) had died unmarried, his mother would have been his heir and the question of adoption would have stood on quite different grounds. By exercising the power of adoption she would have divested no estate but her own, and this would have brought the case within the ordinary rule." The ordinary rule referred to there is, as I understand it, the rule subsequently so clearly stated in the judgment of Chandavarkar, J. This statement was *obiter*, but that is a clear indication of the then view of the Privy Council.

Turning now to *Madana Mohan Deo* v. *Purushothama Deo* (2), in that case a widow adopted a son who died leaving a widow, and it was held following the cases quoted above that the right of adoption by the first widow had been exhausted. But after approving the principle laid down in the judgment in *Ramakrishna Ramachandra* v. *Shamrao Jeshwant* (6), their Lordships stated that they were of opinion that "the principle must be taken as applying so as to have brought the authority to adopt conferred on the first widow to an end when the son whom she had originally adopted died after attaining full legal capacity to continue the line either by the birth of a natural born son or by the adoption to him of a son by his own widow." It is to be observed that it does not say, "after himself attaining full age or the right to adopt a son." Their Lordships however went on to say that "they do not desire to be understood to say that, even in the absence of authority in the son's widow to adopt, the succession of the son and his dying after attaining full legal capacity to continue

(1) (1890) 17 Cal. 122=16 I. A. 166 (P.C.)
(2) (1918) 41 Mad. 855=35 M. L. J. 188=5 Pat. L. W. 179=8 L. W. 167=16 A. L. J. 725=(1918) M. W. N. 621=24 M. L. T. 231=28 C. L. J. 403=20 Bom L. R. 104=23 C. W. N. 177=45 I. A. 156 (P. C.)
(3) 10 M. .I A. 279.
(4) (1882) 8 Cal. 302.
(5) (1887) 10 Mad. 205=14 I. A. 67=5 Sar. 10 (P. C.)
(6) (1902) 26 Bom. 526=4 Bom. L. R. 315.
7. (1901) 25 Bom. 306=2 Bom. L. R. 1101.
8. 8 Bom. P. J. 684.

the line would not in themselves have been sufficient to bring the limiting principle into operation, and so to have so determined the authority of the first widow, who was not the widow of the last owner, and could not adopt a son to him." I understand this to mean that their Lordships wish it to be understood that they do not give any decision on the point, which is the point in this case, and perhaps indicate that the inclination of their minds was against the contention that such adoption was permissible. But the point was not before the Council and did not arise in that case, and it would be most dangerous to treat a dictum of that kind as an authority.

When a point directly arises for decision it is the duty of the Court to consider the point for itself, giving of course due weight to any words which fell, although *obiter* from their Lordships. I can find no authority in any decided case and the respondents have been unable to call our attention to any authority from the usual sources for ascertaining Hindu Law, in support of the proposition. If there is any such limit, it is not in my judgment, open to us to find it on the material before us. It is to be observed that in *Veerabhai Ajubhai* v. *Bai Hirabai* (9), Lord Lindley, in delivering the judgment of the Privy Council remarked referring to this point that no authority had been produced before the Privy Council in support of it. I wish to refer to two cases which give some appearance of support to the suggestion of the existence of this limit, *viz.*, *Ananda Bheema Deo* v. *Kunja Behari Deo* (10), the headnote of which runs as follows:—"The power of a widow to adopt is not limited in point of time by the fact that a line of her husband's heirs have in succession come into possession of the estate. The limit to such power is when the husband's adopted son attains full age and so full capacity to continue the line by natural born sons or by adoption." That headnote is, in my judgment, incorrect, for the case does not decide anything of the kind. It is true that Wallis, C. J. in his judgment states that the Privy Council in *Musammat Bhoobun Moyee Debia* v. *Ram Kishore Acharji Choudhury* (3) so decided: but that observation does not appear to be borne out by a study of the judgment of the Privy Council in the case. It was unnecessary for the decision of the case in *Ananga Bheema Deo* v. *Kunja Behari Deo* (10), and must be treated as *obiter*. In *Venkatarama Aiyar* v. *Gopalan* (11), the decision in which case appears to be right, both the Judges explained what they understood to have been decided by the Privy Council in *Madana Mohana Deo* v. *Purushothama Deo* (2). They took the dictum which I have discussed above and read it as though it were a judgment. I do not agree with the observations of either Judge on the true meaning to be attached to the judgment of the Privy Council in that case.

The District Judge in this case took the interpretation put upon the words in *Madana Mohan Deo* v. *Purushothama Deo* (2), by this Court in *Venkatarama Aiyar* v. *Gopalan* (11) and therefore held that this adoption is bad. For the reasons stated above I think his conclusion is wrong.

The appeal will be adjourned a fortnight for further consideration and for enquiries to be made as to what took place in the Court below, so that we can decide whether to enter judgment or to send the case back to the District Judge. The respondent must pay the costs throughout.

Wallace, J.:—The respondent relies, as the District Judge has relied, on the phraseology in certain passages in the Privy Council judgment in *Madana Mohana Deo* v. *Purushothama Deo* (2) and on the interpretation of those passages by a Bench of this Court in *Venkatarama Aiyar* v. *Goplan* (11).

The first passage is that the mother's authority to adopt must have come to an end when the son she originally adopted died, after attaining full legal capacity to continue the line either by the birth of a natural-born son, (as distinguished from an adopted son) or by the adoption to him of a son by his own widow. The events which put an end to the mother's power to adopt to her husband in that view are either that her son or adopted

9. (1908) 30 I. A. 234=27 Bom. 492.
10. (1918) 25 M. L. T. 204=9 L. W. 385=(1919) M. W. N. 52=49 I. C. 929.
11. (1918) 35 M. L. J. 698=24 M. L. T. 440=(1918) M. W. N. 779=9 I. L. W. 43=49 I. C. 48.

son should have a legitimate son or should leave a widow, that is, the essential prerequisite is not the attainment of his majority or even his succession to the estate, but that he has or has had a wife with the result that he leaves either a son to her or that she survives him as his widow. The common result in either event is that the deceased son's estate is on his death vested not in his mother but in his son or widow. Therefore their Lordships, I consider, are not propounding any new principle but are taking their stand on the old principle enunciated by the Privy Council in *Rungama* v. *Achama* and *Atchama* v. *Ramanadha* (12) and *Mussammat Bhoobun Moyee Debia* v. *Ram Krishore Acharji Choudhury* (3) namely that when the estate is vested in some heir succeeding to, but directly from the deceased son, his mother will not be allowed to adopt to her husband so as to divest that heir.

The second passage in their Lordships' judgment relied on does not seem to me to carry the case any further. It is to the effect "that their Lordships do not desire to be understood as saying that even in the absence of any power in the son's widow to adopt, the succession to Brojo Kishore (that is the son) and his dying after attaining full legal capacity to continue the line would not in themselves have been sufficient to bring the limiting principle into operation, and so to have so determined the authority of Adikonda's widow, who was not the widow of the last male owner, and could not adopt a son to him." Here again the phrase "succession to Brojo Kishore" does not to my mind mean anything more than that he has come into the estate. Had it meant attainment of his majority, that simpler phrase would have been used. I note further that that succession in itself is not sufficient to have determined the authority of Adikonda's widow, but that it must be coupled with the capacity to continue the line as previously explained, that is, coupled with a legal marriage. It is only from such a marriage that there will emerge an heir to continue the line in ligitimate descent and therefore, until such marriage, the full legal capacity to continue the line is not consummated. That marriage itself is not the whole test, but such a marriage as leaves a heir, a son or a widow, to the deceased has been laid down in *Venkappa Babu* v. *Jivaji Krishna* (7).

That I think is the meaning of *Madana Mohana Deo* v. *Purushothama Deo* (2), in which their Lordships were dealing with a case where the adoption pleaded before them would have divested the adopted son's widow of the estate, it not having been shown that the son's widow herself had no power to adopt to her husband, and the Board purported to follow and were in full agreement with the decision in *Ramakrishna* v. *Sham Row* (6) based on *Mussammat Bhoobun Moyee Debia* v. *Ramkishore Acharji Choudhury* (3) *Padma Coomari Debi* v. *The Court of Wards* (4) and *Thayammal* v. *Venkatarama* (5) and held that the principle laid down in this case determined that case also. I find nothing in *Madana Mohana Deo* v. *Purushotham Deo* (2) on which to find on principle that the mere attainment of majority by the son or the adopted son divested his mother of the power to adopt to her husband in the event of that son's death without heir. Under the Hindu Law a minor can marry to get legitimate sons and his widow can adopt to him, so that, even a minor may fulfil the tests laid down in *Madana Mohana Deo* v. *Purushothama Deo* (2) though he has not yet come into full disposing possession of his estate.

There is therefore nothing in that case to support the District Judge's interpretation of it as meaning that the full legal capacity to continue the line is equivalent to attaining majority, in a case where the son has attained age but dies unmarried. In this matter there appears to be no virtue in law in the attainment of majority and hence, when that is the only bar pleaded, there seems no reason for distinguishing between a mother's power to adopt to her husband when the minor son or adopted son has died, from the power to adopt to him when the major son or adopted son has died leaving no heir to himself who will be ousted from the estate by such adoption. See again *Venkappa Bappu* v. *Jivaji Krishna* (7).

Hence the mere attainment of majority introduces into the problem no new factor on which the respondent can rely for its solution. The purpose of adoption is to perpetuate the line, and if the only son

12. (1846) 4 M. I. A. 1.

dies without leaving any one to perpetuate the line, there seems no good reason for restricting the power of his mother to perpetuate it in the only way she can, by adopting a son to her own husband. No direct authority to the contrary has been produced by the respondent while there is much authority in its favour.

I therefore agree with the view of the learned Chief Justice.

This Second Appeal having been posted for further consideration, the Court delivered the following jugment.

Schwabe C. J.:— Matter having come up for further consideration, we think that judgment should be entered for the defendantsIn the suit.

The question was raised before the Subordinate Judge as to whether the sapindas have in fact consented to the adoption or whether they or some of them must be taken to have consented. The Subordinate Judge decided that issue in favour of the defendants and the question formed part of the grounds of appeal before the District Judge. The District Judge's notes show that it was argued before him that these sapindas had no power to authorise the adoption. It also appears from his notes that the question covered by the first issue, namely whether the relations or persons who were described as remoter reversioners could authorise adoption, was argued before him, for we find his notes on issue 1 contain reference to the question whether the reversioners were invited and reference to the defendant's witnesses 1, 3 and 4 and a suggestion that the witnesses 4 and 5 were interested witnesses. I can see no reason why this matter has been gone into at all before him unless it was on the question whether or not the sapindas had duly authorised this adoption. Further I find in the Judgment itself of the District Judge (paragraph 2) a passage in which he discusses whether the consent of two of these reversioners was in fact given, and in answer he finds that, in respect of one of them, as he had been adopted himself into another family his consent was unnecessary, and as to the other one, after examining the exhibits, he finds that he had power to give authority to adopt. This is enough in my judgment to show that the learned Judge did dispose of the question of fact before him, and, of course, on that question of fact, no second appeal lies.

I therefore think that the whole matter has been disposed of and judgment must be entered for the defendants. The respondents must pay the costs throughout.

Appeal allowed.

✱ 1923 MADRAS 521

OLDFIELD, J.

Rajaratnam Iyer alias Bapuram—Petitioner.

v.

Halasyasundaram Iyer and others—Respondents.

Civil. Rev. P. No. 217 of 1922, dated 7th December 1922 against the order of the Court of the Sub. J. of Tanjore in I. A. No. 263 of 1921.

C. P. Code O. 1 R. 10 (2)-Suit against Hindu widow—Adoption of plaintiff in quesition-Right of reversioner to be joined.

The most important question involved in the suit was whether the plaintiff's adoption by defendant No. 1 widow was true and valid, and the same question would in the natural course if the plaintiff persisted in his claim, arise again on the 1st defendant's death between him and the reversioners, whosoever at that time they may be ; *held* the reversioners are proper though not necessary parties. 25 C. L. J. 391 Foll.

It would be strange if a person who, would be represented by a party on the record, and bound by the decision against that party is to be debarred from himself appearing to protect his interests. 11 M. I. A. 241 and 34 Mad. 188 Ref, 11 M I A 241 34 Mad. 188 Appr. [P. 522 C. 1,2]

S. Ramaswami Iyer-for the Petitioner.

M. S. Venkatarama Aiyar, S. Jagadesa Aiyar and A. Krishnaswami Iyer—for the Respondents.

Judgment.—The order I am asked to revise is one made in a suit by the plaintiff, here petitioner, for the recovery of possession of properties comprised in an estate, of which the last male owner was one Sundaram Ayyar. The plaintiff's father was, it

is the plaintiff's case, adopted by the 1st defendant, the widow of Sundaram Ayyar. The plaintiff sues on the ground that he has been unlawfully excluded from the plaint properties by that widow on account of an invalid agreement entered into between her and the 2nd defendant. The lower Court's order is one made on the petition of the present respondents alleging that they are the nearest reversioners to Sundaram Ayyar and asking that they may be made defendants in the suit. There was in this petition an allegation of collusion between the plaintiff and the 1st defendant. But in its order making the respondents parties the lower Court has not referred to any grounds for that allegation or recorded any finding in favour of it ; and no stress has been laid upon it in this Court.

The question then is whether the lower Court's order was one which it was competent to make under O. I, R. 10, Cl. (2) Civil Procedure Code, that is, whether the presence of the respondents before the Court was necessary in order to enable theCourt effectually and completely to adjudicate upon and settle all the questions involved in the suit.

It is clear that one question, and probably the most important question involved in the suit was whether the plaintiff's father's adoption to Sundaram Ayyar was true and valid. The question arises now as between the plaintiff and the 1st defendant. It will in the natural course, if the plaintiff persists in his claim, arise again on the 1st defendant's death between him and the reversioners, whosoever at that time they may be. It is further the case that the adoption is alleged as having taken place over 35 years back and that a complete trial is advisable in the interest of the perpetuation of the testimony, if on no other account. All convenience in the circumstances is in favour of the lower Court's order. Objection to it has accordingly been urged on strictly legal grounds, mainly with reference to the interpretation, which has been placed on the words of the rule. The rule is in fact identical with the English rule on the subject and reference has therefore been made to *Norris* v. *Beazley* (1) and *Seetaramayya* v. *Ramappayya* (2) in which that decision was applied in this country. It does not however seem to me that the authorities are of much use in the present case, because in them the question, in which the persons alleged to have been wrongly joined were interested in having a decision, was distinctly outside the original scope of the proceedings. Here as has been pointed out, the question, which the present respondents are concerned with, is a question, which will have to be decided eventually even if no addition is made to the parties originally on the record.

It is then urged that the respondents having failed to sue within six years from the date of the alleged adoption allowed by the Limitation Act, have lost their right to an adjudication on the adoption until the succession opens in their favour or in favour of the reversioners at the time of the death of the widow. It is not however clear that inability to sue independently debars them from the benefit of an adjudication in proceedings, which have been otherwise legitimately instituted. On the other hand it is pointed out that the widow in such proceedings as these represents the estate and that a decision against her will be binding on those eventually entitled, in the absence of collusion on the part of the respondents. See *Kisal Singh* v. *Balwant Singh* (3) and the cases collected in the judgment of Mookerjee, J., in *Ganga Narain* v. *Indra Narain* (4). The argument is then that it would be strange if a person who, it cannot be disputed, would be represented by a party on the record, and bound by the decision against that party is to be debarred

(1) L. R., 2 C. P. D., 80.
(2) (1917) 5 L. W. 207-39 I. C. 160
(3) (1918) 40 All. 593-45 I. A. 168-28 C. L. J. 519-24 M L. T. 361-9 L. W. 52-23 C. W. N. 326-(1918) M. W. N. 155-36 M. L. J. 597-21 Bom. L. R. 511-48 I. C. 553 (P. C.)
(4) (1917) 25 C. L. J. 391-22 C. W. N. 350-35 I. C. 49.

from himself appearing to protect his interests. The question thus raised has not, so far as I have been shown, been the subject of any direct decision, but that a party so affected would be entitled to be impleaded is indicated by the language used in *Nugenderchunder Ghose* v *Sreemutty Kaminee Dossee* (5) *Veerabadra Aiyar* v. *Marudaya Nachiar* (6) and the decision of Mukerjee, J., already referred to. Taking this view I hold that the lower Court's order was not made without jurisdiction. The revision petition therefore fails and is dismissed with costs of respondents 1 and 2. 3rd respondent widow will pay her own costs.

Petition dismissed.

(5) 11 M. I. A 241
(6) (1910) 34 Mad. 188-21 M. L. J. 120-(1910) M. W. N. 799-9 M. L. T. 235-8 I. C. 1072.

1923 MADRAS 523 (1)

KRISHNAN, J.

Subramania Chetty and another — (Plaintiffs) Peti-tioners.

v.

The British Indian Steam Navigation Company Ltd—(Defendants)—Respondents.

Civil Rev. No. 836 of 1921, D. 22nd December 1922, praying the High Court to revise the decree of the Court of the Dt. Munsif of Cuddalore in Small Cause Suit No. 133 of 1921.

Shipping-Bill of Lading,-Weight contents and value when shipped unknown-Suit for shortage-Onus.

Burden is on the plaintiff to prove shortage where the bill of lading expressly says "weight contents and value when shipped unknown." 1917 2 K B 679 Ref.-P 523 C. 1-

C. Padmanabha Iyenger and T. D. Srinivasachari—for the Petitioner.

O. T. Govindan Nambiar with Brightwell and Morssby—for the Respondents.

Judgment:—In this case the burden was on the plaintiff to prove shortage as the bill of lading expressly says "that weight, contents and value when shipped unknown" see, *In re Anglo Russian Merchant Trades and John Batt and Co London* (1). No attempt has been made by plaintiff to prove this though about a month's time seems to have been given to him by the learned District Munsif. It is urged that I should give him a further opportunity of proving his case. I am unable to do so as I think he had ample opportunity already. The Civil Revision Petition fails and is dismissed with costs.

Petition dismissed.

(1) [1917] 2 K. B. 679 (684)

1923 MADRAS 523 (2)

(*Full Bench*

SCHWABE C. J., PHILLIPS, DEVADOSS VENKATASUBBA RAO AND WALLACE, JJ.

Gopal Naidu and another—Petitioner.

v.

The Crown— Accused.

Criminal Rev. No. 387 and criminal Rev. Pet. No. 331 of 1922, D. 22nd Dec. 1922, from Court of Session of the North Arcot Division Vellore in C. A. No 1 of 1922.

(a) Penal Code S. 342 and Ss. 96, 97, 102 and 105-Confinement-When wrongful.

On the night of 8th August, 1921, two Head Constables arrested one N as he was drunk and creating a disturbance in the brahman street of the village, and they took him to the station and confined him there, although one of them, knew his name and address; *Held* in view of Ss. 96, 97, 102 and 105 they were not guilty under S. 342.

(b) Criminal P. C. S. 434-Form of refusal.

The question referred to the Full Bench was whether 44 M 913 was correctly decided. *Held* this is not a desirable form of reference to a Full Bench because the facts of one case are seldom precisely the same as those of another and it is much better that the point on which the opinion of the Full bench is desired should be formulated. -P. 525 C. 1-

(c) Interpretation of statutes-Codification.

Where a statute is expressly said to codify the law it is not permisible to go outside the code so created, because before the existence of that code another law prevailed. -P. 524 C. 2-

(d) Criminal P. C. S. 54-Scope.

The Code of Criminal Procedure is dealing rather with the arrest for crimes that had been committed than with the arrest for the preven-

tion of crimes. although there are specific instances given permitting the arrest of persons suspected of crimes. [P 526 C 1]

K. S. Jayarama Iyer—for the Petitioner.

The Public Prosecutor (*J. C. Adam*)—for the Crown.

ORDER OF REFERENCE TO A FULL BENCH

We are asked to revise the decision of the Sessions Judge of North Arcot, confirming the conviction of the two petitioners, Head constables, of an offence punishable, under Sect. 342 and their sentences to pay a fine of Rs. 10 each. The findings of the lower Court are, we take it, that on the night of 8th August, 1921, the two petitioners arrested one Nayinatha Udayan, as he was drunk and creating a disturbance in the Brahman street of the village and that they took him to the station and confined him there, although one of them, it is found, knew his name and address. On those findings the learned Sessions Judge held that Nayinatha Udayan, having committed a non-cognisable offence, could not be arrested or taken to the station, inasmuch as there was no necessity for the Head Constables under Sect. 57, Criminal Procedure Code, to do so in order that his name or residence might be ascertained.

Here the petition has been argued first with reference to Sect. 21 of the Madras Police Act XXIV of 1859, the contention being that this section removes any restriction on the power of arrest imposed by any other law, including the Criminal Procedure Code. Sect. 21 no doubt states that :

"it shall be the duty of every Police Officer to use his best endeavour and ability to prevent all crimes, offences and public nuisances, to preserve the peace, to apprehend disorderly and suspicious character."

and then further duties are described with a similar absence of precision. This section, as we understand it, expresses only some of the pious injunctions to which our earlier Indian drafstmen were addicted, and was not intended to enlarge the powers with which the police were at its date or have since been invested under the substantive law, whatever that law at the time in question may have been or may be. We cannot presume an intention to limit the liberty of the subject by language so general. We therefore turn to the second argument relied on by Mr. Jayaram Aiyar on behalf of the petitioners, that in fact what they did was authorized by the substantive law, as declared by judicial authority in this Presidency.

Shortly petitioners rely on the decision in *In re Ramaswamy Ayyar* (1) as justifying their action. That decision we read, was founded on three propositions. First that the Common Law of England would authorize an arrest, not only by the police or a Magistrate, but by any person, in the circumstances of the present case; next, that the Common Law of England is applicable to India, except where a statute either expressly or by implication has abrogated it: and thirdly, that that the common Law has not been abrogated in any way, so far as it is applicable to the facts before us

The first of these propositions has not been disputed here; and we observe only that the Common Law power to terminate a nuisance, such as is here in question, by the arrest of the offender is an effective and immediate remedy adapted to the circumstances of such cases. The second rests in this Presidency on the authority of *In re Venkata Reddy* (2) The learned Public Prosecutor has drawn our attention to *Satis Chandra Chakrabarti* v. *Ramdayal Le* (3) and it is possible that re-consideration of the principle involved in the light of the latter decision may be justified. We do not however pursue this further since we are clear that in connection with the third of the propositions above stated a reference to a Full Bench must be made.

To the third proposition the learned

(1) [1921] 44 Mad. 913-14 L. W. 189-22 Cr. L. J, 412-61 I C. 652.

(2) [1913] 36 Mad. 216-23 M. L. J. 39-11 M. L T. 416-(1912) M. W. N. 476-13 Cr. L. J.-275-14 I. C. 659 (F. B.)

(3) 59 I. E. 143,

Public Prosecutor has taken objection on the ground that certain provisions of statute law were not considered by the learned Judges in the previous case. The offence in question then, as now, was one punishable under Sect. 290 or Sect. 510, Indian Penal Code, Nayinatha Udayan having in fact been convicted of an offence punishable under the former. Which section however was really applicable does not matter, because the offence under each is one, for which the police cannot arrest without warrant; that is, it was non-cognisable. There is then the provision regarding arrest in non-cognisable offences, Sect. 57, Criminal Procedure Code; and whatever the inconvenience involved, we cannot disregard the existence of this apparently exhaustive provision regarding the powers of the police in them. There is no mention of these provisions in *In re Ramaswamy Ayyar* (1), and no consideration of the extent to which they abrogate the right of arrest under the English Common Law. In the absence of such mention we entertain doubt as to the correctness of the learned Judges' conclusion; and we accordingly refer to a Full Bench the question whether *In re Ramaswamy Ayyar* (1) was correctly decided.

OPINION.

Schwabe, C. J.-The question referred to the Full Bench is whether *In re Ramasamy Ayyar* (1) was correctly decided.

This is not a desirable form of reference to a Full Bench, because the facts of one case are seldom precisely the same as those of another and it is much better that the point on which the opinion of the Full Bench is desired should be formulated. In *In re Ramaswamy Ayyar* (1), a Village Magistrate arrested a drunken man whose conduct was at the time a grave danger to the public. In this case two Police Constables arrested a man who was drunk and creating disturbance, but to what extent he was a danger to others does not appear in the order of reference. The decision in *In re Ramaswamy Aiyar* (1), went on the ground that the English Common Law which is:

"that for the sake of the preservation of the peace any individual who sees it broken may restrain the liberty of him whom he sees breaking it so long as his conduct showed that the public peace is likely to be endangered by his acts."

as per Parke, B in *Timothy* v. *Simpson* (4), applies to India and affords a good answer to any person charged for wrongful confinement under Sect. 342 of the Indian Penal Code, if the facts of the case comply with that definition.

The first introduction of English Common Law in this country was in a Charter of Charles II in 1986 whereby it was ordained that the law of Kingdom, which would include the Common Law, should be administered in this country. In later charters and enactments it has been provided that the Hindu Law is to be applied between Hindus and the Muhammadan Law between Muhammadans, and in cases not otherwise provided for, the principles of equity, justice and good conscience; and these latter words have been held to include material parts of the English Common Law. But for the purpose of this case it is not necessary to consider precisely to what extent and with what restriction the Common Law of England is part of the law of India.

In this country the Criminal Law has been codified in the Indian Penal Code and in the Code of Criminal Procedure and the principle has been well established, and is fully enunciated in the speech of Lord Halsbury in the *Bank of England* v. *Vagliano Brothers* (5), that:

'Where a statute is expressly said to codify the law, you are not at liberty to go outside the code so created, because before the existence of that code another law prevailed.'

This perhaps should be limited by the speech of Lord Herschell (at page 145) to the effect that the purpose of the codified statute is that on any point not specifically dealt with by it the law shall be ascertained by interpreting the language used.

(4) (1835) 1 L. R., Exch., 18.
(5) (1891) A. C., 107.

Now there can be no doubt that the Code of Criminal Procedure deals with the powers of arrest with or without warrant, and the Indian Penal Code deals specifically with the question of wrongful confinement. It is however to be observed that the Code of Criminal Procedure is dealing rather with the arrest for crimes that had been committed than with the arrest for the prevention of crime, although there are specific instances given permitting the arrest of persons suspected of crime and it may be correct to say that the Code of Criminal Procedure does not specifically deal with the matter under discussion here. However this may be the Indian Penal Code makes 'wrongful confinement' an offence by Sect. 342. What amounts to wrongful confinement must be ascertained by examining the definition contained in Sects. 339 and 340. If the acts complained of come within both definitions, the offence has been committed unless there are other sections in the Code which provide an excuse for or a defence to what otherwise would be a crime. The Indian Penal Code defines the offence and also states what matters will afford a defence, and therefore it may be said that this Code deals specifically with the question and it follows that the Court is not entitled to invoke the common law of England in the matter at all. I therefore cannot agree with the grounds of decision in *In re Ramaswami Ayyar* (1) but in my judgment, the decision was perfectly correct and can be supported on other grounds to be found on a proper interpretation of the Code itself.

By Sect. 340 of the Indian Penal Code, whoever wrongfully restrains any person in such a manner as to prevent that person from proceeding beyond certain circumscribing limits, is said to wrongfully confine that person. By Sect. 339, whoever voluntarily obstructs any person so as to prevent that person from proceeding in any direction in which that person has a right to proceed is said wrongfully to restrain that person. So on the arrest of any person, when he has not been guilty of an offence for which arrest without warrant is permitted *prima facie*, it is wrongful confinement of the person; Sects. 96 and 97 give a right to every person to defend his own body and the body of every other person and the property of himself and of every other person against certain offences, and this right of private defence 'commences' under Sects. 102 and 105, when a reasonable apprehension of danger to the person or property commences. In our judgment these provisions are quite wide enough to have afforded a complete defence in the case reported in *In re, Ramaswami Ayyar* (1), and in effect provide for this country what is provided in England by the rule of common law referred to. The question in each case must be whether the person arresting and confining has a genuine and reasonable apprehension that to allow the other to remain at large will endanger the person and property of others. Some such provision is a necessity in a civilised community, for otherwise its citizens would be left the alternative of standing by until a crime has been committed or of themselves becoming criminals by taking what might be the only course to prevent the commission of a crime, namely, the confinement of the person whose actions show that the persons and property of others are endangered. In my judgment the Indian Penal Code adequately provides the solution of the difficulty.

Reliance has been placed on Sect. 21 of the Madras City Police Act XXIV of 1859, which provided that it shall be the duty of every Police Officer to use his best endeavour to prevent all crimes and offences and public nuisances, to preserve the peace, to apprehend disorderly and suspicious characters. This was followed by many sections providing when a Police Officer could or could not arrest with or without warrant, but on the coming into force of the first Code of Criminal Procedure these sections were repealed, but Sect. 21 was left unrepealed. This no doubt was done deliberately and it states the duties of the police in the matter of prevention of crime, leaving the matter of arrest of persons for crimes that have been committed or are suspected to have been committed to

be dealt with in future under the Code of Criminal Procedure. It is not necessary to consider in this case whether this section gives to the police wider powers in cases such as the one in question than are enjoyed by all citizens; but it is to be observed that it would be remarkable if Police Officers were by statute enjoined to preserve the peace, and a genuine attempt to do so under circumstances like the present would amount to the commission of a criminal offence by the police. It is not however necessary to consider this point further as it has not been specifically referred to us, but it must not be taken that I am expressing my view of the correctness or otherwise of the decision of the Referring Bench on this point.

The answer to the question referred to us is that the case in *In re Ramaswami Ayyar* (1) is rightly decided on the ground stated above. It will be for the Referring Bench to consider on the facts on this case whether the accused had a genuine and reasonable apprehension that unless the prosecutor was arrested there would be damage to the person or property of others.

Having had the opportunity of reading the judgments of my learned brothers I would add that it will be also open to the Referring Bench to consider the applicability of Sect. 81 of the Indian Penal Code.

Phillips J.—I agree and would only add that in the present case and in similar cases the provision in Sect. 81 of the Indian Penal Code, may also be considered. That section lays down that nothing is an offence merely by reason of its being done with the knowledge that it is likely to cause harm, if it be done without any criminal intention to cause harm and in good faith for the purpose of preventing or avoiding other harm to person or property. While I am not prepared to say that this provision is strictly applicable to the facts of the case referred, it appears to me that it and other provisions of chapter IV of the Penal Code have been framed to provide for cases like the present one, to which before the enactment of the Code, the common law would have applied.

Devadoss, J.—The question referred to the Full Bench is whether *In re Kamaswami Ayyar* (1) was correctly decided. In that cese a Village Magistrate was convicted under Sect. 344, Indian Penal Code. Ayling and Coutts Trotter, JJ., held the common law of England was applicable to this country and that on the facts found the petitioner had " ample justification, not as Village Magistrate, but as a private citizen to put a restraint upon the complainant who was drunk and disorderly and threatened to commit breach of the peace and was a danger to the other villagers". In the case under reference the petitioners who are Police Constables have been convicted under Sect. 342, Indian Penal Code for wrongfully confining the complainant and sentenced to pay fine of Rs. 10 each.

Two questions arise for consideration.

1. Whether the common law of England is applicable to India except where a statute either expressly or by implication has abrogated it ;

2. Granting that the common law of England is applicable to India whether the statute law has not abrogated it so far as is applicable to this case ;

As regards the first point Mr. Jayarama Iyer for the petitioners contends that the common law of England is applicable to India and relies upon *Baboo Dunesh Dutt Singh* v. *Mugneeram Chowdhry* (6) and *Ramloll Thackoorseydoss* v. *Soojummull Chondmall* (7). In *Ramloll Thackoorseydoss* v. *Soojummul Chondmall* (7) an action was brought in the Supreme Court of Bombay on a wager. Lord Campbell in delivering the judgment of their Lordships of the Privy Council observed at page 310.—

" The Statute, 8 and 9. Vict. Ch. 109, does not extend to India, and although both parties on the record are Hindus no peculiar Hindu law is alleged to exist upon the subject ; therefore this case must be decided by the common law of England."

and held that the wager in question

(6) 11 Beng., L. R., 321.

(7) 6 Moore's P. C. C., 300-4 M. I. A., 339.

was not illegal and could be enforced in a Court of Justice.

In *Baboo Gunesh Dutt Singh* v. *Mugneeram Chowdhry* (6) the question was whether witnesses could be sued for damages in respect of evidence given by them in a judicial proceeding. Their Lordships of the Privy Council held.—

"That witnesses cannot be sued in a Civil Court for damages in respect of evidence given by them upon oath in a judicial proceeding. Their Lordships hold this maxim which certainly has been recognised by all the Courts of this country to be one based upon principles of public policy. The ground of it is this, that it concerns the public and the administration of justice that witnesses giving their evidence on oath in a Court of justice should not have before their eyes the fear of being harassed by suits for damages but that the only penalty which they should incur if they give evidence falsely should be an indictment for perjury."

In the former case, their Lordships assumed as a matter of course that the common law of England was applicable to contracts in Bombay. According to the charter of the Supreme Court, the King's Judges were enjoined to administer the common law of England and it was evidently on that ground the question whether the common law of England was applicable or not was not raised in argument in that case. In the latter case their Lordships rest their judgment upon principles of public policy. They do not invoke the aid of the common law of England for holding that a witness could not be sued for damages in respect of the evidence given by him.

In *in re Venkata Reddy* (2) a Full Bench of the Madras High Court held that the statement of an accused person in answer to a question by the Court was absolutely privileged under the common law of England and could not form the subject of an indictment, under Sect. 499, Indian Penal Code, even though false and made without good faith, and that exceptions to Sect. 499, Indian Penal Code were not exhaustive. This decision has been dissented from by a Full Bench of the Calcutta High Court in *Satish Chandra Chakravarti* v. *Ram Doyal De* (8). With the greatest respect to the learned Judge who decided *In re Venkata Reddy* (9), I share with Spencer, J., the apprehension entertained by him in that case that the case of justice might suffer by the extension of the principle of absolute privilege to unscrupulous persons who in a petty case might make the most unfounded aspersions on the character of the relations of the complainant and his witnesses.

When the charter was granted to the Madras Hight Court it was provided by Sect. 30 that all persons brought for trial before the High Court of Madras either in the exercise of its original jurisdiction or as a Court of Appeal, Reference or Revision charged with any offence, the law as contained in the Penal Code or Amending Acts of such Code should be applied. Sect. 112 of the Government of India Act lays down that the High Court of Calcutta, Madras and Bombay should, in the exercise of their original jurisdiction in the suits against the inhabitants of the three cities, apply the personal law in matters of inheritance, succession and contract where the parties are subject to a personal law. But no distinction is to be made with regard to the administration of the criminal law of the land except so far as that law is laid down in the Acts of the Legislatures. The powers of the Governor Generel-in-Council to make the laws are embodied in Sect. 65 of the Act. Subject to certain restrictions, which it is unnecessary to detail here, the central Legislature has power to legislate on all subjects. The common law of England has not been made applicable to this country by any Act of Parliament or by any enactment of the Indian Legislature. Our attention has not been drawn to any statute or legislative enactment which makes the common law of England the law of the land. The charter of Charles II granted to the East India Company and the later charters enjoin upon the company and its servants due obedience to the common and statute law of England It was only towards the close of

(8) 48 Cal. 388.-32 C.L.J. 94.-24 C.W. N. 982-22 Cr L. J. 31-59 I.C. 143 (S.B.)

the 18th century that the Supreme Courts in Madras Calcutta and Bombay were established where the King's Judges administered the common law of England. Outside the jurisdiction of the Supreme Courts the law of the land with regard to to civil matters and the mahomedan law as regards offences, were administered by the Company's Courts. The Principal Civil Court was called Suddar Adaulat, and the Principal Criminal Court was known as Fowzdari Adaulat. In Madras as well as in other provinces regulations. were passed empowering the Courts to deal with Civil and Criminal matters. In Madras Regulation 2 of 1802 was passed giving jurisdictions to Civil Courts. In Madras Regulation 2 of 1802 was passed giving jurisdictions to Civil Courts. Then by Regulation 3 Rules of Civil Practice in the Zillah Courts wers enacted. By Regulation V the Saddar Adaulat or Chief Court of Civil jurisdiction was established. Reg. VI laid rules for the guidance of Magistrates. By Reg. VIII the Fouzdari Adaulat or Chief Criminal Court was established. From 1802 onwards various regulations were passed with regard to the trial of offenders and the trial of civil suits. By those regulations the Judges of the Zillah Court and the Saddar Adaulat were enjoined to apply the Hindu Law to Hindus and the Mahomedan law to Mahomedans and "in cases for which no specific rule may exist the Court shall act according to justice, equity and good conscience." Regulation II of 1802, Sect. 17 and Regulation V of 1802 Sect. 30. This provision was reproduced in Madras Civil Courts Act of 1873; and by Sect. 16, Cl. (c)" in cases where no specific rule exists the Court shall act, according to justice, equity and good conscience." English Judges who sat in the Company's Courts had cauzees and pandits to advise them on points of Mahomedan law and Hindu law. They naturally looked for guidance to the principles of the common law of England as they were familiar with that law. As well said by a famous, Judge, the common law of England is the embodiment of common sense and in most cases the common law of England supplied the Judges with rules and precedence which were in accordance with justice, equity and good conscience. In this manner the common law of England came to be considered to be the law of the land.

There is no statutory law of torts in this country, and under the customary law of India, suits for damages for civil wrongs were almost unknown. British Courts in India entertain suits for damages for torts and give relief according to the rules of the common law of England. The same may be said as regards ease ments and Specific relief before the passing of the Easements Act and the Specific Relief Act. In enjoining the Judges in India that where there is no rule of law applicable to a particular case, they should act according to justice, equity and good conscience, the legislature left it to them to invoke the aid of the common law wherever possible. By such practice of the Courts a custom has sprung up of looking to the English common law for guidance and precidents where there is no customary Hindu or Mahomedan law or statute law governing the case. It is unnecessary to pursue this interesting subject further, in view of my opinion on the second question.

The second question is, granting that the common law of England is applicable to India, whether the statute law has not abrogated it so far as it is applicable to this case. Sect. 22 of the Police Act of 1859 empowered Police Officers to arrest without a warrant. But after the passing of the Indian Penal Code in 1860 and the Criminal Procedure Code in 1861, Sects. 22 to 43 were repealed by Act XVII of 1862. It is contended for the petitioners that Sect. 21 gives power to arrest without a warrant. Sect. 21 lays down the duties of Police Officers. Among other things it shall be their duty to use their best endeavours to prevent crimes, etc., and to apprehend disorderly and suspicious characters. This section does not empower them to arrest persons without a warrant. The intention of

the legislature is made quite clear by the repeal of the Sect. 22 which gave power to the police to arrest without a warrant; and the preamble to Act XVII of 1862 puts the matter beyond doubt. Therefore the contention that a police officer is entitled to arrest without a warrant by virtue of Sect. 21 is untenable. Under S. 44 of the Act penalties are provided for neglect of duty and that section as the Act now stands immediately follows S. 21; and it can be safely assumed that a Police Officer is enjoined by Sect. 21 to carry out certain duties, and his failure to do so without lawful excuse will subject him to penalties under Sect. 44. We must therefore look for authority to arrest without a warrant elsewhere. The law as to arrest without warrant was first codified in Sects. 100, 101, 104 and 108 of the Code of Criminal Procedure, Act XXV of 1861, and the provisions contained in those sections have been reproduced with slight amendments in Sects. 54 to 57 of the Criminal Procedure Code of 1898. Under Sect. 54, a Police Officer may arrest without a warrant any person concerned in a cognisable offence, any person having in his possession without lawful excuse house breaking implements, proclaimed offenders, persons in possession of stolen property, etc. Offences are classified as cognisable and non-cognisable by the Criminal Procedure Code. Cognisable offence is one in which a Police Officer may arrest a person charged or suspected of the offence without a warrant. Under Sect. 55 an officer in charge of a Police Station may arrest (1) any person preparing to commit cognisable offence under certain circumstances; (2) persons without ostensible means of subsistence and (3) habitual offenders. Sect. 57 gives power to a Police Officer to arrest without warrant when any person in the presence of such Police Officer commits or is accused of committing non-cognisable offence and refuses on demand by a Police Officer to give his name and residence, or gives a name or residence which such Officer has reason to believe to be false. Such person may be arrested without a warrant in order that his name or residence may be ascertained. The offence of being drunk and disorderly is not a cognisable offence, and a Police Officer cannot arrest the alleged offender without a warrant. He can arrest him only if he refuses to give his name or residence, or gives a false name or residence. If his name or residence is known to the Police Officer, the law does not empower him to arrest such person without a warrant. In no case other than that provided by Sects. 54, 55 and 57 can a Police Officer arrest a person without a warrant. The law being jealous of the liberty of the subject has set wholesome bounds to the power of the police to arrest without a warrant. The Criminal Procedure Code being a complete Code defining the powers of the police with regard to arrest, it is not open to a Court to travel outside the Code for finding powers either for the police or for private persons to interfere with the liberty of the subject. The provisions enacted in 1861 have not been altered though the Criminal Procedure Code has been amended and re-enacted in 1872, 1882 and 1898. In this connection I may quote the well-known observations of Lord Herschell in *Bank of England* v *Vagliano Brothers* (5). In that case the question was as regards the interpretation to be placed upon Sect. 7, Sub-sect. 3, of the Bills of Exchange Act of 1882. The Court of Appeal relied upon the law as it existed before the Bills of Exchange Act was passed in interpreting the section. Lord Herschell observed:

"I cannot bring myself to think that this is the proper way to deal with such a statute as the Bills of Exchange Act, which was intended to be a code of the law relating to negotiable instruments. I think the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previouly stood, and then, assuming that it was probably intended to leave it unaltered to see if the words of the enact-

ment will bear an interpretation in conformity with this view".

Under certain special and local laws power is given to certain officers to arrest without a warrant for offences under these Acts. Under the Madras Salt Act VIII of 1889, for instance, a Salt Officer may arrest without warrant a person concerned in the manufacture, sale or keeping of such contraband salt or dealing therewith. Under the Madras City Police Act, a Police Officer may arrest without warrant in certain cases.

I may also quote the words of Lord Abinger in *Henderson* v. *Sherborne* (9):

"The interpretation of statutes has always, in modern times, been highly favourable to the personal liberty of the subject, and I hope will always remain so."

The liberty of the subject should not be curtailed by importing something which is not warranted by the statute law of the land. At the same time, it is not necessary to invoke the aid of the common law of England in order to justify the arrest of a person who is threatening to commit an offence against the person of an individual. The general exceptions contained in Chapter IV of the Indian Penal Code afford ample protection against threatened violence to person or mischief to property.

With due respect I may observe that the learned Judges who decided *In re Ramasamy Ayyar* (1) need not have rested their decision on any rule of common law, as the Village Magistrate arrested the complainant to prevent harm to himself and to others, and he was protected by Sect. 81, Indian Penal Code. If a person threatens to commit an assault he can be disarmed and if necessary put under restraint to prevent harm to persons or to property. A private person is justified in doing an act which would prevent any harm happening to himself or to another person provided he does that act, *bona fide* and with-unnecessary force or violence. Both the Indian Penal Code, and the Criminal Procedure Code are complete Codes of laws regulating the right of citizens to personal freedom; and such rights should not be curtailed by judicial decisions unless warranted by statutes. The common law of England applicable to a case of arrest without warrant does not apply to India. The case of an alleged illegal arrest or wrongful confinement has to be decided according to the law as contained in the Indian Penal Code and Criminal Procedure Code. My answer to the question referred to us is, *In re Ramasamy Ayyar* (1) was rightly decided, not because the common law of England was applicable, but by reason of the act complained of coming within the exceptions contained in Chap. IV of the Indian Penal Code.

Venkatasubba Rao J:—I have come to the same conclusion, and as the question raised is one of great importance, I desire to say a few words.

It has been argued that the common Law of England may be applied to India in regard to power to arrest and that a police officer or a private citizen can exercise the power independent of the provisions of the Criminal Procedure Code and any special or local law which by Sect. 1 of the said Code is expressly declared not to be affected thereby. I am totally unable to accept this argument. The Code sets out in great detail circumstances in which arrests may be made and persons who may exercise the right. Provision is made for arrests not only after the commission of an offence but also with a view to prevent offences being committed and in some intances for securing the preservation of the peace. I may instance Sect. 54, Cl. 2 which empowers a police officer to arrest without warrant any person having in his possession without lawful excuse any implement of house breaking. Sect. 55 again authorises any officer in charge of a police station to arrest similarly subject to certain qualifications, a person found taking precautions to conceal his presence with a view to committing an offence or any person who has no ostensible means of subsistence or any person who by repute is an habitual robber or thief. It is thus clear that the Code contains provisions in respect of arrest both for

(9) 2 M. and W. 236.

the purpose of preventing crimes and for bringing offenders to book. The subject is exhaustively dealt with, and it is impossible to hold that a power of arrest is possessed apart from and independent of the statute law. This is my view of the law as it stands, and I may add that as the question relates to interference with the liberty of the subject it is far more desirable on grounds of public policy and expediency, that the right should be precisely defined and regulated by the legislature than that it should be left to the Magistracy of the country to ascertain the law in the words of Lord Herschell in *Bank of England* v. *Vagliano, Brothers* (5) by roaming over a vast number of authorities extracting the law by a minute critical examination of previous decisions and probably also I may add, of the statements to be found in ancient text bocks. It has been pointed out to us that the only case which so far has decided that a private citizen possesses a right of arrest apart from the statute law is *In re Ramasami Ayyar* (1). Speaking for myself I am glad to find that there is so little authority in support of the position that such right exists. In that case the accused removed to the Police Station an individual who was very drunk and hit him in the foot and tore the sacred thread of one of the witnesses. The question arose whether the accused committed an offence of wrongful restraint under Sect. 341 of the Indian Penal Code. The learned Judges, very naturally, considered that it would be unjust to punish a person for doing an act which in the interest of the orderly Government of the society and the preservation of the peace should be declared lawful and they justified the act with reference to power of arrest which every individual as an ordinary member of the general public possesses, under the common law of England. But with great respect, it seems to me, that if their attention had been invited to certain sections of the Indian Penal Code, they would probably have rested their Judgment upon grounds other than that underlying their decision. Sect. 81 enacts that nothing is an offence if it be done without criminal intention and in good faith for the purpose of preventing or avoiding other harm to person or property. It was suggested that if a person who is under the influence of drink carries a revolver in his hand and runs amock there must be the power to arrest him on the part of every citizen as otherwise disastrous results may follow. But this argument ignores that any reasonable act on the part of any citizen interfering with the freedom of the drunken person is amply protected by the aforesaid section and by other sections of the Indian Penal Code. The right of private defence conferred by that Code is quite adequate to meet all reasonable requirements. By Sect. 97 every person is given a right to defend his own body and the body of any other person, his own property as well as the property of other persons. Under Sects. 100 and 104 the right of private defence may be exercised when there is a reasonable apprehension of danger to life or of grievous hurt to body or of robbery or of house breaking or commission of other serious offences. Sect. 100 sets out in very clear terms that the offence which occasions the exercise of the right may be an assault as may reasonably cause the apprehension that death or grievous hurt will be the consequence of such assault. Assault is defined by Sect. 351 as consisting of a gesture or preparation that is likely to cause an apprehension that criminal force will be used. Sect. 103 similarly provides for the exercise of the right of private defence not only when the offences specified therein are committed but also when attempt to commit them are made. In my opinion, therefore, there is no need to have resort in the circumstances such as those existing in *In re Ramaswami Ayyar* (1) to the doctrine of the common law that every private individual has a right to arrest. Dealing with the sale of Goods Act 1893, 56 and 57 Vic. Ch. 71 Cozens Hardy M. R. observes in *Bristol Tramways and Carriage Co.*, v. *Fiat Motors Ltd.* (10);

(10) (1910) 79 L. J., K. B., 1109.

"I rather depricate the citation of earlier decisions such as *Chanter* v. *Hopkins* (11) or *Shepherd* v. *Pybus* (12). The object and intent of the statute of 1893 was no doubt simply to codify the unwritten law applicable to the sale of goods; but in so far as there is an express statutory enactment that alone must be looked at and must govern the rights of the parties, even though the section may to some extent have altered the prior common law."

In an earlier case *Bank of England* v. *Vagliano Brothers* (5) Lord Herschell remarks:—

"I think the proper course is in the first instance to examine the language of the Statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably, intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view. If a statute, intended to embody in a code a particular branch of the law, is to be treated in this fashion, it appears to me that its utility will be almost entirely destroyed and the very object with which it was enacted will be frustrated."

I think that every word in the observations of these eminent judges applies with great force to the subject on hand.

The learned referring judges conclude their order of reference with these words: "And we accordingly refer to a Full Bench the question whether, *In re Ramasami Ayyar* (1) was correctly decided." My answer is that the grounds of the decision are wrong though the decision itself is correct.

Wallace, J.—I agree with the judgment of the learned Chief Justice and would also, with my learned brothers, call in aid Sect. 81 of the Indian Penal Code.

Reference answered in the affirmative.

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(11) (1838) 4 M. & W., 399.
(12) (1842) 3 Man. & I., 868.

✱ 1923 MADRAS 533

WALLIS C. J., KRISHNAN AND VENKATA SUBBA RAO. JJ.

(*Tadepalli*) *Subba Rao Garu and others*—Appellants

v.

Sri Balusu Buchi Sarvarayudu and others—Respondents.

Appeal Nos. 352 of 1918 and 222 of 1919, D 14th Sep. 1922, against the decree of the Court of the Add. Temporary Sub. J, of Rajahmundry in Oringial Suit No. 4 of 1917, and against the decree of the Court of the Temporary Sub. J., of Rajahmundry in E. A. No. 583 of 1918 in O. S. No. 4 of 1917.

(a) *T. P. Act S. 83—Full deposit—Mortgagee part owner of the mortgaged property;*

The plaintiff mortgagor is entitled, to make a deposit of the whole mortgage debt notwithstanding that the mortgagees have become the owners of part of the mortgaged property. (6 M 61 Doubted;) and on the principle of the greater including the less, *omne majus continet in se minus*, the tender would be good even if the plaintiff is entitled to tender a lesser sum, but the plaintiff is not so entitled to tender lesser sum, as the amount of the proportionate reduction in the mortgage debt had not been ascertained either by agreement or by the Court, and in these circumstances it cannot be said that there was any lesser sum which the plaintiff was entitled to tender or the mortgagees were bound to accept. [P. 534 Cs. 1 & 2.]

(b) *T. P. Act S. 95—Mortgagee becoming a part owner;*

The principle in S. 95 is equally applicable to a case where part of the mortgaged property has been purchased by the mortgagee. In such a case the mortgagee's right to possession as mortgagee is equally determined by the tender or deposit and transferred to the redeeming mortgagor. [P 535 C 1]

(c) *T. P. Act S. 76 (1)—Liability of mortgagee for delivering possession.*

It cannot be laid down that if the mortgagees do not deliver possession even after legal tender, they are not entitled to credit for amounts which they paid after the tender, to meet the revenue demands on the mortgaged property, and for necessary repairs and collection charges. Such a rule would involve a great hardship to a mortgagee who refused to accept the tender under a *bona fide* claim of right. In fact it would put him in a worse position than a trespasser, and there seems no need for so stringment a rule.

(d) *Mortgage-Redemption—Mortgagee becoming a part owner—Form of decree.*

Although it is true that the appellant mortgagees have no right to retain possession after the tender and should be made accountable on that basis, having regard to practica

convenience and the scheme of the Transfer of Property Act the proper course in a case where mortgagee has become an owner of some of the suit properties would be to determine the amount of the mortgage-debt for which the properties purchased by the appellants are liable and to finally settle the questions arising between the parties so as to obviate the necessity for a fresh suit. (P. 536)

(e) *Evidence Act S. 115—Execution of decree—Estoppel to appeal.* (P. 539 C. 1)

Execution of a decree has never been held to estop the decree-holder from appealing from it so far as it is against him.

S. Srinivasa Iyengar and V. Ramadoss—for the Appellants.

T. Ramchandra Rao, A. Krishaswwami Iyer, P. Samasundram, G. Lakshmanna, P. Satyanarayana, A. Venkatachlam, M. S Venkatrama Iyer. N. Rama Rao and K. G. Babu Rao—for the Respondents.

Wallis, C. J:——These are appeals by the defendants from the preliminary decree and final decree in favour of the plaintiff against the defendants mortgagees who refused to restore the mortgaged property in spite of the mortgage debt having been deposited by the plaintiff under S. 83 of the Transfer of Property Act. The plaintiff is the assignee of three-fourths of the mortgagor's interest in item one and the mortgagees are also found to have become the owners of the equity of redemption in parts of the mortgaged property which were sold for arrears of revenue which had accrued on other property not the subject of the mortgage belonging to the heirs of the deceased mortgagor. The plaintiff impugned the revenue sales and also contended that the purchases were made *benami* for the mortgagors, but the Subordinate Judge found that the plaintiff had failed to establish his case on those points and I agree with my learned brother that in the argument in the Memorandum of objections we have not been shown any sufficient reason for differing form him on this point. The case must therefore be dealt with on this footing.

The first question that arises is, whether the plaintiff is entitled, as the Subordinate Judge has found, to make a deposit of the whole mortgage debt notwithstanding that the mortgagees have become the owners of part of the mortgaged property. On this question, I think the plaintiff was entitled to do so under the provisions of the Transfer of Property Act. They were undoubtedly persons entitled under S. 91 of the Transfer of Property Act to sue for redemption and consequently come within the words "or any other person entitled to institute such suit" in S. 83 so as to entitle him to make a deposit under that section. These statutory rights are not taken away by the recognition in S. 60 of the right of partial redemption where the mortgagee has become the owner of part of the mortgaged property. It was no doubt held in *Mamu* v. *Kuttu* (1), that where the mortgagee had acquired a part of the mortgaged property, the mortgagors could not even sue for redemption until the mortgagor had obtained a decree for partition,but this decision was before the Transfer of Property Act and even then was of very questionable authority for reasons which will appear later.

In the present case the plaintiff tendered the whole amount of the mortgage debt without any proportionate reduction in respect of the part of the mortgaged property purchased by the mortgagee. On the principle of the greater including the less, *omne majus continet in se minus*, the tender was good even if they were entitled to tender a lesser sum, but in my opinion they were not, as the amount of the proportionate reduction in the mortgage-debt had not been ascertained either by agreement or by the Court, and in these circumstances it cannot be said that there was any lesser sum which the plaintiff was entitled to tender or the mortgagees were bound to accept.

The effect of a lawful tender or deposit is to determine the mortgagee's rights as distinguished from his liabilities under the mortgage including his right to retain possession, and, where one of several mortgagors redeems the mortgage, to transfer such right of possession to the redeeming mortgagor who is in

(1) (1882) 6 Mad. 61.

turn entitled to retain it until redeemed by the other mortgagors. This is the principle embodied in S. 95 which provides that, "where one of several mortgagors redeems the mortgaged property and obtains possession thereof, he has a charge on the share of each of the other co-mortgagors in the property for his proportion of the expenses properly incurred in so redeeming and obtaining possession." This principle is in my opinion equally applicable to a case where part of the mortgaged property has been purchased by the mortgagee. In such a case the mortgagee's right to possession as mortgagee is equally determined by the tender or deposit and transferred to the redeeming mortgagor. The question as to the proper form of decree to be passed when he refuses to accept the tender will be considered later.

Another question which arises in these appeals is as to the extent of the liability of a mortgagee remaining in possession after a lawful tender or deposit to account for the gross receipts of the mortgaged property under S. 76 (i). On this clause the Subordinate Judge has held that the mortgagees are not entitled to credit for amounts which they paid after the tender to meet the revenue demands on the mortgaged property, and for necessary repairs and collection charges, and the commentaries and one or two cases bear out this view, but in none of them has the clause been very fully considered. Such a rule would involve a great hardship to a mortgagee who refused to accept the tender under a *bona fide* claim of right. It is often exceedingly difficult under the existing law to say whether a transaction amounts to a mortgage or a sale, and where it is ultimately found to be a mortgage, it would be very hard to refuse the mortgagee credit for all the necessary expenses incurred by him whilst contesting the right to redeem. As observed in argument it would put him in a worse position than a trespasser, and there seems no need for so stringent a rule. There is nothing like it in England where a mortgagee who refuses to accept the tender may have to bear the costs of the suit for redemption necessitated by his refusal and also loss of interest from the date of the tender, a provision now embodied in S. 84 of the Transfer of Property Act, *Bank of New South Wales* v. *O'Connor* (2). In the case of his being in possession such a mortgagee would also have to account for the gross profits; but there is no authority for saying that he would not be entitled to all due allowances. I do not think that cl. (i) when properly understood imposes any larger liability than would be incurred by a mortgagee in England. All that it says is that he, that is, the mortgagee must notwithstanding the provisions in the other clauses of this section, account for the gross receipts from the mortgaged property from the date of the tender or the earliest occasion when he could draw the money out of Court. He does so account in legal parlance when he brings the whole gross receipts into account, but the section does not say that when he brings the whole gross receipts into account he is not to have the benefit of the same allowances as a trespasser. If the legislature had intended to enact in this matter a novel rule of drastic character I think they would have used clearer language and would at least have said 'notwithstanding anything in S. 72 as well as notwithstanding anything in the other provisions of S. 76,' because it is S. 72 which deals with the credit side of a mortgagee's account and S. 76 deals mainly with the debit side. Further, there is nothing in the history of the clause to suggest that they had any such intention. It is not to be found in the rules as to transfer of property appended to the Sixth Report of the Indian Law Commission, 1870, or in the Transfer of Property Bill based on those rules which was introduced in 1877, but was inserted by the Select Committee who re-drafted the bill with express reference to the case of *Mussammat Asima Beebee* v. *Sheik Ahmudee and others* (3), as cited in Macpherson on Mortgages which was then the accepted text book on mort-

(2). (1889) L. R. 14 A. C. 273.
(3) 9 N. M. P. S. D. 1.

gages in India. It was there held that after a lawful tender a mortgagee continuing in possession was not entitled in accounting for the profits accruing subsequently to the tender to the benefit of the stipulations in the mortgage deed. The mortgage deed had made the mortgagor responsible for any balances due from farmers and cultivators of the land and contained other stipulations as to the way in which the profits should be estimated. The Court held that the effect of the tender was to render the mortgage deed of no effect from the date of the tender and to put an end to the mortgagor's liability for the balances in question and observed "Upon the same principle, the appellant is entitled to the benefit of the tender in the mode of calculating the claim, the proceeds of the estate being estimated according to the gross jamabandi for 1252 fasli *without reference to the terms stipulated in the deed.*"

But for the words "notwithstanding the provisions in the other clauses of this section" cl. (i) might be regarded as merely giving statutory effect to this decision. these words apparently were inserted in the clause *ex abundante cautela* to meet any possible contentions that might be based on the other clauses of the section and especially on clause (*h*) read with S. 77. However this may be, they are not in my opinion sufficient, especially having regard to the omission of any reference to S. 72, to put the mortgagee in accounting for the gross receipts of the property in a worse position than a trespasser; and I think the Subordinate Judge was wrong in disallowing the items claimed by the mortgagees on this head.

The Subordinate Judge has held that the plaintiff was entitled on the tender to take possession of the whole of the mortgaged properties, and has left the rights of the owners of the equity of redemption including the mortgagees to be adjusted in other proceedings. It is no doudt the practice in England to pass such redemption decrees subject to the rights of other persons interested. The appellants contended in the lower Court and here that the Subordinate Judge should have left them in possession of the items of mortgaged property purchased by them and allowed the plaintiff to redeem the remaining properties at a proportionate reduction instead of driving them to a fresh suit. It is of course true that the appellants had no right to retain possession after the tender and should be made accountable on that basis, but having regard to practical convenience and the scheme of the Transfer of Pproperty Act I think the proper course in a case like this would have been to determine the amount of the mortgage debt for which the properties purchased by the appellants were liable and to have finally settled the questions arising between the parties so as to obviate the necessity for a fresh suit. I concur with the order proposed by my learned brother.

Krishnan. J.—*In Appeal No.* 352 *of* 1918:—The suit from which this and the connected appeal arise was one brought to redeem an usufructuare mortgage executed in 1896 by the late Ex-Nawab of Masulipatam in favour of one Tadepalli Purushottam, now deceased, the then manager of the joint Hindu family of defendants 1 to 15, 18 to 34 and 38, for one lakh of rupees with the condition *inter alia* that the usufruct was to be taken in lieu of interest. The properties mortgaged consisted of 9 items. Plaintiff is the purchaser of a three-fourth share in item I subject to the mortgage. Defendants 16, 17 and 35 to 38 are stated to be assignees of the shares in the mortgage of two of the members of the mortgagee's family and defendants 39 to 53 are the heirs, or assignees from the heirs, of the original mortgagor the Nawab who died in 1898. Defendants 54 to 61 claim to be purchasers of the equity of redemption in some of the items mortgaged. These defendants 39 to 61 were added as parties as persons interested or claiming to be interested in the equity of redemption. The plaintiff deposited in Court the whole of the mortgage money Rs. One lakh under S. 83 of the Transfer of Property Act in April 1916 but the mortgagees refused to receive it unconditionally and be redeemed. Hence this suit.

The lower Court passed a preliminary decree for redemption in plaintiff's favour directing the mortgagees to take the money deposited in Court and to deliver up possession of all the 9 items to him; and it also directed that he was to get the rents and profits of the mortgaged properties from the date of suit to date of delivery or for 3 years whichever was the shorter period at a rate to be determined subsequently. Appeal No. 352 is the appeal against the decree by the mortgagee; two memoranda of objections have also been filed against the decree one by plaintiff and the other by two of the heirs of the late Nawab, challenging the finding of the learned Subordinate Judge that the equity of redemption of items 6 and 9 had been validly sold in a Revenue sale and had passed from the mortgagors, but raising no other objections. A final decree was subsequently passed settling the amount of mesne profits which the defendants were to pay to the plainti , disallowing their claim to deduct the Government revenue paid and the charges said to have been incurred for repairs and for collection. The connected Appeal No. 222 is by the mortgagees against that final decree and plaintiff has filed a memo of objections in it claiming his costs which had been disallowed.

Several important questions have been raised in these appeals. It will however be convenient to dispose of the Memoranda of Objections in Appeal No. 352 first as they raise the question whether the finding that the equity of redemption became vested in part in the mortgagees is correct or not, as much of the argument in the case depends on it. There is no real dispute about the facts regarding it. Arrears of Government revenue became due by the mortgagor's heirs on certain properties belonging to them in the Cuddapah District. For the realisation of these arrears the equity of redemption of items 6 and 9 was attached though they were situated in a different district and was sold in revenue sale and purchased, the latter by 54th defendant, a clerk of the mortgagees, and the former by the 55th defendant, his brother-in-law. The attempts of the mortgagor to get these sales set aside failed and the sales were confirmed. It is the mortgagor's case that these purchases were *benami* for the benefit of the mortgagor and it is contended that under S. 90 of the Indian Trust Act the mortgagees should be treated as having made the purchases and as holding the properties for the benefit of the mortgagor. The argument however fails as it is not shown that the mortgagees availed themselves of their position as such in getting the properties sold or in buying them, even if we assume that the purchases by 54th & 55th defendants were really *benami* for them. The sale was not for arrears of revenue due on the mortgaged properties and the mortgagees were under no obligation to pay the revenue on the mortgagor's other properties. It cannot therefore be said that they committed any default in allowing the equity of redemption to be sold for such arrears. It was however urged that as a sum of Rs. 2,500 had been left with the mortgagees by mortgagor and that they should have paid the arrears out of it when the mortgaged properties were attached, to save them from being sold. But the evidence is that this money was left with the mortgagees for the express purpose of effecting repairs to the mortgaged properties and it could not therefore be properly used by them for paying any arrears of revenue. No other objection has been urged before us regarding these sales and we must therefore accept the finding of the Subordinate Judge on issue 3 that the revenue sales are valid and binding on the mortgagor. The further plea that the purchases were *benami* for the mortgagor is not raised now and is not supported by any evidence. The Memoranda of Objections must therefore both be dismissed with costs.

Turning now to the Appeal No. 352 before us the main points argued were those raised (1) in issues 1 and 2 and (2) in issue 8, namely, whether plaintiff is entitled to get possession of all the properties including items 6 and 9 on redemption and whether the payment into Court under S. 83 of the

Act was a valid deposit in law. Taking the first question first there can be no doubt that under S. 60 of the Transfer of Property Act a person entitled to a share only of mortgaged property cannot redeem his share only on payment of his proportionate share of the mortgage money except in the only case where the mortgagee or when there are more mortgagees than one, all of them has or have acquired in whole or in part the share of a mortgagor. In fact the rule is that a mortgage should be redeemed as a whole; the right to redeem in part is given to a mortgagor as a privilege in the exceptional case noted above to avoid multiplicity of suits and in none else. Now in the present case the plaintiff has sued to redeem the whole mortgage. I think he was bound to do so for he could not take advantage of the exception because the equity of redemption in items 6 and 9 is not shown to have passed to all the mortgagees as a body but only to some of them as shown by the Subordinate Judge in paras 14 and 15 of his judgment. Plaintiff was therefore clearly entitled to redeem the whole mortgage. Nevertheless I agree with the learned Chief Justice that the more convenient course here is to decide in this case itself, as all the parties are before us, the question how much of the mortgage money should be taken as proportionately chargeable on items 6 and 9 and to allow redemption of the rest of the items only on payment of that proportionate amount. This can be done without prejudice to plaintiff's claim to mesne profits and without deciding, between the several persons entitled to the mortgagee's interest, their rights *inter se*. I would therefore call for a finding on this question on fresh evidence.

On the next question as to the validity of the deposit in Court, I agree with the learned Chief Justice that under S. 83 the right to deposit the mortgage money in Court is co-extensive with the right to institute a suit for redemption as is apparent from the wording of the section. A person who owns a share only of the equity of redemption is thus in my opinion as much entitled as a person owning the whole of it to take advantage of S. 83 by depositing the amount due on the mortgage and as in this case I have held that the plaintiff is entitled to redeem the whole mortgage he was clearly entitled to deposit the whole mortgage money in Court as he did. In my opinion the section applies equally to cases where the mortgagee has obtained a share of the equity of redemption for there is no limitation in its language. It is not necessary in this case to consider whether in such circumstances the mortgagor should deposit the whole mortgage amount due into Court, or only that portion of it which he would have to pay if he were taking advantage of the exception in the last clause of S. 60 ; for the mortgagor in this case has paid the whole mortgage money. The objection, that the plaintiff could not make a valid deposit because he was only the owner of a share of the equity of redemption and because some of the mortgagees had also become entitled to a share in it, must thus be overruled.

A further objection was raised that the deposit ceased to be a valid one when the plaintiff through his vakil opposed the application of the defendants under Exhibit IV, to be paid the amount deposited and got it dismissed. If he improperly prevented the mortgagees from drawing out the money the tender may become bad under S. 84 of the Act but what happened here was the defendants wanted to take the money without prejudice to certain contentions they were raising and they asked for an order of Court to that effect. This appears from Exhibit IV itself. Plaintiff objected to the Court making any such order, as I think, he was perfectly entitled to do ; he did not object, so far as I can see, to the money being drawn out by them and I do not think his action affected the validity of his tender in any way. I therefore agree that plaintiff is entitled to the advantages flowing from such a deposit. What those advantages are, in this case, form the subject of the connected Appeal No. 222 and I shall consider the question there.

In this appeal one further argument raised by the respondent remains to

be considered. It was contended that because the defendant drew out the money deposited in Court after the decree of the lower Court and pending the appeal to this Court, they must be taken to have acquiesced in that decree and their appeal is therefore incompetent. The facts bearing on this objections are not clear. Some of the money seems to have been taken away not by the defendants but by their attaching creditors and that can imply no acquiescence at all on defendants' part. Whatever they drew out themselves they seem to have drawn out in execution of the decree in this case. Execution of a decree has never been held to estop the decree-holder from appealing from it so far as it is against him.

Reliance was however placed by the learned vakil for the 1st respondent for his objection, on the ruling in *Ramachandra Marwari* v. *Rani Keshobati Kumari* (4). On examining that case it will be found to be entirely distinguishable. Their Lordships were considering the effect under the 2nd clause of S. 83 of a withdrawal of money which had been deposited in Court in full discharge of the mortgage debt. There was no decree in that case prior to the withdrawal. The case reported in *Lal Singh* v. *Pitam Singh* (5) was also relied on. In that case no doubt the money was taken out of Court after the decree of the Appellate Court and pending a Second appeal. The facts of that case however are not very clear, for in meeting the argument that the money should be deemed to have been taken out in execution of the redemption decree, the learned Judges say that the appellants as defendants against whom the decree for redemption had been passed were not the parties to apply for execution and that in the application they made to have the money paid out it was distinctly stated that it was lying in deposit under S. 83 Transfer of Property Act. In the present case there is a clear order in the decree that the defendants were to take out the money in Court and it would therefore seem to be distinguishable from the Allahabad case. Otherwise with all respect to the learned Judges I would have been unable to follow their ruling. Once a decree is passed settling the rights of parties on redemption, what is thereafter done should be referred to that decree. The payment of the mortgage-money can only be under that decree and not under S. 83, Transfer of Property Act, which no longer applies. This objection must also be over-ruled.

Before disposing of this appeal it is necessary to call for a finding on the question "What are the proportionate amounts of the mortgage-debt chargeable upon item 6 and item 9?" The finding must be arrived at in the manner explained in *Ponnambalo Pillai* v. *Annamalai Chetiar*, (6). Fresh evidence will be allowed. Finding in 2 months after the reopening. Objections 10 days.

In A. S. N. 222 of 1919

The question in this appeal turns on the meaning to be given to the expression "account for the gross receipts" in S. 76 (i) of the Transfer of Property Act. The mortgagees claimed to deduct from the rents received by them certain sums of money for (1) revenue paid to Government on the mortgaged properties (2) repairs effected to them and (3) collection charges for collecting the rents and profits. The learned Subordinate Judge has disallowed the whole of these three items. It is contended in appeal that all these should be allowed in favour of the mortgagees.

As found in the connected appeal, the mortgage money was properly deposited in Court by the plaintiff under S. 83 and if the mortgage was one which provided for a rate of interest, that interest would have ceased to run under S. 84. But in this case we have a mortgage with possession with the condition that the usufruct was to be taken in lieu of interest; S. 76 (i) therefore applies. The

(4) (1909) 36 I. A. 85-36 Cal. 840-10 C. L. J. 1-6 A. L. J. 617-6 M. L. T. 1-11 Bom. L. R. 765-13 C. W. N. 1102-19 M. L. J. 419-2 I. C. 935 (P. C.)

(5) (1903) 25 All. 179-23 A. W. N. 2.

(6) (1920) 43 Mad. 372-38 M. L. J 239-(1920) M.W.N. 235-11 L.W. 429-55 I. C. 666 (F. B.)

Subordinate Judge construes the words "account for gross receipts" as meaning "account to the mortgagor for the total receipts from the mortgaged properties without any deductions whatsoever" and he relies on *Beni Prasad* v. *Narain Das* (7) *Satyabadi Behari* v. *Harabati* (8), and Shephard and Brown's Commentary on the Transfer of Porperty Act. There is no authority cited by the commentators for their opinion; and there is nothing in *Satyabadi Behari* v. *Harabati* (8) which supports the Subordinate Judge's view. In *Beni Prasad* v. *Narain Das* (7), no doubt collection charges were disallowed but there is no discussion of the meaning of the words in question, in the judgment. There is thus no real authority on the point.

To take the meaning that the Subordinate Judge has given to the words would, as pointed out by the learned Chief Justice, impose an unduly excessive burden upon a mortgagee in possession who fails to accept a valid tender or deposit. S. 84 imposes on the mortgagee in such circumstances, only the liability of interest ceasing to run; and in the case of a mortgagee in possession who takes his interest from the usufruct, the application of that rule would only result in his having to account for the whole of usufruct without deducting anything for interest but it would not affect in any way his right to any other deductions he may be entitled to. Should we then construe the words of S. 76 (*i*) as imposing a much larger liability by taking away from him all rights of deduction? There is no reason why a mortgagee in possession should be treated by the legislature in a more stringent manner than any other mortgagee committing the same default I think full effect can be given to the words "account for gross recepits" by holding that in the mortgage account to be made up for redemption, the mortgagor should be debited with the total receipts from the mortgaged property without reference to any covenants between the parties in the mortgage deed to take any particular amount as representing such receipts or to apprporiate anything for himself towards his interest of otherwise. The words will then have no bearing on the question of deductions claimed under the provisions of the statute. The history of the provision as set out by learned Chief Justice shows that this is the proper meaning to be attached to them. The words were introduced for the first time by the Select Committee on the Transfer of Property Bill and their report shows that the provision was taken from the case of *Asima Bebee* v. *Sheik Ahmudee and others* (3). In that case the tender by the mortgagor was found to be valid and legal and the question was what surplus profits alleged to have been realised by the mortgagees in possession, the mortgagor was entitled to. The learned Judges held that on the tender being made the conditions and stipulations in the deed in favour of the mortgagees ceased to be in force and therefore they were not entitled to interest thereafter and that they could not rely on an express stipulation in the deed which made the mortgagor answerable for balances due from farmers and cultivators from Fasly 1252 and that the proceeds of the estate should be estimated according to the gross jamabandi without reference to the terms stipulated for in the deed. They however allowed the mortgagees credit for collection expenses. It would thus seem that the term 'gross receipts' has no reference to statutory deductions but only to the stipulations in the deed. A mortgagee in possession who wrongly refuses to accept a tender or deposit does not thereby become a trespasser and cease to be a mortgagee. See *Satyabadi Behara* v. *Harabai* (8) and *Rukmani Bai* v. *Venkatesh* (9). The duties imposed on him by S. 76 continue in force against him and it will be very strange to hold that though he is compelled by law to make certain payments such as the Government revenue, he is not to get them repaid. I think the words in S. 76 (*i*) do not necessitate such a construction and that they only mean that the mortgagor should be debited in

(7) (1909) 5 I. C. 529.
(8) (1907) 34 C. 223-5 C. L. J. 192.
(9) [1907] 31 Bom. 527-9 Bom. L. R. 958.

the account with the total receipts from the mortgaged property without reference to the stipulations in the mortgagee's favour in the deed. If the mortgagee proves that he has made payments from the income validly under clauses (*c*) and (*d*), to that extent I would hold that he has accounted for the receipts. It seems to me that the words "notwithstanding the provisions in the other clauses of this section" have been added to clause (*i*) out of abundant caution as the learned Chief Justice has pointed out, to make it clear that the special rule in that clause is to prevail against the general rule embodied in cl. (*h*) which enables the mortgagee to appropriate the receipts himself towards his interest and principal. They cannot be read as extending the scope of the words "account for gross receipts."

One other question has been raised on the construction of S. 76, cl. (*i*), namely, that the mortgagees are liable only for the total receipts or in other words for the total amount of rents and profits actually collected by them and not for those left uncollected. S. 76 (i) no doubt speaks only of receipts and under that section it will be difficult to make the mortgagees liable for uncollected rents and profits as the Subordinate Judge has done but S. 76 (*b*) imposes on the mortgagee in possession the duty of collecting the rents and profits and the last clause of the section makes them liable for any loss resulting from their failure to perform that duty. Their liability for uncollected rents and profits extends therefore only to the extent to which it can be brought within those provisions and does not depend on S. 76 (*i*). No doubt S. 77 provides that clause (*b*), (*d*), (*g*) and (*h*) of S. 76 shall not apply to cases where by the contract between the parties the mortgagees are to take the receipts from the mortgaged property towards interest as was the covenant in the contract before us. But when on deposit of the mortgage money in Court that covenant ceased to be in force, the excepted clause became applicable to the mortgagees.

We have now to consider what deductions the mortgagees are entitled to. As regards the Government revenue alleged to have been paid, it seems clear they were entitled to pay it under S. 76 (*c*) and on the view I have taken, they are entitled to credit for it in the mortgage account. Collection charges were also properly incurred by them under S. 72 (*a*) and they are entitled to credit for them also. The last item is the charge for repairs. This seems to stand on much the same footing. After the deposit was made in Court and the covenant for taking the usufruct for interest ceased to be in force, S. 77 ceased to apply and S. 76 (*d*) became applicable thereafter. The mortgagees were therefore entitled to pay the charges for any necessary repairs from the rents and profits and claim credit in the account.

No other question has been argued in this appeal. A fresh finding must be called for from the Subordinate Judge as to the proper amount payable by the mortgagees to the plaintiff for the Faslis in question and subsequent Faslis so far as necessary in the light of the above observations. In taking the account items 6 and 9 will also be included. Fresh evidence may be taken and the finding raturned at the same time as the finding in the connected appeal and ten days will be allowed for objections as in that case. The Memorandum of Objections as to costs will stand over for disposal with the appeal.

Judgment (*after return of the finding*):- *In Appeal No.* 352 *of* 1918.—This is an appeal against the preliminary decree in Original Suit No. 4 of 1917 on the file of the Court of the Temporary Subordinate Judge of Rajahmundry. The learned Subordinate Judge has now returned the finding that the amount of the mortgage debt proportionately chargeable on items Nos. 6 and 9 is Rs. 17,272. Neither party has objected to this finding. The total amount of Rupees one lakh paid into Court having been withdrawn by the mortgagees they must refund the above amount (Rs. 17, 272) on their being allowed to retain possession of items Nos. 6 and 9 without these items being included in the redemption decree. To avoid any further com-

plications we direct the mortgagees, defendants Nos. 1 to 38, to pay into the lower Court the above-mentioned amount within a fortnight from this day. We make this order as the parties agree to it without prejudice to their contentions. The appeal is adjourned to 21st August, 1922 for final orders.

In Appeal No. 222 of 1919,—This is an appeal against the final decree passed in O. S. No. 4 of 1917. In that suit this Court called for a fresh finding from the Subordinate Judge as to the proper amount payable by the mortgagees to the plaintiff for the Faslis in question and subsequent Faslis from 1326 to 1330 taking into consideration the deductions to be allowed to the mortgagees. The Subordinate Judge has now returned his findings as regards the profits the mortgagees are, in his opinion, accountable to the mortgagor for the Faslis in question.

As regards items 2, 3, 4, 5, 7 and 8 there is no dispute raised by the defendants (mortgagees) or by the mortgagor. The dispute is confined to item 1 and items 6 and 9. As regards item 1, the first objection taken is that the estimate of the Subordinate Judge of the profits payable for Faslis 1326 and 1327 by the mortgagees is excessive. It seems to have been argued in the lower Court that it was not open to the mortgagees to raise the question as the previous proceedings barred them from doing so, but we think it is not necessary in the circumstances to go into that question, for it is sufficient to find on the mortgagor's second contention that there was no true deficit in the collection in those faslis. The Subordinate Judge has discussed the evidence bearing upon this point at some length. We entirely agree with him that the evidence is quite inadequate to establish that there was any deficiency whatever and that any tenant had failed to pay his rent for those Faslis. The evidence of D. W. 6, as the Subordinate Judge points out, is practically mere hearsay evidence. It is, strictly speaking, not admissible. The evidence of D. W. 7 is quite indefinite and inconclusive, and not supported by any accounts Although it is admitted that there were Chittas and Averjas for those Faslis, none of them has been put into Court and proved. Furthermore, as we have already held in our previous judgment, the mortgagees would be liable to account even for the amount that they have failed to collect if the failure was due to their failure to use their best endeavours to collect them; and there is evidence on record to show that, if there was any failure to collect the whole of the rent, that must have been due either to indifference or negligence on the part of the mortgagees to collect. In these circumstances we agree with the Subordinate Judge that the mortgagees were rightly debited with the total amount of rent payable upon these lands for the Faslis in question by the tenants in occupation.

There is a second point raised with reference to item 1 and that refers to the complaint made by the plaintiff that he did not get possession of 19 acres and odd cents in item 1 when he got possession thereof. The Subordinate Judge has found it proved on this point that the 19 acres and odd were not really put in possession of the mortgagor. So far we are in agreement with him, for there is no contradiction of what the witness D. W, 7 says on the point; but on the question whether the mortgagees (defendants) are liable to account for the profits of these 19 acres for the Faslis in question, we regret we are unable to accept the Sub-Judge's view. There is nothing on record to show that the failure to obtain possession of these 19 acres was due to any default on the part of the mortgagees. The Court directed the whole of the item to be put in possession of the mortgagor. If he had not been so put in possession, it was his duty to complain to the Court and point out that he had not been so put in possession and ask the Court to direct the judgment-debtors (the mortgagees) to so put him in possession but he did not do any such thing. He seems, according to the evidence of the mortgagees, to have been obstructed by somebody in actual possession of the land against whom it is said he had taken proceedings to clear the obstruction and has now brought a suit. There

was no complaint to the Court of any short delivery, as the Subordinate Judge points out, nor was any intimation given to the defendants that there was any difficulty on account of short delivery. The evidence seems to indicate that the plaintiff had adopted the method of suing the party in possession and recovering the property from him with mesne profits. That assumes that the property is not held by the person in possession at the instance of, or under, the judgment-debtors. There is also no direct proof that the obstructors were put in possession by the judgment-debtors or that they were holding it for the benefit of the judgment-debtors. If they were trespassers or were persons who were already in possession before the mortgage was created, the mortgagees would not be under any obligation to give vacant possession to the plaintiff. They were bound to give such possession as the mortgagor gave to them. In these circumstances, considering that the plaintiff has chosen to seek other means to get profits from the party in possession, it is not right to make the defendants liable for such profits of the 19 and odd acres included in item 1 and we disallow that. In this view it is not necessary to go into the question of quantum of profits of these 19 acres.

These are the only objections with reference to item 1. Now as regards items 6 and 9 it is contended before us that, some of the mortgagees having purchased the equity of redemption of those items, they are not bound to give the profits of those lands to the plaintiff. Some question was raised whether this point was not covered by our previous judgment but assuming that we did not expressly decide the question though our observations would seem to indicate that we were rather inclined to think that the defendants would be liable for such profits, we have come to the same conclusion now and hold that the defendants are liable to make good to the plaintiff the profits of these land as well. The plaintiff had paid into Court one lakh of rupees, the total of the mortgage amount and the plaintiff was entitled therefore, as we have already held, to get possession of the whole of the lands, and of course he would have then been able to collect the profits of all the lands. It is only as a matter of convenience and concession to the defendants we have allowed them in this suit itself to retain items 6 and 9 on payment of the proportionate amount of the mortgage debt chargeable on those items. Strictly they were bound to hand over possession of the mortgaged properties on payment of the one lakh of rupees into the Court. If they did not draw out the money it was their own fault. In those circumstances it is clear that the plaintiff is entitled to the profits on these items up to the date when the defendants pay back into Court the Rs. 17,000 and odd the debt chargeable upon these two items.

As regards item 6 there is no dispute as to the amount of profits. But as regards item 9 a dispute has been raised by the defendants (mortgagees) as to the quantum of profits charged against them for Faslis 1328, 1329 and 1330. It is admitted the charges are correct for faslis 1326 and 1327. The contention here is very much like the contention as regards item 1. What the mortgagees say is that they were not able to collect the whole of the rents payable by the tenants according to their engagement and that there was a deficiency in fasli 1328 of about 16 puttis, in Fasli 1329 of about 13 puttis and in Fasli 1330 of about 7 puttis, the normal rent payable being 44 puttis and a sum of Rs. 100. As regards the deficiency alleged, the Subordinate Judge has found that such an allegation has not been proved and, on a consideration of the whole of the evidence bearing upon it, we are not prepared to say that the evidence is such as to justify us in reversing that finding. No evidence on the point has been given by the persons who actually collected the rents. Certain books are produced which were books kept in the head office in Masulipatam, but they were books written up from chittas and other notes which had been sent by the persons who collected rents. Such

chittas are not produced, nor are those accounts of the actual collections proved. In those circumstances it is difficult to say that the defendants have discharged their burden of proof that there was really a deficit in collection in spite of their best endeavours. They were certainly under a duty to keep proper accounts and if they have not done so and are put to any loss in consequence, it is their own fault. We accept the sub-Judge's finding that for these Faslis also the rent collected should be taken to be the same as the rent collected for the two previous faslis.

There is further, as we have already pointed out, in respect of item (1) the fact that on the evidence of the defendants themselves it would, seem that they did not use their best endeavours to collect the rent that they did not effect the necessary repairs and that they somewhat neglected the collection because of the pendency of this suit. The difference in the amount as expressed in rupees of the rent of these lands in the plaintiffs account is due to the fact that the price of the paddy was different in the different years but they all represent the value of 44 puttis of paddy and the Rs. 100 rent payable each year. In these cricumstances, we accept the Subordinate Judge's finding that on item 9th the amount of profits payable by the mortgagees to the mortgagor is what he finds it to be, namely, Rs. 12, 168-1-9

These are the objections raised by the defendants in this Court. The plaintiff has also filed objections claiming that he should be granted interest on the profits from the date of collection. We think he has not established that claim. After all, what he was entitled to under S. 76, cl. (i) of the Transfer of Property Act is the gross receipts by the mortgagees from the date when he had paid the money into Court. We could not construe that as meaning that interest is also payable upon the amounts collected.

As regards the deductions made on account of Government revenue and other charges there is no dispute between the parties. Those items are accepted by them both.

Now a further claim has arisen in favour of the plaintiff (mortgagor) on account of the lapse of time, for at the time when the Subordinate Judge estimated the amounts payable by the defendants to the plaintiff fasli 1330 had come to an end and fasli 1331 was beginning; now that fasli has also come to an end. The plaintiff is therefore entitled to get added on to the figures found by the Subordinate Judge the rents and profits for Fasli 1331 so far as lands which were not given possession of with crops standing on them before the end of fasli. That is a matter which we cannot dispose of at this moment but the parties have stated before us that, if they are given a little time, they would file statements and that possibly they could agree as to the amounts to be added and there would be no necessity to keep this suit on the file of Court any further; for this purpose alone we shall give them a short adjournment. The plaintiff would file a statement and give a copy of it to the other side in ten days' time. The defendants will then have a week to say whether they agree to it or if they disagree, to file a statement. We will defer passing final orders till the case is heard again on the 21st August.

There remains the question of costs raised in the Memoradum of Objections. The first Court gave the plaintiff costs of the preliminary decree, but as regards the final decree it made each party bear its own costs. On hearing both sides we are inclined to think that there is no sufficient cause for interfering with the discretion exercised by the Court in that matter except as regards the stamp duty payable on the amount which should have been decreed to the plaintiff by the lower Court according to the views we have now expressed.

As regards the costs of this Appeal No. 222, we direct each party to bear its own costs.

The appeal is adjourned to the same date as Appeal No. 352, namely, 21st August, for final disposal.

August, 1922, in pursuauce of the order contained in the judgment dated the 25th day of July, 1922, the Court (Krishnan and Venkatasubba Rao, JJ.) delivered the following Judgment:—

The money not having been paid in the lower Court as directed, the parties ask that time may be given for the money to be paid in this Court. Three weeks from this date is allowed for the payment Rs. 17,272 to the credit of Appeal No. 352 of 1918 in the High Court, Plaintiff will have leave to draw out the money from Court when paid in.

The appeals are adjourned for final orders to 14th September, 1922.

These appeals coming on this day for final orders in pursuance of the order of this Court dated the 21st August, 1922, the Court (Krishnan and Venkatasubba Rao, JJ.) delivered the following. Judgment:—*In Appeal No.* 352 of 1918:—The money Rs. 17,272 ordered to be refunded under above order having been paid into Court and as plaintiff has leave to draw it out, the decree of the lower Court must be modified by omitting items Nos. 6 and 9 from it. Otherwise the decree is confirmed. Appellants will pay the plaintiff's costs of the appeal.

In Appeal No. 222 of 1919:—The only dispute now is as to the amount of profits that the defendants are bound to account for to the plaintiff for fasli 1331 with respect to items Nos. 2, 6 and 9. The plaintiff claims in his statement Rs. 3,172 and 9. the defendants admit only Rs. 2,410 and odd. We think if we take Rs. 2,800 as the proper amount, we will not be far wrong, for each side is likely to exaggerate. It is not necessary to delay the case further by calling for a finding as the difference is small. There will be a final decree drawn up according to our judgment. By consent of parties defendants are given two months time from this date to pay the monies payable by them to the plaintiff including costs in Appeal No. 352 of 1918.

✱ 1923 MADRAS 545

PHILLIPS AND DEVADOSS, JJ.

(*Sri Raj A. V.*) *Jagga Row Bahadur Garu* (*dead*) *and another*.—Appellants.

v.

Gori Bibi alias Gonhar Bibi and others —Respondents.

F. A. No. 357 of 1919 D. 19th Dec. 1922, against the decree of the Dt. Judge of Vizigapatam dated 7th July. 1919.

(a) Deed—Construction—Principles—Endorsements—Conduct of the parties.

In construing Pharmanas and grants great weight ought to be attached to the actual words used in the grant than to an endorsement which is brief and simple and may not fully express the intention of the grantor. In interpreting deeds and contracts the intention of the parties to the document should be gathered only from the recitals in the document to which they are parties and not from what they said or did before the document was executed. P. 547

It is not a safe principle to interpret one document by referring to the recitals in another document. But where the Court has given a definite meaning to certain expressions, that meaning should be applied to such expressions in other cases. Page 549 C 1

(b) Grant Construction-Evidence—Opinions-Decision of Inam Commissioner.

The decision of the Inam Commissioner as regards the nature of the grant is not conclusive. It is for the Court to see what the nature of the grant is and though the Inam Commissioner's decision may help the Court in arriving at a finding as to the practice of an institution yet it is not conclusive as to the meaning of the grant. Page 548 C 2 P 549 C 1

(c) Mah. Law-Waqf—Alienation by Mutwalli-Necessity.

It is for the plaintiff to make out necessity and the mere fact that there has been a debt outstanding for a long time is not a circumstance going to show that when the debt was first incurred it must have been for a purpose which would bind the trust. Page 549 C 2

(d) Adverse possession—Trust property.

Any person claiming from a trustee under an invalid mortgage cannot acquire a prescriptive title against the trust.

(e) Civil P. Code S. 11.—Mistake of fact—Wrong parties.

A decision was wrongly held to be *Res Judicata* though the parties in the subsequent suit were not the same as in the prior suit. The same question came up for decision again in a third suit. The parties to the second and third suit were the same. *Held* though there is a mistake of fact as regards the parties yet the judges who decided the second suit decided that the matter was *res judicata* between the parties and therefore their decision was final. P.550

F. S. Vaz.—for the Appellant.

C. Madhavan Nair.—for the Respondent.

Phillips, J.—I agree, but I prefer not to express any opinion as to the meaning of the deed of grant (Ex. VI) but would base my decision on the two points (1) *res judicata*, (2) failure to prove necessity. The decision of this Court in Appeal No. 169 of 1911 is undoubtedly based upon a mistake of fact, but is none-the-less binding upon plaintiff. He cannot now contend that the properties are not wakf; that being so, he must prove necessity for the alienation. Having failed to do this, his appeal fails and must be dismissed with costs of the 1st respondent.

Plaintiff's right to retain possession of the property if he is really in possession does not arise in this suit for money and need not be discussed.

Devadass, J.—This appeal is against the decree of the District Judge of Vizagapatam dismissing the plaintiff's suit on a mortgage bond dated 8th December, 1900, on the ground that the hypotheca are wakf or trust properties and therefore could not be alienated, and that there was no necessity to mortgage the wakf properties.

It is contended for the plaintiff (appellant) before us (1) that the properties are not wakf properties, but are only burdened with a trust in favour of certain charities, (2) that there was necessity for the mortgage; and (3) that the plaintiff has prescribed for a mortgagee's possession and he could not therefore be evicted without the amount due on the mortgage being paid.

The question whether the properties are wakf properties or not, depends upon the construction of Ex VI which is a grant by the Nawab of Chicacole in the Hajira year 1121. The material portions of the document are

"Hajee Mir Mahommad Sadique, Servant of the Holy Hairs of the Holy Prophet engaged himself in praying the creator of day and night and always caused the humble fare reach some of the pious men, devotees, righteous and poor men after performing Fatihi (blessings) on the victorious soul of the Leader of all Prophets. He decorates, lights and performs the anniversary of the Mausoleum every year and low and high people gain prosperity by acquiring a portion of what was left of food and drink, presented and offered to the Holy men, etc.....and as there is no sufficient means for these laudable expenses in this world of causes accordingly considering all.....which relate to the person of the king of the world, etc.....the entire village of Buradi Kunjaram belonging to the said sircar assessed at seven hundred and twenty rupees with effect from the commencement of 1125 Fasli, as per endorsement, was granted by way of expenses of Farsh (carpeting, bedding, matting etc.) and lighting at the Anniversary and maintenance of servants, students, and other men deserving help at the hands of the Refuge of nobility. It is necessary that they should leave it in the enjoyment of the aforesaid person and treat it as above mentioned civil liability so that from year to year utilising the incomes thereof for the expenses of maintenance of servants and requisites of Dargah where angels pray, etc., etc."

On this document there is the following endorsement.

"The endorsement is to this effect that the entire village of Burdi Kunjram belonging to Chicacole Sirkar assessed at Seven hundred and twenty rupees (720) has been fixed by way of aids to maintenance of Haji Mir Mahommad Sadique, servant of the Holy Relics and for the expenses of the Dargah it is necessary that the said village should be left in the enjoyment of the said person with effect from the beginning of the 1125 Fasli. The signature on the petition is to this effect: "Give Sannad." One village, assessed at "720."

Mr. Hameed Hassan, the Persian Interpreter, has explained to us the object of the endorsement; when a petition for grant was presented to the Nawab an endorsement was made as to the order of the Nawab on the petition with a direction that a sannad should issue and on the basis of this the Pharmana or grant was prepared and signed by the Nawab, Ex. VI is a grant bearing the baiz (Royal Mark) of the Nawab.

It is contended by Mr. Madhavan Nair that this document was produced and admitted as evidence after both the plaintiff and the defendants had closed their case and that he was prejudiced thereby. The case was closed and arguments were heard by the learned District Judge on 4th April, 1919. He insisted upon the production of the original grant which was done by the 1st defendant on 16th April, 1919.

There is an endorsement on Ex. VI that both parties admitted the document. That endorsement is dated 24th April, 1919, judgment was delivered after the mid-summer vacation on 7th July, 1919. Mr. Madhavan Nair strongly urges that he had no opportunity of either explaining the contents of the document or of adducing evidence to counteract the effect of them. Seeing what the endorsement on the document is, it cannot be said that the learned District Judge admitted it in evidence without giving the vakils on both sides an opportunity of inspecting it and having their say on it. It cannot be said that this document was sprung upon the plaintiff ; such a document was referred to in the evidence, and seeing what the contention of the 1st defendant was in this case there is no reason to suppose that the plaintiff has been in any way prejudiced by the admission of the document after the arguments were heard. If the plaintiff's vakil thought that he could meet the document in any way he would certainly have asked the judge to give him an opportunity to do so. There is no affidavit before us to show that plaintiff's vakil asked for time to have an opportunity of putting forward any contention in respect of the document and that was refused. Therefore there is no substanee in the objection against the reception of this document in evidence.

It is next urged that Ex. VI does not create wakf but evidences a grant in favour of Mahomed Sadique with a direction to apply a portion of the income to certain charitable purposes, and therefore the property granted by the document is only burdened with a trust and is not trust property inalienable by the grantee. The circumstances under which the grant was made have to be considered. There was a shrine or Dargah in which the holy relics of the Prophet were deposited and Mahommad Sadique being a religious man was engaged in offering prayers, performing fatiahs, feeding the poor and probably in maintaining a school. The Nawab of Chicacole was approached to make a grant as Mahommad Sadique had not sufficient funds to meet all the expenses of the mosque. The endorsement shows that the Nawab wanted to grant the village in question by way of aids to the maintenance of Mahommad Sadique and for the expenses of the Dargah. Whatever might have been the intention of the Nawab as expressed in the endorsement, when the grant was actually made out it was so framed as to make the grant wakf. In construing Pharmans and grants, great weight ought to be attached to the actual words used in the grant rather than to an endorsement, which is brief and simple, and may not fully express the intention of the grantor. In interpreting deeds and contracts the intention of the parties to the document should be gathered only from the recitals in the document to which they are parties and not from what they said or did before the document was executed. The intention of the grantor is quite clear from the following words in the document. The entire village or Burdi Kunjram was granted by way of expenses of Farsh and lighting at the Anniversary and maintenance of servants, students and other men deserving help at the hands of the Refuge of Nobility, the Refuge of Nobility being Mahommad Sadique. What follows puts the intention beyond doubt :—

"It is necessary that they should leave it in the enjoyment of the aforesaid person and treat it as above-mentioned Civil liability so that from year to year utilising the incomes thereof for the expenses of maintenance of servants and requisites of Dargah."

Mr. Hameed Hussain (the Persian Interpreter O. S.).....explained that by Civil liability was meant that it was not an ecclesiastical grant but

wakf which under certain circumstances could be revoked. There is nothing in the operative portion of the document to show that it was intended as a grant to Mahommad Sadique with a pious wish that he should devote a portion of the income to charity. No doubt in that portion of the document relating to the reasons for making the grant the fact that he was not able to meet all the expenses is mentioned. But the operative portion does not make any mention of the needs of Mahommed Sadique.

It is urged that it could not have been the intention of the grantor to make the whole of the income wakf. The word 'wakf' is not used in the document and therefore the property granted by the document could not be considered trust property. This argument overlooks the clear recitals in the document and the object of the grantor, which are that his estate should endure for all time by the prayers that may be offered at the Durgah. Further the income was to be devoted not only to the maintenance of the servants but also of students and other men deserving help. It is said that it is usual in mosques and Durgahs to have a school for teaching Arabic, and the expenses in connection therewith cannot be estimated at any particular figure. The size of the school and the nature of the education imparted therein would depend upon the amount that could be spared for each purpose. Considering all the circumstances of the case, I think the learned District Judge is right in finding, that the property covered by Ex. VI is wakf property and therefore inalienable. In *Ramanandan Chettiar* v. *Vavu Levvai Marakayar* (1). ;

"The lands in question were comprised in a trust deed dated the 28th July, 1893, whereby they were settled substantially in trust to apply an indeterminate portion of the income for the due performance of customary *fatehas* for ancestors and to almsgiving, and to apply the residue of the income in perpetuity for the benefit of the defendants and their ancestors without power of alienation."

Their Lordships observe at page 123:

"The paramount purpose of the grantors was evidently to provide for all the needs of those charities up to the limit of the trust funds, the income received from the land. Those needs are the first burden upon that income. It is the residue, which may be a dwindling sum, that is given to the family. The contention, that, because the share of the income going to the family is at present larger than that going to the charities, the effect of the deed is so to give the property in substance to the family, and that therefore it is invalid as a deed of wakf, is, their Lordships think, entirely unsound."

And they hold that:

"Having regard to all the circumstances of the case, the dominating purpose and intention of the grantors in executing this deed evidently was to provide adequately for these charities."

Mr. Venkatachari for the 1st respondent contended that the inam title deed Ex. I described the property as trust property. In the first place the decision of the Inam Commissioner as regards the nature of the grant is not conclusive. Secondly, it is for the Court when the original grant is before it, to see what that document means. In this case the Inam Commissioner recommended that the inam may be continued on the present tenure. Ex. I shows no doubt that in column 2 the Inam is called Devadayam inam, but in column 10 it is said permanent so long as the service is performed. Then in column 21 it is found "to be confirmed and continued so long as the service is performed." It is not clear from this document whether the Commissioner treated it as service inam or as grant to the Dargah But as I said above it is for the Court to see what the nature of the grant is, and though the Inam Commissioner's decision may help the

(1) (1917) 40 Mad. 116; 44 I. A. 21 32 M. L. J. 101; 15 A. L. J. 139; 5 L. W. 293; (1917) M. W N. 180; 25 C. L. J. 224; 21 M. L. T. 215; 21 C.W.N. 521; 1 Pat. L. W. 394; 19 Bom. L. R. 401; 39 I. C. 235 (P. C.)

Court in arriving at a finding as to the practice of an institution, yet it is not conclusive as to the meaning of the grant and in this case, I have no hesitation in holding that the grant made by Ex. VI was a wakf grant. He relied upon a number of cases to show how the grant is to be understood. It is not a safe principle to interpret one document by referring to the recitals in another document. But where the Court has given a definite meaning to certain expressions, that meaning should be applied to such expressions in other cases. Neither the Firman in *Jewun Doss Sahoo* v. *Shah Kubeerooddeen* (2) nor the one in *Muzhurool Huq* v. *Puraj Ditharey Mohepattur* (3) gives us any help as regards the meaning of Ex. VI. In *Jujatmoni Chowdrani* v. *Romjani Bibee* (4) the requisites of a valid wakf are set out and in *Sathianama Bharathi* v. *Saravanbagi Ammal* (5) the original grant provided that the grantee was "to improve the Mutt, maintain the charity and be happy". It was found that according to the usage of the institution the specific trusts to which the income of the village was applicable consisted (1) in the distribution of Sadavarthi (rice and condiments were supplied in lieu of cooked food) in the Mutt to Gosayi and other pilgrims who pass through Mantithope; and (2) in the maintaining of pooja or worship in the temple called Sankara Bharati Swami Kovil (3) in supporting a watershed or pandal at a place near to the village called Ellandope and (4) in providing maintenance to the descendants of the grantee. The learned Judges held:

"The conclusion to which we come is that the village was granted as an endowment for the Mutt and the charities connected with it, and that what might remain after the due execution of those trusts was intended to be applied to the maintenance of the grantee or his descendants."

(2) 2 M. I. A., 390.

(3) 13 W. R., 235.

(4) (1884) 10 Cal., 533.

(5) (1895) 18 Mad., 266.

The next contention on behalf of the appellant is that there was necessity for the alienation and therefore the debt is binding on the trust. There is no evidence that there was any necessity for borrowing such a large sum. Ex. A is a usufructuary mortgage deed in favour of Sri Ankitam Atchayamma by Jainabibi in which there is a recital to the effect that Rs. 150 per annum was the sum payable for lighting and other expenses of the Dargah and Rs. 100 per annum for the festival of Urus. If that was all the amount that was needed for the up-keep of the Dargah it is not easy to conceive how such a large sum as 10,000 could have been required for the expenses of the Dharga. There is no evidence that owing to famines or other causes beyond the control of the Muthavalli it was necessary to borrow for upkeep of the Dharagh or for performing the annual festival. Though the District Judge has not discussed the evidence at great length, yet in the absence of any evidence worth the name it cannot be said that his finding as to the absence of necessity is wrong. It is for the plaintiff to make out necessity in a case like this, and the mere fact that there has been a debt outstanding for a long time is not a circumstance going to show that when the debt was first incurred it must have been for a purpose which would bind the trust. From the conduct of the parties, who treated the wakf property as family property, it can be safely inferred that they borrowed for their own purposes and it was only in the year 1884 that Jainabibi was willing to acknowledge that the village in question was granted for offering services to the Asar Sheriff at Chicacole and for the expenses as aforesaid and for the festivals in the Dargah. In the earlier proceedings affecting the plaint village there is no mention anywhere that it was granted for the purpose of any service. *Vide* Exs. H. J. and K. I therefore hold that no necessity has been proved in this case.

It is next contended by Mr. Madhavan Nair that he has prescribed for a mortgagee's title, and he relies

upon *Gopala Dasu* v. *Rami*, (6). He urges that the predecessors-in-title of the plaintiff were in possession from the year 1884 up to 1903 and though he relinquished possession for a short time yet possession was given back to him by the mortgagees though he could not collect the rent and that his possession was good in law. Granting that his contention is correct, he could only acquire title by prescription against the trustee or Mutavalli. I fail to see how he could prescribe for a title against the trust. If the properties are trust properties any person claiming from a trustee cannot acquire a prescriptive title against the trust. Ex. A is a mortgage deed dated 2nd December, 1884, executed by Jainabibi who was then the Mutavalli of the Darga. Whether the document is valid, or invalid, it would not give a right to anybody claiming under that document to prescribe for a title against the trust. Granting for argument's sake that the plaintiff has been in possession for more than 12 years under an invalid mortgage deed, and has prescribed for a title against the trustee, such prescriptive title will cease with the lifetime of the trustee. It is admitted that Jainabibi died in 1902 and Kurban Ali died in 1908. Jainabibi was admittedly the Mutavalli during her lifetime and any title by prescription acquired against her would not avail against her successor as was decided in *Vidya Varuthi* v. *Balusami Ayyar* (7). However the plaintiff who is not in possession seeks to recover the mortgage amount by sale of the hypotheca and is not resisting a suit for possession and he cannot therefore insist upon being redeemed. Therefore there is nothing in this contention on behalf of the appellant.

(6) [1921] 44 Mad., 946—13 L. W., 685-41 M. L. J. 194-[1921] M. W. N. 385—64 I. C. 328,

(7) (1922) P. C. 123-44 Mad. 831—48 I. A. 302—41M. L. J. 306—(1921) M. W. N. 449—15 L. W. 78—30 M. L. J. 66—26 C. W. N. 537—(1922) Pat. 245—20 A. L. J. 497—24 Bom. L. R. 629—65 I. C. 161 (P. C.).

There is one fatal objection to the claim of the plaintiff which has evidently been overlooked by the Court below. The plaintiff in O. S. No. 42 of 1907 on the file of the District Court of Ganjam sued Kurban Ali and others for a share of the properties. The plaintiff herein was made the 10th defendant in that suit. The 2nd defendant was Kulsan Bibi, the mother of the 1st defendant herein. In that suit Mr. Sadasiva Iyer who was the then District Judge of Ganjam found that the properties were wakf properties. Though he relied for his finding upon a previous judgment in O. S. No. 22 of 1905 to which the plaintiff was not a party, yet he allowed him to let in evidence to show that it was the self-acquisition of the 1st defendant. On the evidence he found that it was wakf property. 3rd defendant appealed against the decree. The appellant Chand Bibi did not make Gori Bi the 1st defendant herein who was added as the 18th defendant on the death of her mother Kulsan Bi, party to the appeal. The appeal was heard by Abdur Rahim and Srinivasa Aiyangar, JJ., who held that in the previous suit of 1905 the properties in dispute had been found by the then District Judge of Ganjam to be wakf properties and that the judgment was binding upon the parties. *Vide* Ex. IV. They evidently overlooked the fact that the 10th defendant (plaintiff herein) was not a party to the suit of 1905. The learned vakil who appeared for him did not bring to the notice of the learned Judges the fact that his client was not a party to the suit of 1905 They decided that the question whether the properties in dispute were wakf or not was *res judicata* between the parties and therefore could not be reopened. Though there is a mistake of fact as regards the parties to the litigation of 1905 yet the learned Judges decided that the matter was *res judicata* between the parties and therefore it is not competent for us to go behind their decision.

It is urged by Mr. Madhavan Nair that the plaintiff was given his costs in the High Court and therefore the judgment is not binding on him. The

plaintiff was allowed his costs evidently on the ground that he was a receiver in charge of the plaint properties, and it cannot be said that he was exonerated with costs and that the suit was dismissed as against him. On the other hand, it is quite clear from the judgment that the learned Judges considered that the parties before them were parties to the previous suit, and therefore the question was *res judicata* between them. On this ground alone the plaintiff ought to have been non-suited. The appeal therefore fails and is dismissed with costs of 1st respondent.

Appeal dismissed.

1923 MADRAS 551

OLDFIELD, J.

Kulandaivelu Pillai—Petitioner.

v.

Ramaswami Naicker and another — Respondents.

Civil Rev. P. No. 624 of 1921, D. 23rd Jan. 1923 under sec. 25 of Act IX of 887 praying the High Court to revise the decree of the Sub. J., of Madura in S. C. S, No. 18 8 of 1920.

Contract Act S. 233—Money paid to agent—Money not credited—Money recovered by principal by suit—Debtor's suit against agent.

The debtor paid money to the creditor's agent who failed to credit it. The principal brought a suit against the debtor. The debtor was *exparte* and a decree was passed and money recovered. Debtor then brought the suit to recover the money paid to agent. *held* he could not recover owing to his failure in former suit to take advantage of the plea of discharge which was open to him. P. 552 C. 2.

K. V Krishnaswami Iyer — for the Petitioner.

K. Rajah Iyer — for the Respondents.

Judgment.—The plaintiffs, here respondents, obtained a decree against the two defendants, second defendant being the petitioner in this Court for Rs. 400 in the following circumstances.—Plaintiffs, it is not disputed, owed first defendant Rs. 400 and, it is proved, paid it to second defendant, first defendant's ag nt, as such. second defendant however did not account to first defendant for the money, misappropriating it. First defendant then obtained a decree for it against plaintiffs, who did not appear or plead discharge On these facts the lower Court dismissed plaintiff's suit against first defendant but gave a decree against the second defendant; and the question in this revision petition is whether it was right in law in doing so.

It is clear that, if it was not, plaintiffs will have paid what they owed twice. But that result cannot affect the decision, because it is entitled, not by anything in the legal relation between the parties before me, plaintiffs and second defendant but by the failure of the former to take advantage in the previous suit against them of the plea of discharge, which was open to them. It was no doubt suggested on their behalf during the hearing of this petition that they should now be allowed to make first defendant a party to it and claim a reversal of the lower Court's decree in his favour. But it would have been useless to allow this in the absence of any possibility that their contention would succeed. The case must be dealt with as between them and the second defendant alone on the issue whether in the circumstances they are entitled to recover from him in consequence of his failure to account to his principal

Under Sect. 233, Indian Contract Act, in cases, where an gent is personally liable, a person dealing with him may hold either him or his principal or both of them liable. But it is not shown how under any provision of law or in virtue of any principle second defendant was under any liability to plaintiffs in respect of the money received by him from them. This was the basis of the decision in *Ellis* v. *Goulton* (1), Lord Esher and Smith, L. J , dealing with and rejecting *seriatum* the various heads of liability, which could conceivably be relied on; and so also, although the reasons are given more shortly, in *Bamford* v. *Shuttleworth* (2) and *Stephens* v. *Badcock* (3). Against these authori-

(1) (1893) 1 Q. B., 350.
(2) (1840) 11 Ad. & El., 926.
(3) (1832) 3 B. & Ad., 354.

ties plaintiffs have relied first on the dictum of Blackburn, J., in *Pollard* v. *Bank of England* (4) and *Taylor* v. *Metropolitan Railway* (5), in which that dictum is quoted with approval:

"Where money has been paid under a mistake of fact to an agent, it may be recovered back from him unless he has in the meantime paid it to his principal or done something equivalent to payment to him, in which case the recourse is against the principal only."

But in the present case, as in *Ellis* v. *Goulton* (1) and the cases cited with it, there was no question of mistake, the absence of any being referred to explicitly in *Stephens* v. *Badcock* (3), and the two cases last referred to must be distinguished on that ground.

Plaintiffs, however, rely on the fact that these are not cases, in which fraud or dishonesty on the part of the agent was relied on, and have referred to two of the headings under which the liability of an agent to refund money paid to him is classified in Bowstead on Agency, Art. 125 (*b*) and (*c*) P. 421. But of these the first "when the money is obtained by duress or by means of any fraud or wrongful act to which the agent is party or privy" is not relevant. For it is not alleged that plaintiffs made their payment to 1st defendant otherwise than in the ordinary course, in discharge of what they owed his principal; and the lower Court was in fact inclined to find that he originally received the money honestly, failing to credit it correctly only through inadvertance. As regards the other head of liability referred to "When the money is paid under a mistake of fact or under duress or in consequence of some fault or wrongful act and repayment is demanded of the agent before he has in good faith paid the money over to or otherwise dealt to his detriment with the principal in the belief that the payment was a good and valid payment" it is sufficient that as already observed, there is here no question of mistake of fact and there is none of duress or other misconduct on the part of the principal, to which alone the learned author can be supposed to be referring since he has already dealt with cases of misconduct on the part of the agent. It is then immaterial that a demand may be taken to have been made in the present case on the former before he paid the latter, since the other conditions postulated are not fulfilled.

The plaintiff's reference to this authority in fact calls for notice, mainly because the second citation from it purports to be founded on the old case of *Cary* v. *Webster*(1). That case actually decided only that a clerk, receiving money for his principal and paying over to him although without making any entry in his account is not liable to the person who made the payment and the portion now relevant is only in accompanying *obiter dictum* that if the clerk had not made the payment over he or his principal would have been liable at the plaintiffs' option. No reason for this opinion is given and nothing later in the same sense has been shown; and it is therefore unnecessary to regard the decision, in spite of the high authority of Lord Camden who gave it, as extending in any degree the two headings of liability, based on the misconduct of either agent or principal above referred to. That failing, I follow the decision in *Ellis* v. *Goulton* (2) and the two cases mentioned with it. In the absence of such misconduct in connection with the receipt of the money, of which refund is claimed, the basis of those decisions, the absence of privity between the agent and the person who paid him, would have been available equally whatever the circumstances, in which the former retained it. Shortly second defendant received it as his principal's money and plaintiffs, who could have pleaded against first defendant that he did so cannot by their failure so to plead enable themselves to recover from him.

The petition must be allowed, the lower Court's decree being modified as regards second defendant by the dismissal of the suit against him with costs throughout.

Petition allowed.

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(4) (1871) 6 Q. B., 623.
(5) (1906) 2 K. B., 55.

✱ 1923 MADRAS 553

KRISHNAN AND RAMESAM. JJ.

(*Pupooth alias Komancheri*) *Rarichan-alias Ramanunni Kurup*—Plaintiff—Appellant.

v.

Vayisravunth Manakkal Raman and another—Defendants.—Respondents

F. A. No. 251 of 1920 D. 22nd December 1922, against the decree of the Court of the Sub. J. of South Malabar at Calicut in O. S. No. 30 of 1919.

(a) Civil P. C. O. 32 R. 2—Applicability.

R. 2 O. 32 is applicable only when on the face of the plaint the plaintiff appears to be a minor. If on an issue raised and tried in the case, the Court finds that the plaintiff is a minor, it should not dismiss the suit at once but should allow a reasonable time for a next friend to come on record and go on with the suit and it is only if no one comes forward that it should reject the plaint. But if, before the Court decided that the plaintiff was a minor, he had become a major, there is no necessity thereafter to have a next friend for him. (P. 554 C. 2)

(b) Civil P C. O. 32 R. 4 (2)—Failure to give reasons.

Failure to record reasons under R. 4 cl. (2) is only an irregularity and will not by itself vitiate the decree if the minor is in fact properly represented by a guardian appointed by Court. (P. 555, C. 1)

(c) Civil P. C. O. 32 R. 4 (4)—Court Guardian—False affidavit—Effect.

The appointment of the Court guardian on a false affidavit that there was no proper relation of the minor to act as next friend is vitiated by fraud and is of no legal effect. The decree in such a suit and the subsequent sale are therefore not binding on the minor. (P. 555, C. 2)

(d) Guardian and Ward—Contract by Guardian—Minor's liability.

A contract which imposes an onerous obligation on a minor to pay a heavy sum as rent is not binding. A guardian has no power to enter into engagements on behalf of his minor ward making him liable under enerous coveannts. (39 C. 232 Ref.) The action of a *defacto* guardian will be binding on the minor's property only if it is for the minor's benefit or necessity. (P. 556 C. 1, 2)

(e) Civil P. C. O, 6 R. 17—Omission to add further relief.—Amendment allowed.

Where there was a clear omission to add further relief of redemption, the plaintiff was allowed to amend the plaint in second appeal, to add that relief.

T. R. Ramachandra Iyer with A. S. Venku Iyer—for the Appellants.

C. V. Ananthakrishna Iyer, K. Kutti-krishna Menon, T. N. Cherumy Thirmal Peri—for the Respondent.

Judgment:-This is an appeal against the decree of the Subordinate Judge of Calicut in O. S. No. 30 of 1919 on his file dismissing the plaintiff's suit and the plaintiff is the appellant before us.

Plaintiff became the sole surviving member of his Komancheri Tarwad on the death of his mother and sister in March, 1907. He was then solely entitled to the tarwad properties. He was at the time a minor of 8 years age and his father the 2nd defendant, who had previously managed the affairs of his tarwad as his mother's agent continued in management of his affairs as his *de facto* guardian. Being a member of a Marumakkatayam tarwad his father was not his legal guardian, in fact he had no legal guardian. At that time there was a mortgage debt on the tarwad lands in favour of one Bhattathiripad, of Rs. 9,000 which was admittedly binding. To pay off this debt and to meet other alleged necessities, the father, acting as plaintiff's guardian borrowed in March, 1908 a sum of Rs. 12,000 from the 1st defendant and executed a usufructuary mortgage to him—Copy, Ex. A. Two days afterwards he also executed a verumpattom chit or lease for himself and as plaintiff's guardian and took back the properties on lease; see copy Ex. G. Under this arrangement plaintiff was newly made liable with his father to pay a rent of Rs. 1,200 a year. Such an obligation did not exist under the Bhattathiripad's mortgage. The rent was allowed to fall into arrears by the 2nd defendant and he executed a pronote, copy Ex. T, for Rs. 692-12-11 to the 1st defendant, again acting for himself and as guardian of his son. The 1st defendant brought O. S. No. 37 of 1915 on this note and got a decree against both the father and the son. In this suit the Head Clerk of the Court was appointed as the plaintiff's guardian. Subsequently the 1st defendant attached the properties mortgaged to him subject to his own mortgage and got them sold and purchased them himself in Court auction.

Plaintiff brings this suit as a majo

and prays that the mortgage Ex. A may be declared to be invalid to the extent of Rs. 2,200 and odd as not being supported by proper consideration except as to the amount due under the prior mortgage which had been paid off. He also prays for a declaration that the lease Ex. G. is not binding on him at all, as it is not for his benefit or necessity but on the other hand it imposed on him an onerous liability to pay Rs. 1,200 a year as rent. He states that the decree Ex. IX was obtained by fraud, that he was not represented in it by a proper guardian and the Court guardian appointed for him acted with gross negligence in the conduct of the case and he therefore claims that it is not binding on him; and he further prays that the sale held in execution of that decree may be set aside as invalid.

The first point taken against the plaintiff in the lower Court was that at the date of suit he was a minor and the suit as brought without a next friend was unsustainable and must be dismissed. Plaintiff was over 18 years of age but below 21 when the suit was filed and the question whether he was a major or not turns on whether a guardian had been appointed for him under the Guardian and Wards Act. It is not very clear on the evidence whether such an appointment had been made. An application had been filed under the Act by plaintiff's uncle P. W. 2 and the District Judge had passed an order that the plaintiff's father the 2nd defendant would be appointed guardian of the plaintiff's person and property on his furnishing security. Though security was tendered no steps were taken by the Court to test it or get a proper security bond executed and no formal order of appointment was drawn up. Nevertheless in several subsequent court proceedings the 2nd defendant was treated as a properly appointed guardian for plaintiff; and it was also held that his age of majority had been extended to 21 in consequence. It is not however necessary to decide the point definitely for even assuming that the 21 years' rule applied and the plaintiff was a minor at the date of suit, he became a major when the suit was pending in the lower Court and is now a major; and he has before us through his learned Vakil agreed to be bound by all the proceedings that have taken place in the lower Court. O. 32. R. 2 of the Code of Civil Procedure is applicable only when on the face of the plaint the plaintiff appears to be a minor, see *Beni Ram Dutt* v. *Ram Lal Dhukri* (1). That case was decided under the old Code but the new Code makes no change on the point. If on an issue raised and tried in the case, the Court finds that the plaintiff is a minor it should not dismiss the suit at once but should allow a reasonable time for a next friend to come on record and go on with the suit and it is only if no one comes forward that it should reject the plaint. *Beni Ram Dutt* v. *Ram Lal Dhukri* (1) is an authority for this position also. In the present case before the Court decided that the plaintiff was a minor he had become a major and there was no necessity thereafter to have a next friend for him. Plaintiff may no doubt have elected to drop the present suit as not properly instituted but he was not bound to do so; he could affirm the previous proceedings and continue the suit. That is the principle embodied in O. 32 R. 12. A somewhat similar case was considered in *Sankaran Nambi* v. *Davaki Antherjanom* (2) and it was ruled there that when a next friend has been appointed the objection that the suit was originally by a minor without a next friend can no longer be urged.

The next point for consideration is whether the Court sale was valid, for if it was, the property has passed to the 1st defendant and the plaintiff has no more interest in it and cannot maintain this suit. The purchaser in Court auction was the decree holder himself and not any 3rd party and we have not therefore to consider any rights or equities of *bona fide* purchasers in Court auction. The validity of the sale in this case thus depends on the question whether the decree Ex. IX was binding on the

(1) (1892) 13 Cal, 189.
(2) 1922 Mad. 259-43 M. L. J. 572-16 L. W. 26 (1922) M. W. N. 428

plaintiff or not. The plaintiff contends that the appointment of a court guardian for him was null and void as it was obtained by the 1st defendant by means of a false affidavit and that the 2nd defendant being a guardian appointed under the Guardian and Wards Act there was no reason and none is recorded why he should not have been appointed ; and further that the Court guardian was guilty of gross negligence. It will lead to clearness to consider these points separately.

Taking the 2nd point first it will be observed that the 2nd defendant was proposed by the 1st defendant as plaintiff's guardian *ad litem* in the first instance. Four notices were taken out to him; the last of them Ex. XIII (c) was tendered to him personally but he refused to receive it and sign the copy and it was thereupon affixed to his door. That was rightly accepted as good service by the Court under O. V. Rr. 16 and 17. The way in which he behaved when the notice was tendered to him showed clearly that he was not willing to act as guardian and the petition to appoint him guardian was therefore dismissed. The reasons no doubt are not stated in the order but it is apparent what they were. Considering that he was the person who had executed the promissory note on which the suit was brought against the minor, he would have been an unsuitable guardian in any event as his interests would clash with the minor's interests. It was however argued that as he was a guardian appointed by a competent authority under the Guardian and Wards Act the Court acted improperly in superseding him and appointing a Court guardian without recording proper reasons under O. 32 R. 4 cl. (2). Now in the first place as I have already said it is not very clear that he was so appointed, plaintiff's own case being that he was not so appointed. But even if we take it that he had been so appointed the failure to record reasons under R. 4 cl. (2) is only an irregularity, in my opinion, and will not by itself vitiate the decree if the minor is in fact properly represented by a guardian appointed by court. The Allahabad High Court has held that the absence of a former order removing the certificated guardian will not vitiate proceedings if another next friend is allowed to sue and the suit will not be defeated solely upon the ground that no formal permission had been granted. See *Sridar Rao* v. *Ram Lal* (3). The case in *Bhimaji* v. *Hussain Saheb* (4) is easily distinguishable as there was no attempt at all made there to have the certificated guardian appointed as guardian *ad litem* as here.

But the more serious objection to the appointment of the Court guardian is that his appointment was procured by means of a false affidavit. The affidavit filed on 1st defendant's behalf by his brother, D. W. 5, Ex X (a) contains a statement that besides the 2nd defendant plaintiff had no next of kin. The statement is false as there was at least one person known to 1st defendant and his brother namely plaintiff's maternal uncle Ravunni Nair P. W. 2 who though he belonged to a different tarwad as plaintiff's mother had been adopted from his tarwad to plaintiff's Komancheri Tarwad, was certainly plaintiff's next of kin just like his father. Yet this information was suppressed. The only explanation D. W. 5 gave for his action in cross-examination is that Ravunni Nair was "not proposed as guardian because the Court held that the 2nd defendant was the proper person to act as guardian;" this apparently refers to Ex. F. The explanation however is worthless and we must hold that the 1st defendant was guilty of fraud in law in making a false statement and thereby getting a Court officer appointed guardian. The appointment is thus vitiated by fraud and is of no legal effect. This brings the case within the principle of the ruling in the Privy Council in *Bhagwan Dayal* v. *Param Sukh Das* (5) for here as there the case must be treated as having been proceeded

(3) (1908) 31 All. 7-5 A. L. J. 633-(1908) A. W. N. 251-4 M. L. T. 443-1 I. C. 555.

(4) (1920) 43 M. 808-39 M. L. J. 239-28 M. L. T. 295-12 L. W. 114-59 I. C. 842.

(5) (1915) 37 A. 179-13 A. L. J. 179-27 I. C. 623.

with, without a legally appointed guardian *ad litem*. The decree and the subsequent sale are therefore not binding on the plaintiff.

It was also urged that even if we take that the appointment of the Court guardian was a regular and proper one, the decree and sale should still be set aside because there was gross negligence on his part in the conduct of the case. It is not necessary to consider this point as I have already held that the decree against the plaintiff and the sale must be set aside on another ground.

Plaintiff has also asked for declarations that the lease is not binding on him and that the mortgage is invalid to a certain extent. Now clearly the lease which imposes an onerous obligation on a minor to pay a rent of Rs. 1,200 a year is not binding on the plaintiff. A guardian has no power to enter into engagements on behalf of his minor ward making him liable under such onerous covenants. See *Indur Chunder Singh* v. *Radha Kishore Ghosh* (6) *Mis Sarwarjan* v. *Fakhruddin Mahomed Choudhuri* (7), *Waghela Kajsanji* v. *Sheikh Masluddin* (8) and *Narayana Rao* v. *Venkata Subba Rao* (9). It was however argued that the lease and the mortgage were one and the same transaction and that as the creditor the 1st defendant was not prepared to lend except on condition that such a leas should be taken it was justified by necessity in the same manner as the mortgage. This argument cannot be supported for even if the two be parts of the same transaction there is no proof that there was any necessity to borrow at all. There was no pressure from the previous mortgagee. The action of a *de facto* guardian, as 2nd defendant was, will be binding on the minor's property only if it is for the minor's benefit or necessity. That is not proved in this case and the lease so far as the plaintiff is included in it, is therefore not valid.

As regards the mortgage the plaintiff has conceded in this Court that it is valid not only to the extent of the Bhattathiripad's mortgage paid off but also to the extent of the decree debt in O. S. No. 364 of 1905 and for the amount due to Unnith Amma *i. e.* in all for about Rs. 11,000, the objections being confined to about Rs. 1,000 not properly accounted for. There is however a preliminary difficulty in plaintiff's way in getting any declaration as regards the lease and the mortgage inasmuch as no declaration can be given to him under S. 42 of the Specific Relief Act if he can claim further relief. In this case on my view it is clearly open to him to redeem the mortgage to the 1st defendant or such portion of it as is valid. The Subordinate Judge holds that plaintiff is not entitled to redeem without a demand for payment by the 1st defendant and cites *Navunni* v. *Ramaswami Pattar* (10) in support of his view that S. 42 will not apply in such circumstances. But this view is based on a misreading of the covenant in Ex. A. That only provides that if the mortgagee wants payment he must give notice to be paid on the day after "Ucharal" or the beginning of the cultivation season in any year and not at other times. This provision does not affect the mortgagor's right to redeem at any time he likes. The covenant is not mutual by its wording. As the mortgage and the lease are clearly parts of one and the same transaction no declaration can be given regarding either without the plaintiff suing to redeem. The case cited in *Navunni* v. *Ramaswami Pattar* (10) itself recognises this position. Plaintiff's vakil then asks that his client may be permitted to amend his plaint by adding a prayer for redemption and paying the necessary Court-fees on the plaint and the memo of appeal. This is rightly not opposed by the 1st defendant's vakil and may I think be granted. Plaintiff is allowed

(6) (1892) 19 C. 507-19 I. A. 90-6 Sar 185 (P. C.)

(7) (1911) 39 Cal. 232-39 I. A. 1-16 C. W. N. 74-(1912) M. W. N. 22-9 A. L. J. 33-15 C. L. J. 69-14 Bom. L R. 5-21 M. L. J. 1156-11 M. L. T. 8-13 I. C. 331 (P. C.)

(8) (1887) 11 Bom. 551 (P.C.)

(9) (1919) 38 M. L. J. 77-27 M. L. T. 264-(1920) M. W. N. 129-55 I. C. 377.

(10) (1918) 10 L. W. 169-52 I.C. 738.

to amend his plaint and pay the necessary Court-fees for it and for the appeal in this Court in two weeks from this date. The appeal is adjourned for the purpose.

This appeal again coming on for hearing the Court delivered the following judgment.

Judgment :— Further Court-fees has now been paid and the plaint amended to convert the suit into one for redemption. The objection as to non-maintainability of the suit for a mere declaration thus ceases. As the result of the amendment the case must be sent back to the lower Court for a fresh disposal as a suit for redemption subject to the rulings we have given on the points already dealt with. The respondent will be allowed to file a supplemental written statement on the amended plaint and the case will be disposed of according to law.

Each party will bear costs up to date as to the Court fees now paid by the appellant which would be disposed of by the lower Court in its final order.

Case remanded.

1923 MADRAS 557

OLDFIELD AND VENKATASUBBA RAO. JJ.

(*Golkonda*) *Ramachendrudu and others*-Petitioners—Appellants.

v.

Inuganti Venkata Narasimha Row Garu and others — Counter Petitioner—Respondents.

A. A. O. Nos. 172 and 173 of 1920, D. 24th Jan. 1923, against the order of the Court of the Temporary Sub. J., of Ellore D. 13th March 1920, in A. S. Nos. 32 and 33 of 1920.

Mesne profits—Measure of—Deduction of rent payable by petitioners.

In calculating the mesne profits to be allowed to the occupancy ryots from the landholders for the period of their exclusion from the land the rent payable to the landholders should be deducted. Where, after the decision of the District Munsif in these proceedings, a suit by respondents as landholders under the Madras Estates Land Act for rent was dismissed, the respondents' conduct in bringing this suit in the Revenue Court created no estoppel nor otherwise debarred them from their present claim. [P. 557 C. 2]

P. Narayanamurthi—for the Appellant.

V. Ramadoss—for the Respondent.

Judgment:—The point argued in appeal is that which has been dealt with as the third point by the lower appellate Court, whether in calculating the profits allowed to the petitioners for the period of their exclusion from the land the rent payable to the respondent-landholders should be deducted. We agree with the reasons given by the lower appellate Court for its conclusion against the petitioners and need refer only to the fact dealt with in the judgment under appeal, that after the decision of the District Munsif in these proceedings the respondents sued as landholders under the Madras Estates Land Act for rent and their suit was dismissed. It is urged that this is conclusive against their claim to deduct rent from the profits they have to pay the petitioners. We do not agree. The suit in the Revenue Court was founded on an allegation clearly unsustainable that the relation of landlord and tenant was subsisting between the parties during the period in question. The failure of the suit on the ground that this relation was not so subsisting can have no effect on the decision as to the amount of damages payable, the proper basis for that decision being the amount of the profits, which would have been realized if the petitioners' enjoyment of the land in virtue of their title as occupancy ryots liable to pay rent had continued. It is not shown how the respondent's conduct in bringing this suit in the revenue Court creates an estoppel or otherwise debars them from their present claim. In these circumstances, the appeal against appellate order fails and is dismissed with costs.

This judgment applies also to A. A A. O. No. 173 of 1920, which is similarly dismissed with costs.

Appeals dismissed.

1923 MADRAS 558

OLDFIELD AND RAMESAM. JJ.

(*Pothene Puthan Vital*) *Kunhu Pothu Nassiar*—Defendant-Appellant.

v.

Adrasseri Raru Nair and others—Plaintiffs—Respondents.

S. A. No. 1502 of 1920, D. 3rd August 1922, against the decree of the Dt. Court of South Malabar in A. Suit No. 747 of 1919.

(a) T. P. Act S. 53 Proviso—Subsequent transferee—Position of.

The proviso to section 53 of the Transfer of Property Act does protect *bona fide* purchasers for consideration from a fraudulent transferee and not only *bona fide* purchasers for consideration from the first transferor. A purchaser who fails to enquire from the person who naturally could have given him the best information as to defect in the title is not a *bona fide* purchaser.

(b) T. P. Act S. 3—Notice and bona fides—*Distinction.*

Attempt to separate the two questions of notice and *bona fides* is not usually sound. It is seldom possible to form an adequate or correct opinion of the conduct of a transferee without considering whether his good faith extends to his possession of actual or constructive notice with reference to the whole circumstances of the case. (P. 561 C. 1)

C. Madhavan Nair—for the Appellant.

K. P. Ramakrishna Iyer—for the Respondent.

Oldfield, J.—I agree with the order proposed by my learned brother and can add nothing to his reasons for it.

Ramesam, J.-The facts out of which this second appeal arise may be briefly stated as follows.—The plaintiff obtained on the 31st March, 1914, a decree in Original Suit No. 500 of 1912, against the present defendants 3 and 4 and in execution of the decree attached the suit properties. The defendants I and 2 relying on a sale-deed (Exhibit III dated 5th October 1914) preferred a claim objecting to the attachment (M. P. No. 328 of 1918) The claim was allowed on 21st February 1918 (Exhibit A). The present suit was filed on 10th August 1918 for a declaration that the sale under Exhibit III was made with intent to defraud creditors and cannot affect plaintiff's right to attach the properties. On 24th February 1918 (three days after the disposal of the claim petition) the property was purchased from defendants 1 and 2 by defendants 5 and 6 under Exhibit VI. They contend that they are *bona-fide* purchasers for consideration and without notice of the intention to defraud, if any, on the part of the parties to Exhibit III. The Courts below have held that Exhibit III was executed as alleged by the plaintiff. As to defendants 5 and 6, they held relying on *Krishnappa Chetty v. Abdul Khader Sahib* (1) that their sale under Exhibit VI was void against plaintiffs as being made *pendente lite* and did not express any opinion on the question whether they are *bone fide* purchasers for value. Defendants 5 and 6 appeal. The finding that Exhibit III is voidable by the plaintiff is not challenged in Appeal.

It is contended on behalf of the appellants that the case in *Krishnappa Chetty v. Abdul Khader Sahib* (1) is not correctly decided, that it has been dissented from *Pethu Aiyar v Sankaranarayana Pillai* (2) and that a finding should be called for from the lower appellate Court on the question whether defendants 5 and 6 are *bona fide* purchasers for value.

It is contended for the respondent that, even if the sale to defendants 5 and 6 is not vitiated by the doctrine of *lis pendens*, it is unnecessary to have a finding on its *bona fides* as the proviso to S. 53 of the Transfer of Property Act does not protect *bona fide* purchasers for consideration from a fraudulent transferee but protects only *bona fide* purchasers for consideration from the first transferor. In support of this contention he relied on *Basti Begum v. Banarsi Prasad* (3). The conclusions stated at page 308 of that case "Basti Begum took the transfer subject to all defects in the title of her transferors and cannot in equity set up the fictitious document against a *bona fide*

(1) (1914) 38 Mad. 535-26 M. L. J. 449-25 I. C. 11.

(2) (1917) 40 Mad. 955-32 M. L. J. 374-(1917) M. W. N. 284-5 L. W. 519-21 M. L. T. 377-38 I. C. 778

(3) (1907) 30 All. 297-5 A. L. J. 305-(1908) A. W. N. 116.

mortgage. The fictitious instrument received, we think, no new force against the plaintiff from the transfer, The proviso to S. 53 of the Transfer of Property Act, which was relied on by Mr. Dillon, does not appear to us to help his client. That proviso was intended to safe-guard rights which have been already acquired—" seem to support the respondent, though the last sentence is not quite intelligible. In this case, the first transaction is a mortgage, but, as I do not see any reason to distinguish between a mortgage and a sale or between a mortgage of immoveable property and one of moveables in the application of S. 53 of the Transfer of Property Act, the case requires further consideration. A number of English cases were cited in it. In the first one *Halifax Joint Stock Banking Company v. Gledhill* (4) the provisions of 13 Eliz. Ch. V were referred to ; but the conclusion of Kay J. does not support the conclusion in *Basti Begum v. Banarsi Prasad* (3) and no reasons are given in the latter to show how the former was intended to be got over. I will refer to this case again. The other cases cited in *Basti Begum* v. *Banarsi Prasad* (3) fall into two groups. In the first group consisting of *Cockell v. Taylor* (5), *Ogilvie v, Jefferson* (6), *Parker v. Clarke* (7), the second transaction, though *bona fide* did not prevail in the second group consisting of *French v. Hope* (8), *Bicherton v. Walker* (9) and *Rice v. Rice* (10), the second transaction was upheld on the ground that it was a *bona fide* transaction for consideration without notice of the prior equity. In all these six cases there is no question of the application of 13 Eliz. Ch. V. or 27 Eliz Ch. 4. The earlier transactions in the first three cases were not valid even as between the parties. Collett was defrauded by Taylor in *Cockell* v. *Taylor*, (5) Ogilvie was defrauded by his solicitor in *Ogilvie* v. *Jefferson* (6) and Cruchley executed the mortgage while in prison and under the influence of Thomas in *Parker v Clarke* (7). In each of the other three cases the first transaction was perfectly valid there being no fraud or undue influence vitiating it. The second transferees obtained valid titles by estoppel. It seems to me these six cases are illustrative of the rule now embodied in India in S. 41 of the Transfer of Property Act In the first three cases there was not the free consent of the original owner so as to confer a title by estoppel on the second transferee. I do not think it is necessary to say, as Kekewich, J. thought in *French v. Hope* (8) that *Parke* v. *Clarke* (7) was overruled by *Bickerton* v. *Walker* (9). I may also add that the Vice Chancellor's summary of the facts in *Ogilvie* v. *Jefferson* (6) shows that the second transferee in that case cannot be ragardad as a *bona fide* purchaser for value. However this may be, I do not think any of those cases are a guide in the discussion of S. 53 of the Transfer of Property Act. It seems to me that the conclusion in *Basti Begum* v. *Banarsi Prasad* (3) is not justified by the cases cited in it.

The case of *Doe, D. Bothell* v. *Martyr* (11) is similar to the case above cited and does not help us. On the other hand there are a number of other English cases on 13 Eliz. Ch. V and 27 Eliz Ch, IV which will now be considered. I will divide them into two groups.

(a) Those decided with reference to 27 Eliz Ch. IV (i) *Prodgers* v. *Langhan* (12) where it was held that the feoffee for valuable consideration from the first feoffee whose feoffment was coverious has a good title against a second feoffee from the original owner. This case was followed by Lord Eldon in *George* v. *Millbanke* (13) cited below.

The case of *Lloyd* v. *Attwood* (14). seems to decide differently (see especially, Turner L. J. 655 and Knight Bruce L. J. 647); but in that case the

(4) (1891) 1 Ch. D. 31.
(5) (1851) 15 Beav. 103.
(6) (1860) 2 Giff. 353.
(7) (1861) 30 Beav. 54.
(8) (1887) 56 L. J. (Ch) 363.
(9) 1885) 31 Ch. D. 151.
(10) (1853) 2 Drew 73.

(11) (1805) 1 Bos and Pul. (N. R.)232
(12) (1663) 1 Sid. 133 1 Keb. 486.
(13) 1805) 9 Ves. Jun. 190.
(14) (1859) 3 De. G. & J. 614.

two Misses Attwood parted with the title deeds and their mortgage has lost its priority by reason of their laches and the Misses Medley who obtained a sub-mortgage and could have asked for and known the absence of the title deeds cannot be regarded as *bona fide* transferees for value. Nor did Turner, L. J. and Knight Bruce L. J. regard them as *bona fide* transferees for value. I doubt if the passage in May on 'Fraudulent Conveyances' page 254 relating to this case is justified, especially in view of the cases cited at page 253.

(*b*) Cases decided on 13 Eliz Ch. V.

(1) *George* v. *Millbanke* (13). For the purposes of the decision the fact that until the Voluntary Conveyance Act of 1893, all voluntary convenyances, though made without a fraudulent intention were void against creditors, does not make a difference. This case supports the appellant.

(2) *Payne* v. *Mortimer* (15). In this case Turner, L. J. says "Lord Eldon however, in *George* v. *Millbanke* (13) did not put the case upon the statute of Elizabeth. He had regard no doubt, and indeed the report shows, although but obscurely, that he had regard, to the provision in the statute which protects alienees for value only in the case of absence of notice, and he puts the case upon the ground of the assignee for value having a better equity than the general creditors of the settlor. That principle seems to me to reach the present case."

(3) *Halifax Joint Stock Banking Company* v. *Kledhill* (4). On the facts, the settlor's reservation of an interest not being tainted by intent to defraud creditors—the point does not seem to arise but Kay J.'s opinion is in favour of the appellant. He also seems to think that Turner L. J.'s opinion in *Payne* v. *Mortimer* (15) is to the same effect.

(4) *In re Moreat* the opinion of Sterling, J. at p. 834 in favour of the appellant is only an *obiter dictum.*

(5) *Morewood and Bayne* v. *The South Yorkshire Railway and River Dun Co.* (16). The opinion of the Court (Pollock, C. B., Watson and Bramwell, B. B.) is in favour of the appellant.

Generally, I am unwilling to refer to American decisions. But, having regard to the paucity of authority in India and the somewhat inconclusive nature of the English cases, I now refer to two of the American Cases. In *Lee* v. *Abbe* (17) and in *Anderson* v. *Roberts* (18) it was held that *bona fide* purchasers from a fraudulent grantee without notice of the fraud will be protected. I agree with the remarks of Spencer C. J. at page 241, "again, the proviso is general, it exempts any conveyance upon good consideration and *bona fide* to any person not having notice of the fraud or collusion from the effects of the enacting clause. And why should not its benefits be extended to any *bona fide* purchaser for valuable consideration, whether he purchases from the fraudulent grantor or the fraudulent grantee? I think it has sufficiently appeared that this fraudulent grantee takes the entire interest of the fraudulent grantor and that the deed is voidable at the instance of the creditor, not legally and strictly void." He then refers to Marshall, C. J.'s decision in *Fletcher* v. *Peek* (19) to show that a *bona fide* purchase from the fraudulent grantor is protected and proceeds "It is in vain that we search for any difference between a conveyance by a fraudulent grantor whose intention was to deceive subsequent purchasers and a conveyance by a fraudulent grantor when the intention was to defraud present or future creditors. He then refers with approval to *Prodgers* v. *Langham* (12).

I am therefore of opinion that the appellants' contention is right and that we must have a finding on the question whether they are *bona fide* purchasers for consideration and without notice of the fraud relating to Exhibit III. The question of *lis pendens* will be decided if necessary after the finding is returned. The finding will be returned with reference to the evidence on record. Six weeks are

(15) (1859) 4 Deg. & J. 447.
(16) 3 H & N. 798.

(17) 2 Rook 359; 1 Am. Dec. 78.
(18) 18 John 513 :9 Am. Dec 235.
(19) 6 Cranch. 133.

allowed for finding and ten days for objections.

This Second Appeal coming on for final hearing after the return of the finding of the lower appellate Court upon the issue referred by this Court for trial, the Court delivered the following :

Judgment :—The lower Court was called on to find on the question whether the appellants (5th and 6th defendants) were *bona fide* purchasers for consideration without notice of the the fraud involved in Exhibit III. In returning its finding it has dealt separately with the question whether 5th and 6th defendants were *bona fide* purchasers and whether they had notice. The attempt to separate these two questions is not usually sound for it is seldom possible to form an adequate or correct opinion of the conduct of a transferee without considering whether his good faith extends to his possession of actual or constructive notice with reference to the whole circumstances of the case. It is however sufficient for us to deal with the portion of the finding which relates to the 5th and 6th defendants' possession of notice for the lower Court has, in our opinion, entirely mistaken the legal position created by the facts

The lower Court says that the 5th and 6th defendants would not, even if they made enquiries, have obtained information from the 1st and 2nd defendants' witnesses or the mortgagee Narayana Nair, because the 1st and 2nd defendants' witnesses of course would not disclose any fraud, and Narayana Nair equally would not do so, as he was to get mortgage redeemed by them. The lower Court then goes on :—" The document which the defendant 6 says he saw would tell him nothing" and that may be correct. But then it goes further and says that the defendants were not bound to pursue the matter of the claim petition and ascertain what objections to the claim were raised by the decree-holder. This, in our opinion, is entirely wrong. The decree-holder, the person who was alleging fraud in connection with Exhibit III, was the person, to whom enquiries as to any objections to the title to the property would naturally be addressed, and he would certainly be in the best position to say what objections in the shape of fraud were available against the title. The lower Court says also that, even if the 6th defendant knew of the claim petition, that would tell him nothing; on the other hand the order allowing the claim would lead him to think that the title of the claimants was good. This is an absolute misrepresentation of the effect of the order, Exhibit A; and even if this were the only objection to the lower Court's finding we should be unable to accept that finding on account of it. Exhibit A after stating the facts and the case of the decree-holder as being that Exhibit III evidences a fraudulent and collusive transaction, goes on to say that the claimant must establish his case in a regular suit properly framed for the purpose. That statement is presumably made with reference to authority, as it then stood, that a transfer can be impeached as fraudulent, not by way of a plea in defence, but in a suit properly framed for the purpose. True, the next sentence in Exhibit A is to the effect that the claimants have established a *bona fide* title to the properties, whatever that may mean. But it is clear that the effect of Exhibit A, as a whole, was simply to decide in favour of the continuance of the attachment and that the order did not, and indeed could not, do more than make the title to the attached property contingent on the result of the suit, if any, which might be brought within a year. That being the real effect of Exhibit A and the possession being with the 5th and 6th defendants; they have on their own showing failed to make any enquiry of the person, who could have given them the best information as to the defects in the title. We cannot hold that they were transferees in good faith without notice. We must therefore reject the lower Court's finding.

The result is that the appeal fails and is dismissed with costs.

Appeal dismissed.

1923 MADRAS 562

SCHWABE C. J. AND WALLACE J.

Subbier—Appellant-Plaintiff.

v.

Moideen Pitchai and others—Respondents-Defendants.

S. A. No. 1624 of 1920, D. 18th Jan. 1923, against the decree of the Court of the Add. Sub. J., of Tinnevelly in A. S. No. 48 of 1920.

Civil P. C S. 11-Decision in claim proceedings under O 21 R 58 not contested-Effect.

The decree holder in a Small Cause Suit applied for attachment of a debt alleged to be due by one K to the judgment-debtor. Notice of that application was served upon K as garnishee and also upon the widow of the judgment-debtor as representing his estate. She did not appear but the garnishee appeared and put a counter statement in which he alleged, that the debt had never been due to the judgment-debtor, that it had been assigned and he had promised to pay the assignee, and that the amount of the debt was not Rs. 350 but Rs 300. That application came before the District Munsif, the garnishee appearing and the District Munsif passed an order in these words" Attachment is confirmed". In due course the debt was brought to sale and was purchased by the present plaintiff, who was himself the decree holder, The plaintiff then sued to recover the debt, and the garnishee raised the same defences, *held* the garnishee not having proceeded, when the claim was decided against him in execution, under O 21 R 63, the matter was *res judicata*. [P. 562 C. 2]

Salem Ramaswami Iyer — for the Appellant.

K. U. Luke—for the Respondents.

Schwabe C. J.—In the case the facts are that a decree-holder in a Small Cause Suit applied for attachment of a debt alleged to be due by one Khader Moideen to the judgment debtor. Notice of that application was served upon Khader Moideen as garnishee and also upon the widow of the judgment-debtor as representing his estate. She did not appear but the garnishee appeared and put a counter-statement in which he alleged three things, first, that the debt had never been due to the judgment-debtor, second, that it had been assigned and he had promised to pay the assignee; and thirdly, that the amount of the debt was not Rs 350 as claimed by the decree-holder but Rs 300. That application came before the District Munsif, the garnishee appearing and the District Munsif passed an order in these words; "Attachment is confirmed," In due course, the debt which had been attached was brought to sale as the property of the judgment-debtor in the Small Cause Suit and was purchased by the present plaintiff who was himself the decree-holder. The present plaintiff then sued to recover the debt.

It has been held by the District Munsif and on appeal by the Subordinate Judge that there never was any debt due by the garnishee to the judgment-debtor, and in fact that the debt which had been supposed to be due to the judgment-debtor was due not to him but to his widow, and consequently the suit was dismissed.

The question for our determination is whether it was open to those Courts to go into this question at all, and, in my judgment, it was not. By Sect. 11 of the Civil Procedure Code, no Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties. Now the whole matter decided was directly in issue in the execution and garnishee proceedings in 1913. It is true that the order made in 1913 was not at once final, because, under O. 21, R. 63, where a claim or an objection is preferred, the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute but subject to the result of such suit, if any, the order shall be conclusive. Now the garnishee did not choose within the time limited by the Indian Limitation Act, namely, a year, to bring in, any such suit, and so the matter becomes conclusive it having been decided by the Court in 1913 that the debt was a debt for Rs. 350 due by the garnishee to the judgment-debtor. As long as that order stands it cannot be re-agitated as between the parties to those proceedings.

We are told that after service upon him of the notice calling upon him to show cause why this debt should not be attached, the garnishee acted upon a notice he had received of an assignment of the debt to a third party and paid the full amount to the third

party. I should very much doubt the truth of that statement, because it is exceedingly unlikely having got notice from the Court that some one else was claiming that he should have paid this alleged assignee pending the hearing of the application. If he did so, and the result of this judgment is that, he will now have to pay over again to some one else, and he has no one to blame but himself for not taking the steps which were provided for him by the Code, namely of suing to establish his right under O. 21, R. 63, within a year. I suspect the reason why he did not do so was that he knew at that time he would not succeed

The decrees of the two lower Courts must therefore be set aside and the plaintiff will get a decree, in the usual mortgage decree form, against defendants 1 to 5 for Rs. 350 and interest thereon at six per cent. per annum from the date from which interest was due on the mortgage, *i. e.*, May 2,1912 to the date of payment with costs both here and the Courts below. Time for payment six months.

Wallace, J.—I agree.

Appeal allowed.

1923 MADRAS 563

SCHWABE C. J., AND WALLACE. J,

Baba Sah and another-Appellants —Defendants.

v.

Hajee Mohamad Akbar Sahib and others-Respondents-Plaintiffs.

City C. C. A. Nos. 29, 30,33, and 34 of 1921, D. 10th Jan. 1923 against the order of the Court of the City Civil Judge, Madras in O. S. Nos. 132, 285, 132 and 284 of 1920.

T. P. Act S. 3-Notice-Land occupied by tenants.

Where plaintiff owns the superstucture on the land bought by appellant under Ex. IV from defendants 2 and 3, who in their turn had bought under Ex. III from 1st defendant and it was not disputed that plaintiff held an agreement prior to both Exs. III and IV from 1st defendant to sell that land to him, and the appellant admitted that at the time of his purchase he learnt from Ex. III that the superstructure belonged to plaintiff, and that he made no enquiry of plaintiff, under what right he occupied the land. *Held* it was incumbent on him to enquire into the nature of the interest held by plaintiff, and if he wilfully abstained, from making any enquiry, or was grossly negligent, in making enquiry, he will be, in law, affected with notice of any fact which he would have come to know had he made such enquiry, and *held* further that appellant though possibly a purchaser in good faith was a purchaser with notice of the contract to sell of which plaintiff now seeks specific performance, and cannot therefore, (vide Sect. 27 Specific Relief Act) resist the plaintiffs' suit. 45 Bom. 910 Ref. [P 564 C 2]

S. T. Srinivasagopalachariar-for the Appellants.

T. Ethiraja Mudaliar, Md. Ibrahim Sahib and C. Venkatasubbaramiah-for the Respondents.

Judgment:—The substantive point for decision in C. C. C. A. No. 29 of 1921 is, whether on the date of his purchase under Ex. IV appellant (4th defendant) had notice of the prior agreement by 1st defendant to sell the same property to the plaintiff. Plaintiff owns the superstructure on the land bought by appellant under Ex. IV from defendants 2 and 3, who in their turn had bought under Ex. III from 1st defendant. It is not disputed that plaintiff held an agreement prior to both Exs. III and IV from 1st defendant to sell the land to him.

2. Appellant admitted in evidence that at the time of his purchase he learnt from Ex. III that the superstructure belonged to plaintiff, and that he made no enquiry of plaintiff, under what right he occupied the land. It appears that he made no enquiries whatever, either from his vendors, (*e. g.*, whether they were receiving the ground rent from any one) or from 1st defendant their vendor, or from plaintiff or from subtenants actually in occupation of the superstructure under plaintiff. Such utter absence of reasonable enquiry is either wilful or grossly negligent.

3. The general principle of constructive notice in such a case is that notice of occupation (of the property purchased) by a person other than the vendor, which indicates that the vendor is not entitled to present possession, at once puts the purchaser on enquiry as to the interest that occupier holds in the property. The usual case is where the property is

physically occupied by tenants, and then the purchaser, is by that occupation itself, which puts him on enquiry, in law effected with notice of the interest which these tenants have in the property. He is by their occupation not affected with notice of more than the terms on which they hold including any agreement collateral to their lease but he is not bound to enquire, nor are they bound to answer to whom they pay rent, so that the purchaser is not in such a case affected with notice of the tenant's lessor's title or rights. This is the general principle laid down in a series of English cases from *Daniels* v. *Davison* (1) onwards, succintly dealt with in *Hunt* v. *Luck* (2). The principle has been embodied in India in Sect. 27 of the Specific Relief Act and Sect. 3 of the Transfer of Property Act.

4. So that where nothing more is known to the purchaser or would be known to him on reasonable enquiry than the fact that certain tenants are in occupation under a tenant right, he is not affected with notice of more than the facts as to those tenants' rights. But when beyond this, the purchaser is directly informed and therefore knows of the occupation of the property by another whether by himself or by his sub-tenants, he is equally put upon notice to enquire into the interest of that other. This is no extension of the principle above mentioned, but a mere application of it. It makes no difference in principle whether the occupation by another is brought to his notice by physical occupation or by direct information. Where then the purchaser is definitely informed that another is in occupation of the property, whether himself directly or through sub-tenants, does not matter, he is at once put on enquiry as to the nature of the interest of that other in the property. This application of the general principle is clearly set out in *Hunt* v. *Luck* (2) quoted above, and has been followed in India in the case reported in *Faki Ibrahim* v. *Faki Gulam* (3). The absence of such enquiry will fasten the purchaser with all the equities which the occupier holds against the purchaser's vendor.

5. Now in the present case appellant knew and apparently knew nothing more than that plaintiff was the owner of the superstructure, and appellant does not say whether he knew that plaintiff was not occupying it himself With such knowledge it was incumbent on him to enquire into the nature of the interest held by plaintiff, and, if he wilfully abstained, as he did, from making any enquiry, or was grossly negligent as he was, in making enquiry, he will be, in law, affected with notice of any fact which he would have come to know had he made such enquiry. Such an enquiry would have showed him that plaintiff was a tenant under 1st defendant and would also, as soon as he enquired about the period of plaintiff's interest in the land, i. e., the period of the tenancy, as he was also bound to do, have informed him that the tenancy was to come to an end as soon as 1st defendant executed and registered the deed of sale of the land which he had agreed to sell to plaintiff. We must therefore hold that the appellant willfully abstained from, or grossly neglected to make, an enquiry which would have informed him of the prior agreement by 1st defendant to sell the land to plaintiff which precluded plaintiff from selling it to his (appellant's) vendors, and that appellant had in law constructive notice of that fact. Plaintiff is entitled then and has an equity, to repel the claim of the appellants who made no enquiry as to the nature of his possession. Where appellant made no enquiry at all, he is taken to have had constructive notice of all the equities in favour of plaintiff. The fact that his immediate vendor was not 1st defendant, but purchasers from 1st defendant, does not effect this question of notice.

6. Appellant then though possibly a purchaser in good faith, was a purchaser with notice of the contract to sell of which plaintiff now seeks specific performance, and cannot therefore (*vide* Sect. 27, Specific Relief Act,) resist the plaintiff's suit.

(1) (1819) 16 Ves., (June., 249)
(2) (1901) 1 Ch., 45.
(3) (1921) 45 Bom., 910—23 Bom. L. R. 335—60 I. C. 986.

7. We therefore agree with the lower Court's decision though the reasons given by it are hardly adequate. It follows that this appeal must be dismissed and we dismiss it with costs to plaintiff and half costs to 1st defendant payable by appellant. The defendants I to 4 will within one month from today execute the conveyance directed by the decree of the lower Court regarding the land in Schedule A, and on execution thereof the Rs. 1,000 now in deposit in the lower Court will be paid out to 4th defendant.

C. C. C. As. Nos. 30, 33 & 34 of 1921.

C. C. C. A. 30 of 1921 follows No. 29 of 1921 and is dismissed with costs (excluding vakil's fee). C. C. C. As. 33 and 34 of 1921 are not pressed before us and are dismissed with costs to 4th defendant and half costs to 1st defendant. In C. C. C. A. No. 33 of 1921 payable by appellant (one vakil's fee for both,).

Appeals dismissed.

1923 MADRAS 565

SCHWABE C. J. AND WALLACE, J.

South Indian Industrials Ltd., Madras—Appellants-Defendants.

v.

Alamelu Ammal—Respondent—Plaintiff.

C. C. C. A. No. 58 of 1921 D. 24th Jan. 1923, against the decree of the City Civil Court Madras in O. S. No. 123 of 1921.

(a) *Tort—Negligence—Sufficient care and precaution.*

The defendants for the purposes of their own business used a method of breaking up cast-iron which consisted of dropping a heavy weight of pieces of iron resting on a bed of iron with the intention that these pieces should be broken into smaller pieces. The weight was dropped from a height of 35 feet with the inevitable result that pieces of iron flew about to distances of four or five yards. They had at a distance put up a screen of 12 to 15 feet which was obviously so inadequate that, pieces were habitually thrown out of the pit. They had issued warnings to persons near, appreciating full well that they were carrying on a dangerous operation. But they did not issue warnings to workmen at a distance, to go on working at the risk of being hit, *Held* that defendant company were liable for an accident taking place at a distance of some 70 to 90 feet at which the deceased was standing at the time of the accident. That sufficient care was not taken and that, therefore the defendants were guilty of negligence. [P. 566 C. 1]

(b) *Maxims—Volenti non fit injuria.*

To succeed under the maxim, it is necessary for the defendant to prove that the person injured knew of the danger, appreciated it, and voluntarily took the risk. That he had some knowledge of the danger is not sufficient. A man cannot voluntarily undertake a risk the extent of which he does not appreciate. When the defendant himself pleads that he did not anticipate and could not have anticipated pieces flying over a distance of 90 feet, he cannot plead that his deceased workman could possibly have anticipated it for himself. [P. 566 C. 2]

(c) *Fatal Accidents Act (1885)—Measure of damages.*

Under the Fatal Accidents Act, the widow of the deceased or the person suing is entitled to compensation for the financial loss sustained by the death. She is not entitled to anything for pain or suffering or anything of the kind, but purely for the financial loss sustained. That the accident was rather an extraordinary one, is wholly irrelevent. The proper way of estimating the loss is to form some estimate of what the value of the continued life of the deceased would have been to the plaintiff and how long it was probable that it would continue. One year's wages is ridiculous in the absence of any evidence that the man was of ill-health or that his earning life was likely to be no more than a year. [P. 566 C. 2]

T Richmand, V. Rajagopalachariar and *K. P. Raman Menon*—for the Appellants.

E. Doraisami Iyer—for the Respondent.

Schwabe C. J.—This is a quite hopeless appeal. The facts are that the defendants for the purposes of their own business used a method of breaking up cast-iron which consisted of dropping a heavy weight on pieces of iron resting on a bed of iron with the intention that these pieces should be broken into smaller pieces. The weight was dropped from a height of 35 feet with the inevitable result that pieces of iron flew about. It is common ground that they habitually flew to distances of four or five yards from the pit. If persons choose to carry on dangerous operations of that kind, it is their duty not only to the public but to their servants to take adequate precautions that those pieces shall not cause injury. They ought to exercise, ordinary care, caution and skill to prevent that. The mere fact that an accident has

happened is strong evidence in a case of that kind that they had not taken the ordinary care, caution, and skill required for preventing the happening of the event. They knew that these pieces were being thrown out of the pit. They put up a screen which was obviously so inadequate that, as I have said, pieces were habitually thrown out of the pit. They issued warnings to persons near, appreciating full well that they were carrying on a dangerous operation. They did not trouble themselves to issue warnings to persons at a distance, but chose to allow their workmen at a distance, to go on working at the risk of being hit. It is suggested that human foresight and skill could not have discovered that pieces of iron would go to a distance of some 70 to 90 feet, at which the deceased was standing at the time of the accident I am not prepared to accept that view. Scientific knowledge has surely by this time reached the length of being able to tell with some accuracy what the effect of dropping a weight of a certain amount from a height of 35 feet upon pieces of iron will be and to what distances pieces of that iron will or may be sent. I am quite satisfied that the learned Judge was right in holding that sufficient care was not taken and that, therefore, the defendants were guilty of negligence.

It has been suggested by the defendant's Engineer and Manager of the factory that no further precautions have been taken since the accident. I hope that this evidence is not true, because that such a thing should have happened as happened in this case and that they should continue the operation without taking further precaution against the recurrence of such accident is, to my mind, negligence of the grossest kind.

The defence is put forward that the deceased voluntarily undertook the risk of this happening to him. That is the defence which is expressed in the maxim *volenti non fit injuria*; but, for this to succeed, it is necessary for the other party to prove that the person injured knew of the danger, appreciated it, and voluntarily took the risk. There is no evidence of any of these three things. The suggestion is that he had some knowledge of the danger because another man working in the same place spoke to the fact that a short time before a piece of iron had flown from north to south as far as the place at which that man was standing. That he appreciated the risk of pieces striking him is impossible to find in view of the fact that the skilled European Manager swore that he himself did not appreciate that there was any risk. Of course a man cannot voluntarily undertake a risk the extent of which he does not appreciate.

This appeal will accordingly be dismissed.

There is a cross-appeal against the amount of damages awarded. Under the Fatal Accidents Act, the widow or the person suing is entitled to compensation for the financial loss sustained by the death. She is not entitled to anything for pain or suffering or anything of the kind, but purely for the financial loss sustained. The learned Judge has awarded somewhere about one year's wages. He says that, in coming to that conclusion, he has taken into consideration that the accident was rather an extraordinary one, a consideration which, in my judgment was wholly irrelevant. What he had to consider was the financial loss. Once he had found that the defendants were liable, the question was how much they were liable for and not whether it was unfortunate for him that he was struck but, only what was the financial loss the plaintiff had sustained. The proper way of arriving at that is to form some estimate of what the value of the continued life of the deceased would have been to the plaintiff and how long it was probable that it would continue. I think that one year's wages is ridiculous in the absence of any evidence that the man was of ill-health or that his earning life was likely to be no more than a year. Giving the best consideration that I can to the facts of this case, I think, taking about Rs. 13 as the monthly wages and somewhere about three years as the right period, we can arrive at the correct figure if we increase the damages awarded by the lower Court

to Rs. 500 and I accordingly fix the damages at Rs. 500.

The cross-appeal will therefore be allowed with costs on Rs. 500, the amount awarded; and the appeal will be dismissed with costs.

Wallace, J.—I agree. When it is admitted by D. W, 1 that, even with the exsisting fence of three feet, iron pieces were at times flying over the fence to a distance of 12 or 15 feet from the pit, it is clear, that it was within the knowledge and the experience of the defendant company that a fence, three feet high was not an adequate protection. In these circumstances, had the company taken "reasonable precaution", it would have raised the fence so as to prevent this intermittent scattering of iron pieces to a distance of 12 or 15 feet at least. A mere warning to those working in the neighbourhood is not sufficient precaution as the defendant company itself recognised when it put up a fence to the height of 3 feet. The defendant company has therefore failed to take reasonable precaution to avert even the danger of which it was admittedly aware, and, not having adopted such reasonable precaution, it cannot be absolved from the charge of negligence and default, or escape the legal consequences thereof.

As to the contention based on the maxim *volenti non fit injuria*, when the defendant company itself pleads that it did not anticipate and could not have anticipated pieces flying over a distance of 90 feet, I do not see how they can plead that their deceased workman could possibly have anticipated it for himself and thus the essential ingredient of that defence is lacking. As to the contention that deceased must have known that ordinary care and caution were being exercised, and yet continued working, that defence also fails, as in my view, such ordinary care was not exercised.

I agree with the Chief Justice as to the amount of damages proposed by him and with his order dismissing the appeal.

Appeal dismissed.
Cross-Appeal allowed.

1923 MADRAS 567

SPENCER AND VENKATTASUBBA RAO. JJ.

Kalyanasundaram Iyer—Appellant—Petitioner.

v.

Narasimha Iyengar and others—Respondents-Defendants.

A. O. No. 80 of 1921 D. 21st December 1922, against the order of the Court of the Sub. J., of Coimbatore in I. A. No. 536 of 1920.

Civil P. C. O. 40 R. 1—Attachment of decree obtained by Receiver—Receiver's transferee.

An act done without the Court's sanction to proceed against a Receiver can subsequently be validated. Where no step had been taken to validate the irregular attachment by the time that the Receiver assigned his interest as decree-holder to the innocent purchaser, the appellant's right as an attaching creditor cannot be allowed to prevail over the rights of a *bana fide* transferee for consideration of the decree-holder's interest. [P. 567 C. 2, P. 568 C. 1]

S. T. Srinivasagopalachariar—for the Appellant.

A. Ramchandra Iyer—for the Respondents.

Judgment:—The Subordinate Judge rightly was of opinion that the appellant's attachment of the decree obtained by the Receiver in O, S. No. 113 of 1919 was invalid for want of the leave of the Court that appointed the Receiver. We accept the principle that an act done without the Court's sanction to proceed against a Receiver could subsequently be validated as has been held by this Court in *Ammu Kutty* v *Manavikraman* (1) and *Jagana Sanyasiah* v. *Atchanna Naidu* (2) and by the Calcutta High Court in *Banku Behari Dey* v. *Harendra Nath Mukerjee* (3) and *Sarat Chandra Banerjee* v. *Apurba Krishna Roy* (4).

But in this case no step had been taken to validate the irregular attachment by the time that the

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(1) [1920] 43 Mad. 793-12 L. W. 331-59 I. C. 568.
(2) [1922] 42 M. L J. 339-15 L. W. 289.
(3) [1910] 15 C. W. N. 54-8 I. C. 1.
(4) [1911] 15 C. W. N. 925-14 C. L. J. 55-11 I. C. 187.

Receiver assigned his interest as decree-holder to the innocent purchaser who is 1st respondent in this appeal, and therefore the appellant's right as an attaching creditor cannot be allowed to prevail over the rights of a *bona fide* transferee for consideration of the decree-holder's interest. An attempt has been made to show that the Receiver had no power to assign the decree under the powers vested in him, but this contention cannot be maintained in view of the wide authority given by the vesting order of 18-4-1908, which expressly refers to the "full powers" of O. 40, R. 1.

The Appeal fails and is dismissed with costs.

Appeal dismissed.

1923 MADRAS 568

KRISHNAN AND RAMESAM. JJ.

Venkatachala Pillai—Appellant.

v.

Arunthavathachi—Respondent.

A. O. No. 305, of 1921, D. 6th October 1922, against the decree of the Court of the Sub. J., of Cuddalore in Original Suit No. 65 of 1919.

(a) Evidence Act S. 115—Truth known.

A person who knows the truth can hardly be allowed to rely upon an estoppel arising from a false representation. No estoppel can arise where the truth is known to the party who claims the estoppel (30 I. A. 114 Ref,) nor unless it is shown that the party claiming estoppel ever intended to do a thing and was prevented from doing so by the act or assertion of the other person. [P. 570 C. 1,2]

(b) Hindu Law—Partition—Evidence of intention of parties.

The following cases were held not sufficient to indicate partition :—

(1) A deed executed by two brothers with intent to admit a third brother of theirs who had passed into another family by adoption, into the original co-parcenary. [P. 570 C. 2]

(2) A recital in a deed that the property of the family would be divided at some future ime. [P. 571 C. 1]

(3) Mere definition of shares.

(4) Constant assertions by one of the brothers that he was adopted into another family.

(5) Execution of some lease deeds in the name of one member only, and.

(6) Assignment of pro-notes by one of the brothers to the other 30 C 7 38 P. C. Dist.

A Krishnaswami Iyer and C. Padmanabha Iyer—for the Appellant.

T. Rangachariar, K. Bashyam Iyengar and Narasimha Iyengar—for the Respondent.

Krishnan J:— This is an appeal by the defendant from the decree of the Subordinate Judge of Cuddalore in O. S. No. 65 of 1919.

The plaintiff is the widow of one Anantanarayana Pillai and the defendant, Venkatachala Pillai, is her husband's brother.

She claims the properties in various ways; firstly the whole of the properties in Schedules II and 111 on a certain footing; secondly half of those properties on a certain other footing; and thirdly one third of the properties in schedule 11 and IV and the whole of schedule III properties on still another footing. The facts of the case are fully set out by the learned Subordinate Judge in his judgment and need not again be referred to in detail.

Anantanarayana, Ramchandra and Venkatachela (the defendant herein) were brothers being the sons of one Muthuswami Pillai. Muthuswami Pillai had two brothers himself, but they died 20 or 25 years ago leaving no male issue, and all their property passed to Muthuswami Pillai. Schedule II of the plaint gives property which Muthuswami had and which would have passed to his three sons as the ancestral estate. Schedule III gives the properties which the plaintiff's husband and his brothers got from their maternal grandfather and Schedule IV consists of certain properties which had once belonged to one Subbaroya Pillai and which passed to Venkatachala Pillai. The plaintiff states that as her husband was the sole surviving member of the joint family at the time of his death, he is entitled to the whole of the properties described in schedules II and III; in the alternative she says that if the defendant is held to be entitled to the properties as co-owner to himself and to plaintiff's husband she would be entitled to half of the properties

in all the three schedules. She denies that the defendant continued as co-parcener of her husband at the time of his death.

It is the defendant's case that he was such a co-parcener and therefore the whole of the properties in the three schedules in the plaint passed to him and that the plaintiff got only a right of maintenance.

Of the three brothers Anantanarayana Pillai, Ramchandra Pillai and Venkatachala Pillai, Ramchandra Pillai, the second brother, was admittedly adopted away from the family by one Pannapattu Subbaroya Pillai, and he seems to have succeeded to the properties of Subbaraya Pillai and enjoyed them. Just before his death, a document, the effect of wich has been discussed before us at some length and which we have to consider, Exhibit A, was executed by the plaintiff's husband, this Ramchandra Pillai and their father Muthuswami Pillai as representing the defendant who was then a minor. It is the plaintiff's case that, some time thereafter, the defendant was himself adopted by Ramchandra Pillai into the new family to which Ramchandra Pillai had passed and he contends, that having been so adopted away, he has no more rights in the original family, and it is in that eventuality, she says, she is entitled to the plaint properties in schedules II and III. Schedule IV properties which came from Subbaraya Pillai she would admit would then belong to the defendant solely. So that, one important question in this case has been whether the adoption of the defendant by Ramchandra has been proved. The Subordinate Judge found on the evidence that it must be taken that the adoption, has not been proved and that, in fact, it was a false assertion made by the defendant and his brother, the plaintiff's husband. There is a good deal of evidence to show that this adoption was not true in fact, for very soon after Ramachandra Pillai died, the properties of Ramchandra Pillai were claimed by his widow Valliammal. She got a transfer of patta of the property in her name to start with. There is nothing to show that Venkatachala Pillai objected to that course being adopted. Nextly we have a suit brought by a stranger, a Nattukottai Chetti, for a debt alleged to be due by Ramchandra Pillai against Valliammal as his legal representative. The suit was decreed and a considerable bulk of the properties of Ramachandra Pillai was sold and purchased by the Chetti himself. The defendant subsequently brought a suit to have that sale set aside, but he did not continue that suit and obtained no relief. Subsequently we find some reversioners of Ramchandra Pillai bringing a suit against this Chetti in which Venkatachala Pillai and Valliammal were both made parties. In that suit Venkatachala's alleged adoption was disputed and there was a finding arrived at that the adoption was not true. The main evidence which was put forward in that suit to support the adoption was a will supposed to have been executed by Ramachandra Pillai. That will was also found to be not genuine. It was decided that the plaintiffs in that suit were the reversioners, which meant that the truth of the adoption was negatived. No appeal was filed by Venkatachala Pillai against this decision, although there was an appeal by the other parties. Again a subsequent suit, vide Ex. H. which the defendant and his brother Anantanarayan brought, the latter as an assignee of the mortgage in favour of Ramchandra Pillai and the former as his adopted son, was dismissed. The finding there also was against the adoption, but no further steps were taken in that litigation either to establish the adoption. We find, therefore, that immediately on the death of Ramachandra Pillai the defendant's supposed adoption was disputed, and every time it went before the Court, the decision was against the truth of the adoption.

Further we find certain transactions which also go against the truth of this adoption. As has been already stated, the bulk of the properties of Ramchandra Pillai were sold and purchased by Nattukottai Chetti but there were some properties still left and they were conveyed by Valliammal to a

relation of hers, one Muthu Velayuden. Of course she could not validly have done this if the adoption was true, and yet no steps were taken by the defendant to dispute the validity of that sale.

These and other circumstances referred to by the Subordinate Judge in his judgment show very clearly that it is not possible to find that the adoption was in fact proved. No doubt on the other hand it is pointed out to us that in spite of all these adverse decisions, Venkatachala the defendant, went on asserting that he was the adopted son of Ramchandra Pillai in the numerous documents which he executed till about May 1916. Why he did so it is difficult to say for certain, but the Subordinate Judge has given what he considers to be the probable reason for it, and it is not unlikely that that may be the motive that made him continue to assert that he was the adopted son of Ramachandra Pillai. Anyhow the fact of the adoption, we must take it, has not been proved, and we agree with the Subordinate Judge on that point.

It was then suggested that, because the defendant went on asserting that he was the adopted son of Ramchandra Pillai, he must now be held to be estopped from saying that he is a member of the same family as Anantanarayana Pillai,for,it is contended, that, if he had not done so, Anantanarayana Pillai might himself have formally divided himself off from Venkatachala Pillai and secured his share for his wife and daughters, and as by the latter's conduct Anantanarayana was misled into not doing that, an estoppel arises against the defendant. We are not able to accept this argument for, in the first place, it is not denied that if the adoption is false Anantanarayana knew the whole truth about it, perhaps to a greater degree than the defendant himself. A person who knows the truth can hardly by allowed to rely upon an estoppel arising from a false representation. No estoppel can arise where the truth is known to the party who claims the estoppel vide *Mohori Bibee* v. *Dhurmodas Ghose* (1). In the second place there is absolutely nothing to show that Anantanarayana Pillai ever intended to divide from Venkatachala Pillai and was dissuaded from doing so because Venkatachala Pillai was asserting that he was the adopted son of Ramchandra Pillai. There is thus no basis for the estoppel pleaded.

Then it is said that by the document Exhibit A there was a severance of co-parcenary between Venkatachala Pillai and Anantanarayana Pillai. On this point the Subordinate Judge has held against the plaintiff and in favour of the defendant. The document is a very curious one. It calls itself a deed of union and it is in fact an attempt by the two brothers, Anantanarayana and Venkatachala to unite with the third brother Ramchandra Pillai who had been adopted away into another family. It purports to be an agreement by which the properties of all the three brothers were put together with a statement that they should be, when a division takes place in the future, divided into three shares equally, that if any uterine brothers are born, they are also to take jointly with them, and, in fact that the three brothers are to treat themselves as members of a joint family. It is contended for the respondent that this deed, as a matter of legal consequence whatever the parties might have intended, resulted in the severance of co-parcenary between the plaintiff's husband and Venkatachala Pillai, for it is said that two members of a joint family could not constitute themselves into a unit and take in a stranger, without themselves being treated as divided. In our opinion the intention of the deed is clearly not to divide but to combine, and if the deed has failed to do that it has failed of its purpose. It may be valid as a matter of contract between the stranger Ramchandra Pillai and the two brothers, members of the joint family, but it does not sever the latter's co-parcenary. In fact it expressly says that no party to the deed is

(1) [1903] 30 I. A. 114–30 Cal 539–7 C. W. N. 441–5 Bom L. R. 421–8 Sar 374 (P. C.)

to assert that any portion of the property belongs to him separately or exclusively. It provides for future born children, to be made sharers. It no doubt also provides that the eldest man was to manage all the properties and keep accounts. It was suggested that this and the fixing of the share as one third to each of the parties are indications that a division was intended, and the case in *Balkrishen Das* v. *Ram Narain Sahu*, (2) was cited as an authority for the position that a definition of shares will result in the family being treated as divided. But that case is very different because there was a present allotment of the different shares with a statement in the deed that any person who wanted to separate may take his share and leave the joint family and the others may continue in joint enjoyment. Here there is no such provision. Exhibit A does not contemplate a division but it expressly says that in case the defendant who was then a minor becomes of age, the properties are to be divided in future into three shares. That amounts to nothing more than a mere statement as to what each person would be entitled to in case of a division if no brothers are born. We cannot accept that as indicating that Anantanarayana Pillai and the defendant intended to divide themselves off from each other in *presenti* by that deed.

It was next argued that certain dealings between the parties and the conduct of Anantanarayana Pillai and the defendant showed that they had treated themselves as divided in status and that they were really so divided

It is this part of the case that the Subordinate Judge has found in favour of the plaintiff and given her decree for half of the properties in schedules II, III and IV. We are unable, however, to follow the Subordinate Judge in the view that he has taken on this part of the case. He says that the commensality between Venkatachala and Anantanarayana came to an end about a year before the latter died, meaning that they were living separately. Then he refers to certain lease deeds of the lands taken in the name of the defendant alone, and to certain debt bonds being taken exclusively to Anantanarayana's name. He then refers to two documents, Exhibits C and C (1) which were two pro-notes assigned over by endorsement by the defendant to Anantanarayana. Pausing here for a moment we do not think that any of these circumstances are of any value in showing that Anantanarayana Pillai and Venkatachala became divided. It is not the plaintiff's case that there was any division just before the death of Anantanarayana. Her case is that from very long ago, since the date of Ex. A and certainly after the date of the alleged adoption, the two were not members of joint family but were divided. The endorsement that the Subordinate Judge refers to leads to no conclusion whatever without knowing more about the nature of the debt for which these pro-notes were executed. We only know that was a transfer by endorsement, by one member of a family to another, of two notes; this is of no evidentiary value in considering the question whether they were divided or not. The transactions may have taken place even if they were undivided if for example they were dealing with self-acquired properties.

Then the Subordinate Judge refers to an instalment of kist being paid in Anantanarayana's name, though previously all along it had been paid in the defendant's name. He refers to Ex. E and X and XI series in support of this. How this indicates that Venkatachala divided off from Anantanarayana it is difficult to imagine. No reliance has been placed by the learned Vakil for the respondent before us on this circumstance. We are unable to attach any significance as the Subordinate Judge seems to have done to the assignments of the pro-notes or to the payments of kists. We think they are all circumstances quite consistent with the parties remaining in the same state as they were before.

(2) [1903] 30 Cal 738-30 I. A. 139-7 C. W. N. 578-5 Bom L. R. 461 (P. C.)

Then the Subordinate Judge says. "The following fact strongly militates against the supposition that it was the intention of Anantanarayana and defendant in cultivating and enjoying the lands jointly, to do so as members of a co-parcenary and he refers to the defendant, Venkatachala masquerading to all the world in the disguise of Ramachandra Pillai's adopted son. We have already referred to this circumstance and, whatever the reason for his having done so may be, it certainly does not indicate any intention on his part to divide himself off from his brother In fact apparently these men were of opinion that, even after the adoption into another family, they could remain as members of the original family or bring themselves back into it as they have attempted to do in Exhibit A in the case of Ramachandra Pillai and continue as members of the joint family.

Another circumstance has also been referred to viz, that Venkatachala Pillai adopted the Sivite faith of Ramachandra and performed funeral ceremonies to him. This may be some evidence on the question of the truth of the adoption, but we have already held that the evidence on that point is strongly the other way. It has little or no bearing upon the question of division. In fact it is not urged by the learned vakil for the respondent that it is any basis for any inference that there was any division between the brothers. Anantanarayana and Venkatachala were originally members of a joint family and, unless the plaintiff is able to show some act on their part which amounted to a division of status, at any rate between them such as any unambiguous declaration of one party to the other that he was thereafter to be considered as divided in status from the other, we must hold that the original joint family status has not been affected and they continued a joint family till the death of Anantanarayana Pillai. In these circumstances it would follow that Venkatachala as the undivided brother of Anantanarayana Pillai is entitled to all the plaint properties and that the plaintiff's suit should have been dismissed altogether. Accordingly we allow the appeal and dismiss the plaintiff's suit.

As the litigation was in part, at any rate, brought by the way in which Venkatachalla Pillai himself behaved by asserting that he was the adopted son of Ramachandra Pillai, we think that in this case the costs should not follow the event. Each party will bear its costs in the lower Court and in the appeal, but in the memorandum of objection we direct that the plaintiff will pay the costs of the defendant.

The memorandum of objections is dismissed with costs.

Appeal allowed.

1923 MADRAS 572

AYLING AND RAMESAM JJ.

(*Mathoor Gramam Rama Pattar's son*) *Ramasami Pattar and others*—(Defendant) Appellants.

v.

Mankursi Variath Lakshmi Varassiar and another—(Plaintiffs) Respondents.

S. A. No. 687 of 1921, D. 17th Jan. 1923, against the decree of the Court of the Sub. J., of South Malabar at Palghat in A. S. No. 35 of 1920.

(*a*) *Grant—Construction — Kazhagam service.*

Having regard to the terms in a deed :— " You are to enjoy the same conducting Vazhipadu to the deity", and to the meaning of the terms Vazhipadu in Gundart's Dictionary :— " offering of rice of which the greater part returns to the donor", *held* that the grant was not at all a service grant. The obligation to make the show of an offering being a nominal obligation was merely a moral one. [P 573 C 2]

(*b*) *Evidence Act S. 101—Grant—Resumption.*

The burden of founding a resumable tenure is on the grantor.

T. R. Ramachandra Iyer and C. S. Swaminathan—for the Appellants.

C. V. Ananthakrishna Iyer and C. Unikanda Menon — for the Respondents.

Ramesam, J.—The suit was brought to recover certain lands, known as Kunnathupadam lands on the ground that they belong in Jenm

to the Kurichimalai Devaswom represented by the 1st plaintiff; that they were granted to the 1st defendant on condition of rendering Kazhagam service in the temple, that he has ceased to render Kazhagam service and hence the lands are liable to be resumed; that the 1st defendant's right in the lands was sold in execution of a decree (O. S. No. 25 of 1915) and purchased by the 2nd and 3rd defendants; and that the 1st defendant though called upon to surrender the lands failed to do so.

The defendants plead that the lands were not held on condition of rendering Kazhagam service and were not resumable.

I will now refer to the previous litigations bearing on the tenure under which the suit lands were held In 1851 the predecessor-in-title of the 1st plaintiff sued the predecessor-in-title of the 1st defendant for possession of the same lands on practically the same allegations; but the suit was compromised. Ex. B was the petition of compromise in which it was stated that "the lands and paramba involved in the above suit had been given away long time back as offering (Vazhipadu) and as Uuruyilydakam for the Kurichimala Thevar (deity) to the Kurichimala Variyam of the 1st and 3rd to 6th defendants who are the Karaima Kazhagam holders of the temple". It then proceeds to state that 1st plaintiff executed a deed of consent "to the effect that the said properties may be held and enjoyed on Saswatham right after conducting the offerings (Vazhipadu) in future". The deed referred to in this petition is Ex. A. the operative words in which are "you are to hold the said properties for ever as Saswatham as in the past and to enjoy the same conducting Vazhipadu to the deity.". In my opinion the tenure on which the suit lands are held depends on the construction of Ex. A

In O S. No. 501 of 1890 the present 1st defendant and other members of his tarwad obtained a decree against the then karnavan of the plaintiff's tarwad for wages for Kazhagam service and O. S. No. 152 of 1892 was filed by the junior members of the plaintiff's tarwad for declaring that as the defendants held the present suit lands as wages for Kazhagam service, the decree in O. S. No. 501 of 1890 was improperly obtained. It was found that the present suit lands were not held as wages for Kazhagam service but for utilizing the income for the Nivadyam in the temple. The Courts below relying on the latter part of this finding and considering that Nivadayam is a kind of Kazhagam held that the suit land is held on condition of performing Kazhagam service and decreed the plaintiff's suit as the 1st defendant has ceased to perform the services.

In the first place, it is clear that, as the real issue in O. S. No. 152 of 1892 was whether the decree in O. S. 501 of 1890 was properly obtained and the nature of the tenure of the suit lands arose only incidentally: therefore the decree in O S. No. 152 of 1892 is not *res judicata* against the plaintiffs on the question whether the suit lands were held for Kazhagam service or not. Still less is it *res judicata* against defendants on the question whether they were held for any other service. The proper view is thus not to regard the observations in the judgment of O. S, No. 152 of 1892 as finally deciding anything regarding the tenure of the suit lands.

One point is obvious from the history of the suit lands as set forth above—*Viz.*, that whatever the defendant had to do in connection with the suit lands was certainly not Kazhagam From 1851 onwards, the defendants always denied that the land had anything to do with Kazhagam service and they always succeeded in this plea. It is significant that neither Ex. A 1 nor B connects the lands with Kazhagam. Having regard to the terms of Ex. A 1:—"You are to enjoy the same conducting Vazhipadu to the deity" and to the meaning of the terms Vazhipadu in Gundart's Dictionary:—"offering of rice of which the greater part returns to the donor", it seems to me that the grant was not at all a service grant. The obligation to make the show of an offering being a nominal obligation seems to be a merely moral one. The burden of founding a resumable tenure is on the grantor,

Lakhamgavda v. *Keshav Annaji* (1); and the words in Ex. A are too vague to connote a condition on breach of which the lands could be resumed. On a construction of Ex. AI, the 3rd issue ought to be found against the plaintiff. The Second Appeal must be allowed and plaintiff's suit dismissed with costs of appellants throughout.

Ayling, J.—I agree.

Appeal allowed.

(1) (1904) 23 Bom. 305-6 Bom. L. R. 364.

1923 MADRAS 574

(Full Bench.)

SCHWABE C. J. OLDFIELD AND COUTTS TROTTER, JJ.

The Secretary, Board of Revenue (Income Tax) Madras — Referring Officer.

V.

Ripon Press and Sugar Mills Co. Ltd —Assesssee.

Civ. Ref. No. 2 of 1922, D. 29th Jan. 1923, stated under S. 51 of Act VII of 1918 by the Secretary, Board of Revenue (Income Tax), Madras in I. T. A. No. 28 of 1920-21.

Income Tax Act (1918) S. 3 (1)—'Accrues arises or is received in British India.'

The company carried on a factory at Raichur in the territory of the Nizam of Hyderabad. At that factory material is pressed. Against persons who bring the material to the factory a charge is made, and the charge is received wholly, in Hyderabad. The Company's head office is in Bellary in Madras Presidency. There are Directors there, and they control the business carried on at Raichur by directing its policy fixing the rates to be charged for the work done there, examining the accounts and issuing dividend warrants in respect of the profits earned. The only other thing that is done in British India is the receipt of some money for the purpose of the office expenditure at Bellary and possibly the receipt of some money which is occasionally used for the payment of dividend warrants at Bellary though, by the terms of the dividend warrants, they are payable only at the office of the treasury at Raichur. *Held* except for the small amount received as the Company's money by the Company in Bellary, there is no income which accrues or arises or is received in British India and there is nothing in the Act to show that such profits earned outside British India are to be deemed to accrue or to arise or to be received in British India. 45 B 1286 ; 43 M 753 ; 3 L 349, Ref.

[P, 574 C. 2.[

The Government Pleader—for the Government.

C. Sambasiva Rao—for the Assessee.

Schwabe, C. J. :—In this case the facts contained in the original reference and the further report which is by no means clearly expressed, amount to this. The company carries on a factory at Raichur in the territory of the Nizam of Hyderabad. At that factory material is pressed. Against persons who bring the material to the factory, a charge is made, and the charge is received wholly in Hyderabad. The Company's head office is in Bellary in this Presidency. There are Directors there and they control the business carried on at Raichur by directing its policy, fixing the rates to be charged for the work done there, examining its accounts and issuing divident warrants in respect of the profits earned. The only other thing that, it would appear, is done in British India is the receipt of some money for the purpose of the office expenditure at Bellary and possibly, though it is not clear on the statement, the receipt of some money which is occasionally used for the payment of dividend warrants at Bellary though, by the terms of the dividend warrants, they are payable only at the office of the treasury at Raichur.

The question referred to us is whether the Company can be assessed to income-tax on the whole of its profits for the year, it being claimed that Bellary is the place where the total amount of the profits is paid by the Company to its share-holders by the issue of dividend warrants. The question turns on the interpretation of S. 3 (1) of the Income Tax Act VII of 1918 which runs thus: 'This Act shall apply to all income from whatever source it is derived if it accrues or arises or is received in British India, or is, under the provisions of this Act, deemed to accrue or arise, or to be received in British India.' Except for the small amount received as the Company's money by the Company in Bellary, in my judgment, there is no income which accrues or asises or is received in British India and there is nothing in the Act to show that such profits earned out-

side British India are to be deemed to accrue or to arise or to be received in British India.

There is a direct authority on the point in *In re The Aurangabad Mills, Limited* (1). In that case the facts were precisely the same as in this case except that the Bombay Directors of the business which had its factory in Aurangabad, seemed to have controlled the business in Aurangabad more than the Bellary Directors did in this case, and except for the fact that it was admitted in that case, though it is not clear in this case, that money was received in Bombay for the express purpose of paying some of the Bombay share-holders their dividends; and it was held in that case that the general profits of the Company were not liable to income-tax. I agree with that decision, which governs this case, and I have nothing to add to the reasons given by Macleod, C. J. in that case. I think that this case really is also covered by the ruling of this Court in *Board of Revenue Madras* v. *Ramanathan Chetty* (2). There is a recent reported case *Sundara Doss* v. *Collector of Guzarat* (3), where it was held that where a man carried on business outside the part of India to which the Income-tax Act applies, earned his profits there, and then had them remitted to him in India where he resided, that money was not received in India. It was pointed out that it had been received outside and had remained in the possession, actual or constructive, of the trader throughout and that it could not be considered to be received again when it was brought into British India whether brought by him or sent from abroad to him in British India. I point out this because that is a point which may be involved in the event of the question being referred to this Court whether small amounts, received by the Company as stated by me above in Bellary are themselves liable to taxation.

(1) (1921) 45 Bom. 1286-23 Bom. L. R. 570-64 I. C. 9.

(2) (1919) 43 Mad. 75-37 M. L. J. 663-(1919) M. W. N. 826-10 L. W. 570-26 M. L. T. 447-53 I. C. 976 (F. B.)

(3) (1923) Lah. 14-3 Lah. 349.

I therefore answer the question referred to us in the negative. The costs to be assessed by the Registrar are payable to the assessee.

Oldfield, J.—I agree and I only wish to point out that, although the argument as to the receipt by some of the share-holders of dividends in Bombay was available to the Crown *In re Aurangabad Mills Limited* (1), it was not thought worth while to make any distinct reference to it in the judgment. I supplement what has been said by my Lord regarding it, because it is as well to point out that the terms of the reference of the Board indicate a fundamental misconception on one important point. Mention is made in that reference of the fact that "the majority of the shareholders (who after all form the company) receive their dividends in British India." The identity between the shareholders and the Company is not material for the present purpose, since the assessment is not of the income as the income of the individual shareholders, but as the income of the Company; and we have nothing to do with the shareholders in their individual capacity. So far as the Company is concerned, the only material matter is the receipt of the income and that income was received at Raichur. If some of it came to Bellary and was actually used to pay dividends, that is no reason why we should assume that what was done in Bellary was anything more than the distribution of what was already the Company's income and was payable as of right in accordance with the arrangements made by the Company to the shareholders only at Raichur outside British territory. It is not necessary for us, and it is not possible on the facts before us, to say whether payment in the cases referred to in the reference was made at Bellary by the officers of the Company to the payees, who took their money there instead of presenting their dividend warrants at Raichur after receipt of the money by those officers at the latter place as the payees' agents, or to attempt an exact definition of the legal position. It is sufficient that such payments have nothing to do with the accrual of income to or its receipt by the Company, as such. With

these observations, I agree in the negative answer proposed.

Coutts Trotter, J.—Iagree. Where you have dividend warrants issued to shareholders expressed to be payable at the office of the treasury at Raichur, it is very strong evidence that the income regarded as the Company's income has been received and has accumulated in Raichur. I entirely agree with the decision cited to us in *Sundar Das* v. *Collector of Guzarat* (3) that you cannot receive the same sum of money *qua* income twice over, once outside British India and once inside it. *In re The Aurangabad Mills Limited* (1) covers the point raised in argument, and I respectfully agree with that decision.

Reference answered in the negative.

1923 MADRAS 576

PHILLIPS AND DEVADOSS, JJ.

Allagu Pillai (died) and others—Appellants.

v.

Veluchami alias Mayilappa Pillai and others—Respondents.

F. A. F. O. No. 15 of 1922, and A. A. O. No. 14 of 1922, D. 21st Feb. 1923, against the decree and order D. 19th August 1921 of the Court of the Sub. J. of Sivaganga in Original Suit No. 5 of 1918.

Civil P. C. Sch. II Para 15 & O. 23 R. 3—*Partial award—Submission after time.*

There is no rule of law that a partial award is invalid but that question has to be decided on the intention of the parties, the matter being a subject of contract between them, i. e. it is valid unless there was an implied agreement that the award should be void unless an award were given in respect of all the matters referred for decision. Where after the time for submission of the award had expired, the Court, passed its order, *Held* it must be deemed to have exercised its power to supersede the arbitration and to deal with the suit. When a reference is made to arbitration Court is not bound to act under Sch. II. [P. 576 C. 2 P. 577 C. 1]

C. S. Venkatachariar and K. V. Krishnaswami Iyengar—for the Appellants.

A. Krishnaswami Iyer and V. Ramaswami Iyer—for the Respondents

Judgment:—In this case a suit was referred to arbitration, three arbitrators being appointed. As two of the arbitrators were absent the parties agreed to abide by the decision of the third alone. He was accordingly requested to decide this suit and other matters. He gave his decision so far as this suit was concerned and deferred his enquiry into other matters, but owing to defendants' obstruction no award was made in those matters. On application the lower Court has recorded the award under Order 23 Rule 3. Defendants appeal.

The greater portion of their argument has been addressed to the plea that as the award was only partial, it is not valid and has referred to *Randall* v. *Randall* (1) and *Bradford* v. *Bryan* (2). An examination of these and other cases on the point *i. e. Risden* v. *Inglet* (3), *Ormelade* v. *Coke* (4), *Wrightson* v. *Bywater* (5) and *Simonds* v. *Swaine* (6) shows that there is no rule of law that a partial award is invalid, but that the question has to be decided on the intention of the parties, the matter being a subject of contract between them. In the earlier cases an express contract was required, but later an implied contract that the award should be given on all points referred was held sufficient. We therefore have to determine the intention of the parties in the present case. The defendants do not seem to have placed much reliance on this implied contract until they came up in appeal and even in their appeal memorandum, the ground is not taken clearly and unambiguously. The arbitrator's report (Exhibit C) and his report Exhibit G as well as 1st defendants's letter (Exhibit D) and Exhibit F show that the matter involved in this suit was decided, and the decision accepted by both parties. The reference in Exhibit C to certain contentions put forward by defendants shows that they were a plea in *miseri cordium* after the decision and could in no way affect the award. Taking all the circumstances into consideration we think that there was no implied agreement that the award should be void unless

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(1) (103) Eng. R. 32.
(2) (125) Eng. R. 1167.
(3) 78 Eng R. E. P. 1063.
(4) 79 Eng R. E. P. 303.
(5) 150 Eng. Rep. 1114.
(6) 127 E. R. 947.

an award were given in respect of all the matters referred for decision. Further defendants prevented the completion of the award by their own conduct, and on the principle that when a party to a contract wrongly prevents a thing being done by another party that thing is deemed to be done *vide Mackay* v. *Dick* (7), and defendants cannot now plead that the award is incomplete. A further point was taken that as a reference had been made to arbitration the Court could not act under Order 23 Rule 3, but only in accordance with Schedule II Civil Procedure Code. The time for submission of the award had expired when the Court passed its order. It must therefore be deemed to have exercised its power to supersede the arbitration and to deal with the suit.

The second reference to private arbitration was made before the time expired and it is argued that there was then no suit to be compromised, as the suit was only pending for certain limited purposes specified in schedule 11. Even conceding this proposition the suit must still exist and the compromise was a compromise of that suit.

Venkatasami Naicken v. *Venkatasami Naicken* (8), is authority against the further proposition that the Court was bound to act under Schedule II and not under Order 23 Rule 3.

The agpeal is accordingly dismissed with costs and the Civil Miscelleneous Appeal is also dismissed, printing costs alone being allowed.

Appeal dismissed.

(7) 6 App. Cas 251.

(8) [1919] 42 Mad. 625.

1923 MADRAS 577

OLDFIELD AND VENKATTASUBBA RAO, J.

Rasa Goundan and others-Defendants—Appellants.

v.

Arunachela Goundan and others—Plaintiffs—Respondents.

S. A. No. 1334 of 1921 D. 12th Feb. 1923, against the decree of the Court of Coimbatore in A. S. No. 21 of 1921.

T. P. Act S. 53—Transfer—Partition.

Partitions are transfers within the meaning of S. 53. 10 L. W. 498 Not foll. [P. 577 C. 2]

A. Krishnaswami Iyer — for the Appellants.

C. S. Venkatachariar — for the Respondents.

Judgment :—In the lower appellate Court this case was argued only with reference to limitation. We agree that Art. 120 is applicable, because there is no necessity for the plaintiff, a stranger to the document in question, to have it set aside and no obstacle to his limiting his claim to a declaration of its validity.

This failing, it is contended that the lower Courts were wrong in applying S 53 of the Transfer of Property Act to the transaction in question before them, because that transaction is a partition and partitions are not transfers within the meaning of S. 53, We are unable to understand how a partition is not a transfer of property within the meaning of that section, since it must be regardad, as it is described in *Altabanesea Bibi* v. *Saftulla Mia* (1), " as signifying the surrender of a portion of a joint right in exchange for a similar right from the co-sharer." The argument attempted has in fact been supported only by reference to the words in that decision preceding those quoted :—" The object of a suit for partition is to alter the form of enjoyment of joint property by the co-owners," and the dictum of Spencer, J. in *Indoso Jithiaji* v. *Kothopalli Ramacharlu* (2) ; " It effects a change in the mode of enjoyment of property, but it is not an act of conveying property from one living person to another." In reply to those citations we need observe only that one of the objects of a suit for partition is to alter the form of enjoyment of joint property, without at the same time depriving the partition of its character as a transfer, and that we have been shown no other

(1) (1916) 43 Cal. 504-22 C. L. J. 259 -31 I. C. 189.

(2) (1919) 10 L. W. 498-54 I. C. 146.

authority in agreement with the opinion of Spencer, J. Holding that a partition is a transfer of property, to which S. 53 is applicable, we reject this ground of appeal. The second appeal fails and is dismissed with costs of the plaintiff-2nd defendant.

Appeal dismissed.

1923 MADRAS 578

SCHWABE, C. J. AND WALLACE, J.

Kishtappa Chetty—Defendant — Appellant.

v.

Lakshmi Ammal—Plaintiff—Respondent.

C. C. C. A. No. 17 of 1922, D. 11th Jan. 1923, against the decree of the Court of the City Civil Judge, Madras D. 9th March 1922 in O. S. No. 132 of 1921.

(a *Limitation Act Art. 10—Trustee—Trusts for specific purpose.*

By some agreement the jewels in question were settled on the terms of a document which was to the effect that they should be enjoyed by the plaintiff during her life without power of alienation and upon her death they should be divided between the defendant and other parties to the agreement. Within a short time of the making of that agreement the jewellery came into defendant's hands. At the time the document was executed there was an express promise by the defendant that he would within ten days obtain the jewels and deal with them in accordance with the document; *Held* that defendant was 'trustee' within Art 10. The phrase "trust for a specific purpose" in this section is merely a more expanded mode of expressing the same idea conveyed by "express trust" in English Law: and it is used in this section in contra-distinction to "trusts arising by implication of law, trusts resulting and trusts constructive." The word "vested" in S. 10 means nothing more than properly having control of the property. [P. 579 C. 1]

(b) *Limitation Act Art 49—Applicability.*

Art 49 is not dealing with articles deposited in any sense. [P. 580 C. 2]

(c) *Limitation Act Art 145—Applicability.*

Art 145 covers a case of deposit more than the *depositum* of Roman Law. [P. 580 C. 2]

M. A. Thirunarayanachariar—for the Appellant.

C. T. Ananthakrishna Iyer—for the Respondent.

Schwabe C. J:—This is an appeal from the City Civil Court in a suit in which the plaintiff sought to recover certain jewels or their value, and an order was made for their return or for their value, Rs. 1000.

The facts of the case are that the jewels in question being in the possession of the plaintiff were handed by her to the defendant on terms that he might pledge them for a short time for his own benefit and should then redeem them and return them to the plaintiff. While the jewellery was still in his possession or in the possession of the pledgee with whom he had pledged them, the plaintiff and the defendant and other members of the same family, the plaintiff being the widow of a brother of the defendant, entered into an agreement, Ex. A. By that agreement the jewels in question were settled, on the terms of Ex. A which was to the effect that they should be enjoyed by the plaintiff during her life without power of alienation and upon her death they should be divided between the defendant and other parties to the agreement. Within a short time of the making of that agreement the jewellery, if it was not already in the hands of the defendant, came into his hands, for he was under a duty to redeem it and there is no evidence that he did not do so. At the time that Ex. A was executed there was an express promise by the defendant that he would within ten days obtain the jewels and deal with them in accordance with Ex. A. In 1916 the plaintiff demanded from the defendant the return of the jewels and he refused. She subsequently took criminal proceedings against him but was referred by the Criminal Court to the Civil Court, and in 1921 she brought this suit. She alleged that she had discovered in 1917 that the defendant had sold the jewels in 1912. The defendant denied that he did sell the jewels in 1912 or at any time and there has been no finding of fact as to whether he has or has not sold them.

The learned Judge has held that the suit is not barred by limitation because S. 10 of the Limitation Act

applies and that the defendant is a trustee for the plaintiff. It is contended before us that S. 10 has no application and that the case is governed by Art. 49 and is, therefore, barred because the suit was not brought with in three years after the demand and refusal referred to above. S. 10 applies only to "suits against persons in whom property has become vested in trust for any specific purpose." It has been held in *Bhurabhai* v. *Luxmani* (1) that the phrase "trust for a specific purpose" in this section is merely a more expanded mode of expressing the same idea as that conveyed by the expression "express trust" in English Law: and it is used in this section in contra-distinction to "trusts arising by implication of law, trusts resulting and trusts constructive." In my judgment, that is a correct statement of the law and I think it is right to say that, wherever you have an express trust, the trustee comes under Section 10 and no period of limitation avails him. What amounts to an express as opposed to a constructive trust was fully discussed in *Soar* v. *Ashwell* (2). That was a case in which a solicitor for some trustee received some of the trust monies on the terms that he was to invest them for the trust. It was held that he, by those terms, became an express trustee of those monies. In my judgment, in this case the true position after the execution of Ex A. was that, when the jewellery came into the hands of the defendant, a party to that agreement, he, by his agreement, had undertaken to hold it and apply it in accordance with the terms of Ex. A. and was thereby constituted an express trustee in whom the property was vested for thatp urpose. I do not think that the word "vested" in S. 10 means anything more than properly having control of the property. The jewellery was accordingly held by him from that time forward on terms that he should hand it over to the plaintiff, if alive, or, if dead, should hand it over to himself and others entitled to it in reversion. I, therefore, agree with the decision of the learned Judge of the City Civil Court I agree with the decision of the majority in *Administrator General of Bengal* v. *Kristo Kamini Dasee* (3), which supports this view.

I wish, however, to deal also with the other point, namely, whether, assuming that there is no trust, the case is governed by Art. 145 or by some other and what Article of the Schedule to the Limitation Act. For this purpose one has to consider the terms on which the defendant originally got the jewellery into his possession. The terms were that he might use the jewellery for his own benefit by pledging it and, if not so required if and when redeemed he should hand it over to the plaintiff. Art. 145 refers to suits against depositaries or pawnees to recover moveable property deposited or pawned; the period of limitation is 30 years from the date of the deposit or pawn. It is argued that the word "deposit" there must be confined to the strict meaning of "*depositum*" in Roman Law and there is some authority in support of that view There is a judgment to that effect of Sadasiva Aiyar J. in *Narayanaswami Thevar* v. *Aiyasamy Iyengar* (4), where it was unnecessary for the decision, and of the Bench in *Gopalasami Ayyar* v. *Subramania Sastri* (5), where, as the Court was holding that the time had not expired, it was also unnecessary for the decision. There is also the dissenting judgment of Hill J. in *Administrator General of Bengal* v. *Kristo Kamini Dassee* (3). Looked at from the point of view of Roman Law, I do not think that the handing over of the property in this case by the plaintiff to the defendant was a *depositum*. I think it is more in the nature of *commodatium*. There are six kinds of bailment refered to in Roman Law and set out in detail in the famous judgment of Holt C. J. in *Coggs* v.

1. (1908) 32 Bom. 394-10 Bom. L. R. 540.
2. (1893) II Q B. 390.
(3) (1904) 31 Cal. 519-8 C.W.N. 500.
(4) (1912) 24 M. L. J. 184-18 I.C. 921.
(5) (1911) 35 Mad. 636-(1911) 2 M.W.N. 190-10 M. L. T. 572-22 M. L. J. 152 12 I. C. 207.

Bernard (6). But the Indian Limitation Act was meant to provide a simple guide to cover every possible case that might come before Courts in India. It is obvious that the intention was to merely have to look up the particular suit and you would find the answer in the First Schedule. The results, it is true, are not very happy, but I cannot believe that it was the intention of the framers of that Statute that the various District Munsiffs throughout India or other Subordinate Judges who have to administer the law should have to study either *Coggs* v. *Bernard* (6) or the Roman Law in order to ascertain what was the true meaning of Art. 145 I think they meant to use simple and plain language and they used the word depositary ; and, in using that word, they meant simply to say that, where one man's property was handed by that man to another, he became a depositary of it, unless, of course, there was something in the terms of the handing over which would prevent his being treated as a person with whom it was deposited at all. It is almost impossible that, when they were making a period of 30 years applicable to cases of goods handed over either for safe custody or in pledge, they should have intentionally made a shorter period for cases of goods handed over for the advantage of the person to whom they were handed. It would be most illogical to allow a shorter period in the case where the "depositee," if I may use the word, gets the advantage than is allowed in the case where the depositee is merely doing something for the advantage of the depositor, and it is to be observed that cases not coming under Art. 145 come nowhere, unless indeed they can be brought within the words of Art. 49. Art. 49, if intended to cover cases like the present, is most curiously worded, for it is for suits for other specific moveable property than property lost or acquired by theft or dishonest misappropriation or conversion or for compensation for wrongfully taking or wrongfully detaining the same ; and the period of limitation is 3 years from the time when the property is wrongfully taken or injured or when the detainer's possession becomes unlawful. It seems to me that an entirely different class of suits is being dealt with-not suits for recovery of property deposited with another but suits in respect of property wrongfully taken or wrongfully detained. It is to be observed that, if this is not so, there would be two different periods allowed in respect of goods deposited strictly so called ; for, where goods are deposited for safe custody only and a demand is made for their return and refused, those goods become wrongfully detained and there would be a period of 30 years under Art. 145 and a period of 3 years under Art. 49 ; and it is not probable that the legislature intended to arrive at that result. I think that this is an argument in favour of the view that Art. 49 is not dealing with articles deposited in any sense and it would follow that it is an argument in favour of holding that Art. 145 covers more than the *depositum* of Roman Law. In my judgment, if this case were not covered by S. 10, it would be covered by Art. 145, and if it is not covered by Art. 145, it is not provided for at all and would, therefore, be covered by Art. 120, and the suit is in time.

For these reasons, in my judgment, this appeal must be dismissed with costs.

Wallace J.—I agree that S. 10 of the Indian Limitation Act applies and it is sufficient to dispose of this case.

This is in effect a suit by a widow for property in which she has a life-interest under a deed of maintenace executed by all the members of the joint family property withheld from her by the manager of the joint family. Whatever were the terms by which the defendant originally came into possession of the jewels, he, whenever he subscribed to Ex. A which declared that the jewels were to be the property of the plaintiff for her life-time and then promised, as was found in the judgment in the previous case, O. S. No. 427 of 1919 on the file of the lower Court, to return them to

(6) (1703) 1 Sm. L. C. 173 (191.)

her within ten days evidently then, either having them himself in his possession or being able to obtain them within that period, constituted himself, so long as he held them and did not return them to her, a trustee of them on her behalf. And having regard to his definite promise to return them, he held them in trust for a specific purpose; while from his promise and the terms of Ex. A it seems to me clear that the jewels were considered then to be in the possession of the 1st defendant and, therefore, vested in him. I see no difference in his position from that of a managing member of a joint family, who is withholding from a widow in the family entitled to maintenance property which that widow on the arrangement of the joint family itself is entitled to have in her own possession and which the manager is bound at her request to hand over to her for her life-time. That would clearly be a case in which the property has become vested in the manager for a specific purpose, as soon as he continued to hold it after the family arrangement came into force, and where the manager would be in the fiduciary relationship from that time and would be bound to hold the property for her as directed by her. In this view, the defendant is at the very least a trustee *de son tort*, if that expression may be used, and is certainly an express trustee in English Law as laid down in *Soar* v. *Ashwell* (2). It seems to me further clear, as indicated above, that the property was, on the date of Ex. A, vested in the defendant for a specific purpose.

I, therefore, agree that S. 10 applies in terms and that the appeal must be dismissed with costs.

Appeal dismissed.

1923 MADRAS 581

SCHWABE, C. J. AND WALLACE, J.

Lakshminarayana and another-Appellants—Defendants.

v.

The Standard Oil Co., of New York-Plaintiffs—Respondent.

O. S. A. No. 27 of 1922, D. 18th Jan. 1923.

Civil P. C. O. 77 R. 1-Parties, default-Punishment-Costs.

Defendants 2 and 3 did not appear owing to a mistake of their vakil and owing partly to their not having received a telegram which had been sent by their vakil in such time that, if it had been received in the normal course, he would have got them in the Court on the second day of the hearing *Held* under those circumstances it is not right that they should be penalised to the extent of the case being decided against them. But adequate punishment is to be found in the remedy of costs.

[P. 581 C. 1]

P. Narayanamurthi, P. Satyanarayana and K. Ramamurthi-for the Appellants.

T. Rangaramanujachariar, R. Sriramachariar and B. Satyanarayana-for the Respondents.

Schwabe, C. J.—This is another illustration of what happens when parties do not appear at the time they ought to appear through their own fault or the fault of their legal advisers. A strong case for the plaintiff was put before the learned Judge. Defendants 2 and 3 did not appear owing to a mistake of their Vakil and owing partly to their not having received a telegram which had been sent by their Vakil in such time that, if it had been received in the normal course, he would have got them here on the second day of the hearing. Under those circumstances, in my Judgment, it is not right that they should be penalised to the extent of the case being decided against them without their being heard. It is contrary to principles of natural justice that cases should be decided on the hearing of one side only if the other side is ready and willing to be heard. In such cases, as a rule, adequate punishment is to be found in the remedy of costs, which not only penalises the party in default but, theoretically at any rate, indemnifies the other party from the expense

which he has been put to by reason of the default. In these circumstances, in this case, there must be an order setting aside the decree and sending the case back for rehearing. The costs of the first hearing awarded against defendants 2 and 3 must be paid by them, in any event of the rehearing. The amount paid into Court and security given will remain pending the rehearing of the suit. Application can be made by the plaintiff to the Original Side, if it is desired, to use the evidence already on record and to adduce further evidence. The evidence to be called on behalf of defendants 2 and 3 will be limited to their own evidence and that of the two attestors to the partition deed. The appellant will get a refund of the Court fees paid by him for this appeal.

Wallace, J:—I agree.

Appeal allowed.

✱ 1923 MADRAS 582

PHILLIPS AND DEVADOSS, JJ.

Muthu Pillai- 1st Defendant—Appellant.

v.

The Secretary of State through Collector of Madura-Plaintiff-Respondent.

F. A. No. 33 of 1922, D. 18th Jan. 1923, against the decree of the Additional Judge of Madura.

Contract-Auction sale—Sale concluded but not confirmed-Purchaser's right.

A house was put up for sale by Government and the auction was held by the Tahsildar on 15th July 1915. 1st defendant was the highest bidder and the report of the sale was forwarded to the Collector for confirmation. But it was neither confirmed by the Collector nor cancelled until late in 1917. Finally in 1916 at his own request 1st defendant was allowed to occupy the house on condition that he would quit it whenever required. The present suit was brought to recover possession from the 1st defendant who refused to quit. The Government declined to confirm the sale in 1st defendant's favour, but he now contends that he is entitled to possession as the sale was completed. *Held* that there was no completed contract and that the transaction before the Tahsildar amounted to merely an offer, and that there was no concluded contract on the 15th of July when the auction took place and that the offer made by the first defendant was never accepted. [P. 583 C. 1,2]

F. S. Vaz-for the Appellant.

C. Madavan Nair—for the Respondent.

Judgment.—In this case a house was put up for sale by Government and the auction was held by the Tahsildar of Madura. 1st defendant was the highest bidder and the report of the sale was forwarded to the Collector for confirmation. 1st defendant deposited 15 per cent, of the purchase money on the day of sale and the balance one month later. The sale was held on the 15th of July, 1915 and it was neither confirmed by the Collector nor cancelled until late in 1917. Apparently the 1st defendant on several occasions applied to the Collector for the grant of sale certificate and for the possession of the house. On one occasion he was informed that the matter had been referred to Government and orders were awaited. Finally in 1916, at his own request 1st defendant was allowed to occupy the house on condition that he would quit it whenever required. The present suit has now been brought to recover possession from the 1st defendant who refused to quit. The Government declined to confirm the sale in 1st defendant's favour, but he now contends that he is entitled to possession as the sale was completed.

The real question for our consideration here is what was the effect of the transaction of the 15th of July, 1915, namely, the auction held by the Tahsildar? It is contended for the 1st defendant that it was a completed contract and, on that assumption, the greater part of his argument has been addressed. It is contended for Government that there was no completed contract but that the transaction before the Tahsildar amounted merely to an offer which the Collector could or need not, accept as he pleased. The sale notification contained a stipulation that the sale would be confirmed on receipt of the Collector's order of confirmation and, after holding the auction, the Tahsildar wrote at the foot of the bidding list "The auction was concluded in favour of Muthu Pillai" (*i. e.*, the 1st defendant). It is argued for the 1st defendant

that the meaning of "The auction was concluded in favour of Muthu Pillai" is that there was concluded agreement to sell and that the right was reserved in the Collecton to rescind such agreement on reasorable ground, and reliance is placed on *Chitibobu Adenna* v. *Garimalla Jaggarayadu* (1). The facts of that case, are however, somewhat different from the present one, for when the sale was held there would appear to have been no prior stipulations as to what was going to happen, and finally the Amin who conducted the sale recorded the following:

"1st defendant bid the last bid for Rs. 150, and as no other bid is for more than that, the sale has been confirmed in the name of the highest bidder, subject to the approval and orders of the Special Agent."

Subsequently apparently the sale was approved by the Special Agent. Here we see that there was a distinct statement that the sale had been confirmed and was merely subject to a subsequent approval by the Special Agent and in these circumstances, it was held that there was an acceptance by the principal of the offer and, therefore, the contract was concluded. In the present case, howevr, there has been no such communication to the 1st defendant and he was distinctly informed that the sale would not be confirmed until the orders of the Collector had been received; so that the order of the Tahsildar saying that the auction had been concluded in 1st defendant's favour cannot have the effect of altering that condition namely that the sale would not be confirmed until the orders of the Collector were obtained. In the present case no such orders were obtained and the sale was not confirmed. No doubt, there was a great delay on the part of the Collector in making up his mind whether the sale should be confirmed or not and it would probably have been open to the 1st defendant, after waiting for a reasonable time, to refuse to be bound by the contract. That was not what he wanted to do; he wished to hold by the contract, and was always pressing for the confirmation of the sale, and it is quite clear from his conduct that he was under the impression that the sale had not been concluded, for we see that he frequently put in petitions asking for the confirmation of the sale and pointing out the difficulties in which he was placed. On this evidence, we are satisfied that there was no concluded contract on the 15th of July and that the offer made by the 1st defendant was never accepted. That being so, the whole of the argument addressed to us on the supposition that there was a concluded contract need not be considered now.

The only other two points which remain for consideration are (1) the rate of interest which has been allowed to the 1st defendant upon the money which he deposited and (2) the amount of rent which has been awarded to Government for 1st defendant's occupation.

As regards interest, the 1st defendant in his early petitions always asserted that he had borrowed at 12 per cent., but when the case came into Court he alleged that he had borrowed at 18 per cent., and he produced one document which showed that on a certain occasion he did borrow Rs. 2,000 at 18 per cent. In view of his former assertions that he borrowed at 12 per cent., this last statement is obviously false and it throws a good deal of doubt on the allegation that he was compelled to borrow at all. In any case, the lower Court has considered what would be the reasonable rate of interest and has awarded 6 per cent. and we are not prepared in appeal to interfere with this finding.

As regards the rate of rent, we have on the one side the opinion of the Tahsildar and the Kurnam of Madura Town that the proper rent is Rs. 35 a month, whereas the 1st defendant says that it is only Rs. 20. The 1st defendant has admittedly leased out a portion of the house, but he has not adduced any evidence to corroborate his statement that the whole house would fetch only Rs. 20. The only ground on which we could interfere would be that Rs. 35 seems to be a somewhat high rate of interest on the capital, but there is no evidence as to what the usual rate is in Madura and therefore, we must accept the lower

(1) (1915) 28 M. L. J. 617—29 I. C. 12.

Court's finding that Rs. 35 is the proper rent.

In the rusult, the appeal is dismissed with costs.

Appeal allowed.

✱ 1923 MADRAS 584

OLDFIELD AND VENKATTASUBBA RAO. JJ.,

(*Bankara*) *Basavana Gowd and others*—Appellants.

v.

(*Bankara*) *Doddalingappa and another*—Respondents.

A. A. O. No. 166 of 1922, D. 22nd Jan. 1923, against the order of remand of the Dt. Court of Bellary, D. 10th Nov. 1921.

Civil P. C. O. 2 R. 2—Partition Suit.

That generally only one suit for partition will lie represents settled law. That is the only view reconcilable with the terms of section 11, explanation 4 and order 2 R 2 C. P. C. The cause of action in a partition suit of joint family property must be regarded as exhaustive of the whole property available for division, so far as its existence is known at the date of the plaint, The position of suit properties in two jurisdictions makes no difference in the application of the principle involved in Order 2 R 2. A statement that plaintiff reserves his right to sue for the property and that he will enforce that right in other proceedings is not enough. He cannot exclude the application of the principle above referred to by merely saying that he would not respect it. Statements that plaintiff reserves his right to sue in respect of a part of the property are not uncommon in plaints and are made properly and naturally when the property in question is not immediately divisible and the plaintiff desires to put on record that he will claim it in the future.

[P. 584 C. 1, 2; P. 585 C. 1, 2.]

Judgment:—In this case the question is whether the present suit is sustainable for one item of what is admittedly joint family, in view of the fact that the plaintiff has already brought a suit and obtained a decree for other items.

We cannot follow the learned Judge in deciding in the plaintiff's favour, on the sole ground that the property now claimed as in the possession of the 7th defendant is alleged by him to be his by purchase and prescription, whereas in the previous suit it seems to have been referred to in the plaint as in the possession of the 7th defendant as a tenant. In either case the joint family character of the property was in question; and it is was on account of that character reference to it was made before and the claim to it is made now. We cannot see how the ground on which the 7th defendant may be withholding it from the coparcenery is material to the plaintiff's duty to have included it in the previous suit.

To turn to the grounds of decision adopted by the learned District Munsif it cannot be disputed that a suit for partition of joint family property is a comprehensive ascertainment of the assets, including immoveable property belonging to the family and the liabilities to be satisfied out of those assets. In our opinion, the contention that generally only one suit for partition will lie represents settled law. That is the only view reconcilable with the terms of section 11, explanation 4 and Order 2 r. 2 C. P. C. The ground, on which the plaintiff would distinguish the present case and exclude it from the purview of those provisions, is that the property dealt with in his previous suit was situated within the jurisdiction of one Court, whereas the property now in question is situated in that of another. It is no doubt the case that the first of those Courts is in the Bombay Presidency, whilst the second is in the Bellary District of this Presidency. But we have not been shown how that difference of Presidency is in any way material. The Plaintiff's argument is that sections 16 and 17 of the Code give him the option to bring either two suits in the two Courts for the property in the jurisdiction of each or one suit in whichever Court he may prefer for the whole property, and that he has simply exercised his option in choosing the former alternative. That, however, takes no account of the broader principle involved in section 11 explanation 4 and order 2 rule 2 or of the meaning to be attached to the expression "cause of action" used in them. The cause of action, as already observed, in a partition suit of joint family property must be regarded as exhaustive of the whole property available for division, so far as its existence is known at the date of the plaint. We have not been shown any authority for holding that the principles of the

provisions of the Code last mentioned are over-ridden by those of sections 16 and 17 or that sections 16 and 17 are not simply the machinery provided to enable litigants with property in more than one jurisdiction to adhere to those principles. The decision quoted re *Subba Rao* v. *Rama Rao* (1) no doubt refers to the moffussil, but as the learned Judges observed, the words of sections 11 and 12 in the Code then in force enabled the plaintiff to sue in one Court in respect of property situated in more than one, only with the permission of the Saddar Court, the position then being identical with that which now obtains on the Original Side of the High Court, where permission is necessary before a suit can be brought in respect of property outside as well as in the Original side jurisdiction. *Subba Rao* v. *Rama Rao* (1) therefore and other cases relating to the Original jurisdiction of this and other High Courts are accordingly beside the point. In *Monsharain Chakravarthy* v. *Gonesh Chandra Chakravarthy* (2) the property was held in common. There was therefore no question of the necessity for an exhaustive settlement of assets and liabilities, which a suit for partition of family property entails. *Ram Harakh* v. *Ram Lal* (3) is based mainly on *Subba Rao* v. *Rama Rao*; (1) and with all respect we differ from the learned Judges in the view we take of that case and are unable to follow them in the remainder of their judgment. In these ciscumstances we cannot hold that the position of these suit properties in two jurisdictions makes any difference in the application of principle involved in Order 2 R. 2.

Reliance is next placed in the mention by the plaintiff of the property now in dispute in his previous plaint that mention being accompanied by a statement that he reserves his right to sue for it and that he will enforce that right in other proceedings. Such statements are not uncommon in plaints and are made properly and naturally, when the property in question is not immediately divisible and the plaintiff desires to put on record that he will claim it in the future. But in the case before us we have not been shown how his statement could have any effect, since he could not exclude the application of the principle above referred to by merely saying that he would not respect it.

The remaining argument addressed to us in support of the lower appellate Court's decision is that the property now claimed was excluded from the previous suit in consequence of the negligence or fraud of the plaintiff's guardian. There is no such allegation in the plaint in the present suit, and none was made in the appeal to the lower appellate Court. We are not prepared to consider a new case of that description for the first time in second appeal.

The result it that the appeal is allowed the lower appellate Court's decision being set aside and the District Munsif's decision restored with costs throughout.

Appeal allowed.

(1) [1865] 3 M. H. C. R. 376.
(2) [1913] 17 C. W. N. 521-16 I. C. 383.
(3) [1915] 38 All. 217-14 A. L. J. 257-33 I. C. 124.

1923 MADRAS 585

OLDFIELD AND VENKATASUBBA RAO, JJ.

Lakshminarayana Aiyer—Appellant.

v.

Subramania Iyer—Respondent.

Appeal against order No. 171 of 1922, and Appeal against Appellate Order No. 57 of 1922, D. 23rd Jan. 1923, against the order D. 12th Dec. 1921, of the Dt. Court of West Tanjore; and against the order D. 2nd Dec. 1921 of the Dt. Court of Tanjore.

Provincial Insolvency Act (1920) Ss. 18 & 24 —Residence—Proof.

A person especially a person in the financial position of the debtor, may not have any permanent or continuous residence, hence his occasional absence from a district does not affect the question of residence. To entitle the debtor to present a petition the debtor can be required to furnish only such proof as to satisfy the Court that there are *prima facie* grounds for believing his allegation that he is unable to pay his debts. [P. 586 C. 2,1 P. 587 C. 1]

K. Bashyam Iyengar—for the Appellants.

T. K. Venkatarama Sastri—for the Respondent.

Oldfield, J:—This is an appeal against an order by the District Judge of Tanjore West annulling the adjudication of the appellant-debtor under section 35, Provincial Insolvency Act. The lower Court has given two reasons for its order. First, that the debtor was not resident on the date of the presentation of the petition within its jurisdiction; secondly that he was not proved to be, as section 10 requires, unable to pay his debts.

As regards the question raised by each of these grounds of decision, it must be pointed out that the amount of proof, which can be expected of the debtor, the burden undoubtedly being on him, will vary very greatly with reference to the circumstances of the case.

Here the debtor, throughout has alleged that he was, at the date of the petition a resident in West Tanjore District, and there is the verified statement in his petition to that effect. and also a counter-affidavit filed in the present proceedings in the lower Court.

It is further not shown that he was cross-examined in any way on his allegations against that; there is only the fact that the present respondent first creditor, did not actually deny the residence in the district and has, never, said where in his opinion the debtor in fact resides, but only in his petition under section 35 put the debtor to proof of his residence in the following terms. "The alleged insolvent has not given *prima facie* proof of his right to present the petition or that the District Court has jurisdiction to entertain the same" The contentions of the opposing creditor being thus indefinite, in our opinion, it was not necessary for the lower Court to complain of the absence of additional affirmative evidence on the part of the debtor. It in fact proceeded mainly with reference to the returns on certain processes addressed to it. There is first the return dated January 1920, that he was not to be found in his house at Tirupapuliyur, South Arcot District because he had left it for a place in West Tanjore. That return, however, so far as it is evidence on the material point, the debtor's possession of a house and residence in Tirupapuliyur, does not necessarily involve that the process server adopted for his purpose, the assertion of the present respondent at whose instance the process was issued that the debtor was residing in Tirupapuliyur, and further this piece of evidence, so far as it is admissible relates to a date 8 months before the date of the presentation of the debtor's petition. Next reference has been made by the lower Court to the effect that, when another notice was sent on 25-3-1920, the return was that the debtor had gone away and his whereabouts were unknown. There is also the fact that the insolvent in his counter-petition in these proceedings gave his address as Kuttalam, in the Mayavaram Taluk. That is no doubt just outside the border of the West Tanjore District; but it is very near to the adjoining border of East Tanjore District. We have been referred to definitions of residence adopted by two learned Judges of the Calcutta High Court for the purposes of construction of order IX, Civil Procedure Code, in *Kumud Nath Roy Chowdhury* v. *Jotindra Nath Chowdhury* (1). But we are not prepared to adopt those definitions as exhaustive. We can quite understand that a person especially a person in the financial position of the debtor, may not have any permanent or continuous residence It is, in our opinion, sufficient that we have no reason for doubting that he has remained as he said, within the limits of the District of West Tanjore, though he may have occasionally gone outside the district and returned to it. It should be said that the debtor in the lower Court and in his grounds of appeal here was foolish enough to rely on a case of residence in a house in Kuttalam, which belonged to him and which he had let to somebody else. That he has given a bad reason in support of his contention does not debar us from holding that it is sufficiently supported otherwise by his own statement in his petition and his counter-affidavit, which has not been shown to be incorrect.

(1) [1910] 38 Cal. 394.

Turning to the second ground on which the lower Court annulled the adjudication, that the debtor was not proved to be unable to pay his debts, we refer to the proviso to section 24 (1) (*a*) Provincial Insolvency Act as showing that the debtor can, for the present purpose be required to furnish only such proof as to satisfy the Court that there are *prima facie* grounds for believing his allegation. The facts as set out in his petition, and those facts were not disputed in the lower Court and are not disputed here, are that his debts amount to over Rs. 40,000 and his assets to over Rs. 51,000. No doubt there is, on these figures, a balance of about Rs. 8 000 in his favour. But he has contended further that, all his properties being under attachment by the 2nd respondent and his petition for permission to execute a private sale of the properties having been practically negatived, the surplus of assets over debts is only apparent. We have not been given the exact terms of the proposal for a private sale or of the order of the Court rejecting it. It is however sufficient that the properties are under attachment and presumably would be sold and that it is accordingly not possible for the debtor to realize the price himself or to use them for the payment of his debts,

There is next the material consideration that the realization by the debtor under pressure or by the Official Receiver or otherwise by the Court by public sale is not likely to be advantageous and it is even less likely, to result in the property fetching a fair price. That is the common experience of private sales under pressure and of court sales. It is of course impossible to say with any accuracy how far the price, which would be realized in these circumstances, would be less than the fair value of the properties, if realized with reference to ordinary considerations. It is not in our opinion clear that the margin between that it is not disputed, would be the fair value of the properties and the debts will not be wiped out in the course of the immediate realization. There is enough in the undisputed allegations of the debtor as to his circumstances to satisfy the requirements of the provision of law already referred to, and there is nothing in evidence on the other side. We therefore must dissent from the lower appellate Court's conclusion that the debtor has failed to prove inability, to pay his debts.

These findings entail the success of the appeal and the setting aside of the lower Court's order with costs throughout. The case will go back to the Official Receiver who will proceed with the administration of the estate.

The order annulling the adjudication of the present appellant-debtor having been set aside, we must set aside the decision of the lower appellate Court in A. A. A. O. No. 37 of 1922 and remand the appeal to it for disposal on the merits.

Costs to date will be costs in the cause and be provided for in the order to be passed.

Case remanded.

✱ 1923 MADRAS 587

OLDFIELD AND RAMESAM, JJ.

(*His Holiness Sri*) *Sukratendra Thirtha Swamiar of Kasi Mutt* — Accused Petitioner.

v.

Prabhu—Complainant-Respondent.

Criminal Rev. No. 212 of 1922 and Criminal Rev Petition No: 187 of 1922, D-5th December 1922, praying the High Court to revise the judgment of the Court of the Session of the South Canara Division in Cr. A. No. 35 of 1921.

Penal Code S. 499 Excep, 7—Religious head —Order of interdict by.

Where the religious head of the sect issued a temporary interdict against a member of that sect for taking part in an all-caste dinner with pariches, in order to prevent his taking part in a caste dinner which was to take place very shortly, and there was nothing to show that the Swami was not willing to hear the person aggrieved, *Held* that no offence under S. 499 was committed. Though action like that of the accused, the Swami, savours of tyranny and oppression from the point of view of an advancing community and becomes almost intolerable as the general community becomes more Catholic, so long as a submission to the headship of a Swami remains the usage of the caste and the members of the community do not shake themselves off from such headships, the Swami is perfectly within his rights to resort to the Orthodox methods of conventional

discipline and of vendicating caste usages provided principles of natural justice are not violated. The advancing community is not justified in expecting its own progressive opinions to be reflected in the immutable minds of the Swamies or their faithful followers nor can they be coerced to change with the times by fear of criminal prosecution. [P. 591 C. 1,2]

Nugent Grant, K. S. Krishnaswami Iyengar and T. M. Kasthuri—for the Petitioner.

The Advocate General (C. P. Ramaswami Iyer), S. T. Srinivasagopalachariar and A. S. Natarajan—for the Respondent.

V. L. Ethiraj — for the Public Prosecutor on behalf of the Crown.

Oldfield, J.—I adopt the statement of facts in my learned brother's judgment, which I have had the advantage of reading, but give my own reasons for concurring in his conclusions, because the questions raised are of importance and may arise with increasing frequency in the future. They relate to the conditions of membership in associations, castes, and sects, which as regards their adult members at least are consensual, but which probably have no counterpart first, because, the obligations of membership in them are on the one hand so loose that they have never been formulated by statute or any written constitution and on the other so strict that their breach is visited, as in the case before us, with the severest penalties. With the advantage or stability of such social conditions I am not concerned. It is sufficient that a law, which regulates the internal rights of those subject to them has been laid down clearly in *The Queen v. Sankara* (1) and *Krishnasami v. Virasami* (2) and is not disputed. These associations are autonomous, the powers vested in their constituted heads being, subject to any special custom (none being relied on in the present case), those necessary for the protection of the interests committed to their charge. The Court's only duty is to see that these powers are exercised in accordance with the principles of natural justice ; that is in the majority of cases, after the person to be affected by their exercise has been heard and his defence has received fair consideration.

There is no dispute before us that the accused, petitioner is the head of the religious community, to which complainant belongs ; or that he has authority to exclude from it permanently or in appropriate cases until the offence against its customary law has been atoned for by penance; or that Ex. F, the notice by which complainant's exclusion pending the passing of a further order was published, was *prima facie*, defamatory The only question before us is whether Ex. F, was covered by Exception 7 to Sect. 499, Indian Penal Code, because notwithstanding that complainant had not been heard, it was published in good faith, provisionally to meet the urgency of the case. It is alleged that it was not so published because the circumstances did not require a provisional order and because its provisional character was a pretence, the real intention being to exclude complainant permanently or for an indefinite period, without hearing him or passing a final order at all.

The passing of a provisional order, such as Ex. F, without enquiry of hearing the person to be affected was, as the evidence shows, in accordance with precedent and can be justified so far as it was essential to the effectual execution of accused's power and duty to protect the interest of the community in his charge by saving its members from the risk of contamination from intercourse with one, whose orthodoxy was in doubt. Even if immediate action had not been necessary on account of the communal feasts, which were to take place on the day of and two days after the publication and which were distinct reason against the delay, precautions had in any case to be taken against the wider consequences of ordinary association between the complainant and the community at large. Before the publication of Ex. F, on 23rd November, 1920, there had been no reasonable opportunity for enquiry, because the formal representation Ex. II, on which accused wisely insisted before he would act reached him only on 20th November,

(1) (1883) 6 Mad. 381.
(2) (1887) 10 Mad. 133.

1920. No doubt, since complainant's alleged breach of cast law was committed on 24th October, 1920, and since the matter was first brought to accused's notice shortly after 4th November, 1920, there was, before accused sent his reply Ex. II on 20th November, 1920, an interview with 11th and 12th prosecution witnesses, who said that complainant would undertake not to attend the feasts and that a provisional interdict might be prepared for publication in case he attempted to do so. But the Court has no right to review the accused's exercise of his discretion in rejecting this undertaking and the alternative, the issue of an interdict in case complainant broke his word, would probably have been inffectual to prevent the consequences, including very likely a disturbance, of his doing so. It is clear from the evidence that complainant's conduct raised difficult questions of fact and religious law. For in his lawyer's letter, Ex. A, he had referred to the newspaper report of the original occurrence, dinner at which he and pariahs had eaten together, as false without qualification and it appears from the evidence that there was much to be said as to the exact conditions, in which such intercourse would be sinful and that some of accused's advisers were raising the question whether any penance could be effectual. In these circumstances there is, regard being had to the limitation on the Court's rights to scrutinize the accused's proceedings, more than enough to show that they were up to this stage taken in good faith.

In fact this account of what happened has really been necessary for the appreciation of complainant's further contention that the provisional form of Ex. F, was and was intended to be a device, by which the permanent or indefinite postponement of the passing of a final order after enquiry and hearing of his defence could be secured. But in view of the circumstances already stated the further short delay until 9th December, 1920, when the complaint was filed, needs no separate justification.

No doubt the later periods until 4th October, 1921, the date of the Magistrate's decision, and until 6th December, 1922, that of the hearing of the appeal, both (it may be observed) unduly prolonged by those responsible for the conduct of the proceedings, passed without a final disposal by accused of the case and they may be relied on, not as supporting directly the charge, which had been made before they began, but as evidence of accused's original intention. But they go very little, if any way, towards establishing what complainant requires and what the form of Ex. F being provisional, it is for him to prove. In that sense there is nothing direct to support him, his evidence going no further than that, when 11th and 12th and 18th prosecution witnesses, apparently on 30th November, 1920, and 1st December, 1920, remonstrated with accused and asked whether he would hold an enquiry, say within a year, he gave them no answer, a natural course when it is remembered that this prosecution had already been threatened and that enquiries were inconsistent with respect to his spiritual supremacy. After the complaint, which was made mainly, without reference to the failure to hear complainant and on the ground that the interdict was uujustifiable on its merits, accused may well have hesitated before proceeding to a final sentence, which might be regarded as an agravation of what he had done. It may be true that, as 18th prosecution witness says he represented, there have in the past under accused's predecessors been cases, in which the interval between the provisional and final orders was long enough to raise suspicion as to the intention of the former. But that is not sufficient to justify the affirmative conclusion, for which complainant contends and which he can support only on the negative ground of a delay, which is intelligible in the circumstances of the case. It is not in those circumstances possible to hold that accused intended the order Ex. F, to be other than provisional, or that he acted in bad faith. The result is that Exception 7 to Sect. 499 is applicable and that the conviction and sentence

must be set aside, the fine, if levied, be refunded;

Ramesam, J.—This is a revision petition filed against the order of the Sessions Judge of South Kanara, confirming the conviction and sentence by the 1st Class Divisional Magistrate of Mangalore under Sect. 500 of the Indian Penal Code (Defamation) The accused is the petitioner. He is the head of the Kasi Mutt in South Kanara District and a section of the Gowd Saraswat Brahmins are the disciples of the Mutt.

On 24th October, 1920, in celebration of the 56th anniversary of the Brahmo Samaj there was dinner at which about 150 people of all castes including Pariahs, Mahomedans and Christians were present There were also three Gowd Saraswat Brahmins, two of whom were Messrs. M. N. Prabhu (the complainant) and M. Madhava Rao, vakils practising at Mangalore. The dinner was by invitation and it appears that no Pariah was invited nor were any Pariahs named on the list of invited guests. Mr. Prabhu was in the row opposite to the one in which the Pariahs sat. An account of the dinner appeared at the local Vernacular paper—Kantirava (Ex. I dated 26th October, 1920). This was followed by a Memorial (Ex. II dated 29th October, 1920) signed by more than a hundred people of the Gowd Saraswat Community to the Muktessars of Sri Venkataramana Temple in Mangalore calling attention to the report in the paper and to the fact that three members of their community had been present at the dinner and requesting the Muktessars to take action lest those persons should attend the temple dinners which were to come off on November 23rd and 25th and there should be a disturbance. The Muktessars then called a meeting (Ex. VIII) on November 2nd and at that meeting a resolution was passed that the Memorial should be forwarded to the Swamis of the Kasi and Gokarna Mutts for disposal. The resolution was confirmed at another meeting and the Memorial was forwarded by Ex. XIII dated 4th November, 1920, to the accused who happened then to be in Mangalore. On the 14th November, Messrs. Prabhu and Madhava Rao addressed Ex. S to one Mr. Venkoba Rao (P. W. 12) in which after referring to the caste trouble 'now pending before the Swami of Kasi Mutt, they gave an undertaking not to attend the temple dinners or even enter the Temple premises during the Kartika Pournami celebrations (November) without prejudice to any action they may be advised to take in the matter in future' The 11th and 12th witnesses for the prosecution had at about this time two interviews with the accused. The first one was on the invitation of the accused. The second one was three or four days afterwards. Between the two, Mr. Prabhu met Mr. Srinivasa Pai P. W. 11 and told him of his willingness to do Prayaschittam, if necessary, and to request the Swami not to issue an interdict. P. Ws. 11 and 12 at these interviews did their best to induce the Swami not to take any strong course of action against Mr. Prabhu. Mr. K. Sadasiva Rao, an Advocate of Mangalore also sent Ex. A. (dated 16th November, 1920) to the Swami on behalf of Messrs. Prabhu and Madhava Rao, complaining that the report in the Kantirava was false and malicious (but without giving any particulars as to where and in respect of which the report was inaccurate) and warning that the Swami will be held wholly and solely responsible in law if he should issue arbitrarily and without full enquiry and before hearing what his clients have to say in the matter, any interdict against them. On the 20th November, the accused replied to Ex. XIII by calling for the original Memorial and a muchilika (a statement) solemnly affirming the facts stated in the paper Ex. III dated 20th November, 1920, A statement signed by a number of persons confirming the report in the paper was accordingly sent to the accused. The interdicts Exs. F and H were thereupon issued on the 23rd November. They purport to be *interim* orders and are to remain in force until a second order is issued.

The report, the present complaint, was launched on 8th December. The

Sessions Judge finds (1) that there was no excessive publication: (2) that there was no violation of the principles of natural justice in the procedure adopted by the accused and (3) that a temporary interdict was unnecessary and that a final order without unnecessary delay ought to have been issued once for all. On this last ground, he held that the accused did not act in good faith and affirmed the conviction.

Taking up this last ground, I am unable to concur with learned Sessions Judge. It is not for the Courts to dictate the details of the procedure to persons in the position of the accused, considering that there was conflict of opinion as to how far the action of Messrs. Prabhu and Madhava Rao was reprehensible and that the matter was urgent as the temple dinner was to come off on the 23rd, it cannot be said that temporary interdicts (like Exs. F and H) were not called for. On the other hand, the very fact that the accused was not in great haste to make up his own final opinion one way or other argues in favour of the view that he was acting with great caution. Though society has marched far, (one would think it is not very far) since 1883 the law as laid down in *The Queen* v. *Sankara* (1) has not changed and it cannot be said that greater promptitude is required from caste authorities in 1920 than in 1883. It must be remembered that though action like that of the accused savours of tyranny and oppression from the point of view of an advancing community and becomes almost intolerable as the general community becomes more Catholic, so long as a submission to the headship of a Swami remains the usage of the caste and the members of the community do not shake themselves off from such headships, the Swami is perfectly within his rights to resort to the Orthodox methods of conventional discipline and of vindicating caste usages provided principles of natural justice are not violated. The advancing community is not justified in expecting its own progressive opinions to be reflected in the immutable minds of the Swamies or their faithful followers; nor can they be coerced to change with the times by fear of criminal prosecution.

The learned Advocate General who appeared for the complainant attempted to support the conviction on two grounds (1) that the interdicts were issued without due notice to Mr. Prabhu and in effect, without giving him an opportunity of being heard and (2) that the temporary interdict was really intended to be permanent as no final order has yet been issued. As to the first ground, the interviews of P. Ws. 11 and 12 with the accused and the notice Ex A sent by Mr. Sadasiva Rao show that Mr. Prabhu anticipated the action of the Swami and had an opportunity of making such representation to him as he thought fit and it must be held that, for the purposes of a temporary order at least, the absence of a more formal notice could not be taken as indicating want of good faith.

As to the 2nd it is enough to observe that it cannot be said that a reasonable time for a complete enquiry had elapsed by the time the prosecution was launched. It is true that no final order has been issued up to date. The Counsel for the accused explains that this is due to the present proceedings. Though the explanation is not such, as a man of business should advance, I still think it is true. The Advocate-General says that when the accused was asked to state when he would hold his final enquiry, he did not give any answer. It is difficult to hold that he was bound to give an answer to such a question especially having regard to the manner in which it was put to him. Anyhow, the materials on the record are totally inadequate to enable me to come to the conclusion that it was clear by the 8th December that the accused had no intention to hold the final enquiry within a reasonable time.

In my opinion no offence has been made out and the conviction and sentence must be set aside. I only wish to add, I have no doubt that Mr. Prabhu had been the victim of an oppression nothing short of cruel, and he has all my sympathy. I do not in the least sympathise with the accused or his followers. The fault lies in the social system of which Mr. Prabhu is

a member and the sooner one sets about to improve it the better, and it is futile to attempt to make persons like the accused responsible for the prosecution.

Conviction set aside.

1923 MADRAS 592

WALLACE, J.

(*Mathi*) *Venkanna and others*—Petitioners.

v.

Crown—Opposite Party.

Cr. Rev. No. 239 of 1922 and Cr. Rev. Pet. No. 211 of 1922 D. 15th November 1922, under Sects. 435 and 439 of the Cr. P. Code, C. 1898, praying the High Court to revise the Judgment of the Court of the Divisional Mag. Bandar in Cr. No. 46 of 1921.

Penal Code, Ss. 143, 147, 447–Compounding.

The essence of the offence under Sect. 143, Indian Penal Code, is the combination of several persons united in the purpose of committing a Criminal offence and that purpose constitutes in itself an offence distinct from the Criminal offence which these persons agree and intend to commit. The law allows the compounding of the offence of criminal trespass, but not the offence of five or more persons combining to effect the criminal trespass.

T. Ramachandra Rao—for the Petitioners.

The Public Prosecutor — for the Crown.

Wallace, J. —The only point raised in this petition is that the conviction under Sects. 143 and 147 of the Indian Penal Code was illegal, since the offence under Sect. 447, Indian Penal Code, was compounded.

It appears that on 5th July, 1920, a compromise petition was put into the lower Court signed by the first petitioner (Ist accused) and prosecution witnesses (Nos. 1 and 2). P. W. No. 1 being the alleged owner of the field on which the alleged trespass took place. The case was being prosecuted by the Police and the compromise petition was rejected by the lower Court as the offence under Sect. 143 of the Indian Penal Code is not compoundable.

The common object charged against the accused as members of an unlawful assembly is the criminal trespass aforesaid. Petitioner contends that, since the parties had a legal right to compound that trespass, such a composition has the effect of annulling the common object charged and therefore, the charge under Sect. 143. Indian Penal Code, falls to the ground.

I am not prepared to support this contention. The essence of the offence under Sect. 143, Indian Penal Code, is the combination of several persons united in the purpose of committing a Criminal offence and that purpose constitutes in itself an offence distinct from the Criminal offence which these persons agree and intend to commit. The compounding of one offence does not mean that the offence has not been committed, but that it has been committed, though the victim is willing either to forgive it or to accept some form of solatium as sufficient compensation for what he has suffered. The law allows P. W. No. 1 to so deal with the offence of criminal trespass, but not with the offence of five or more persons combining to effect that criminal trespass.

Petitioners refer me to the ruling quoted in SHEIKH BASIRUDDI v. SHEIKH KHAIRAT ALI (1), but that ruling does not say that the composition of the offence of house trespass and grievous hurt in that case had the effect in law of compounding the offence of being members of an unlawful assembly, whose common object was the commission of those offences. It rather implies the opposite.

The petitioners' objection, therefore, fails. I dismiss this petition.

Petition dismissed.

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(1) (1912) 17 C. W. N. 948–14 Cr. L. J. 458–20 I. C. 618.

✱ 1923 MADRAS 593

AYLING AND ODGERS, JJ.

Kuppuswami Mudali — Defendant Appellant.

v.

Narayanaswami Iyer—Plaintiff Respondent.

S. A. No. 592 of 1922 D. 15th Feb. 1923, against the decree of the District Court of East Tanjore at Negapatam in A. S. No. 285 and 318 of 192'.

Neg. Instruments Act S. 57-Pronote not endorsed-Effect.

A pro-note was executed in favour of the executor, who was subsequently discharged by a decree of Court and the estate vested in the legatee. The pro-note was not endorsed by the executor to the legatee who passed it to plaintiff; *held* the legatee had not obtained any interest in the pro-note which he could transfer to plaintiff, in the absence of an endorsement by the executor [P. 594 C. 2]

S. Muthiah Mudaliar—for the Appellant.

S. Panchapagesa Sastri—for the Respondent.

Odgers, J.—In this appeal, the defendant is the appellant. He together with two others, Amirtham Pillai and Packiria Pillai, was executor of the estate of Tambuswami Pilliai deceased. Defendant appears to have collected some of the outstandings due to the estate and executed a promissory note in favour of Amirtham Pillai for Rs. 1,090 in 1916. The estate became vested in Tambuswami's sons, (it is said) after a decree of Court by which presumably the executors were discharged, and one of them Kailasam Pillai endorsed this promissory note to the plaintiff, acting, it is alleged, as managing member of the family. Two points were raised for the appellant : (1) that Kailasam Pillai acquired no property in the promissory note by virtue of the vesting of the estate in himself and (2) that he did not endorse as managing member. The two lower Courts found that endorsement to Kailasam by the late executor was unnecessary. The first Court puts it on the ground that all the rights of an executor vested in Kailasam ; the lower appellate Court on the ground that the promissory note was taken by Amirtham Pillai on behalf of the estate. Dealing with the first point, the short question is "can the ordinary rule as to endorsement be dispensed with ?" Does Kailasam Pillai acquire any property in the promissory note from the fact that the estate has been handed over to him and is no longer in the hands of the executors ? An executor or other legal representative must endorse (S. 57 of the Negotiable Instruments Act) even though the note may have been endorsed by the deceased before his death since the legal representative is not the agent of the deceased. It is said that this case is closely analogous to cases where a note vested without endorsement by operation of law and must be decided on that footing. The Negotiable Instruments Act only deals with transfer by negotiation, viz., according to the law merchant. It does not affect the rules of law regulating the devolution of bills or notes by acts of law or their transfer as choses in action or chattels. As none of the requirements for the latter are present here, the only point is whether the vesting in the presnt case was by operation of law. On the death of the holder of a bill the title thereto passes to his personal representatives i. e., executors or administrators, without endorsement but I have been unable to find any case which covers a legatee such as Kailasam Pillai and further I can find no ground for holding that Kailasam Pillai represents the estate or can be considered as the agent of the executor. The nearest cases cited to us were those reported in *Sowcar Lodd Govinda Doss* v. *Muniappa Naidu* (1) and *Ramanadhan Chetty* v. *Kathavelan* (2) The first was a case of the Court of Wards taking charge of an estate and ousting a usufructuary mortgagee from possession. The tenants of the mortgaged premises executed promissory notes to the Court of Wards' Manager for their rents. It was held competent to the

(1) (1908) 31 Mad. 534-4 M. L. T. 341

(2) (1918) 41 Mad. 353-33 M. L. J. 627-22 M. L, T. 458-(1917) M. W. N. 843-6 L. W. 753-42 I. C. 934.

mortgagee and his heirs to maintain suits on such promissory notes when the Court's superintendence had come to an end and it had delivered to the mortgagee (the plaintiff) the promissory notes without endorsing or otherwise assigning them in writing. The case was decided by Miller and Pinhey JJ. Miller J., puts the decision on the ground of agency; the mortgagee was a receiver and was landlord before dispossession, afterwards the Court of Wards was landlord. The mortgagee as landlord was the real payee and entitled to sue when the Court's superintendence terminated. Pinhey J., also put it on the ground that the power of the Court of Wards having ceased there was nobody who could legally endorse. It appears to me that thus set out the case is materially different to the one before us. I cannot see how Kailasam can in any way be said to be the Receiver of the estate or agent of the executor Amirtham Pillai and it does not appear that the latter could not be or could not have been compelled to endorse by process of law. The 2nd case quoted above was decided by my learned brother and Seshagiri Aiyar J. That was a case of one trustee replacing another and it was held that a promissory note executed in favour of a trustee can be sued on by his successor without endorsement. The decision was rested again on the ground of agency. "Broadly speaking, trustees exercise rights and obligations as agents of the trust,, and reliance was placed on CATHERWOOD v. CHABAUD (3). There the bill in question was given to one S. C. as administratrix of J. C. for money due to her intestate (i. e. J. C.). The money was not paid in the lifetime of the adminitratrix S. C., and it was held that the right to the bill devolved upon the representatives of J. C. (administrators *de bonis non*) on the ground that they succeeded to all the legal rights of the administratrix in her representative capacity as the money recovered was immediately applicable to the right fund as assets of the first intestate. The Court expressly said there may be cases where the administrator of an administrator might and ought to sue.

The decision is clearly based on the ground that the Administrator *de bonis non* represented the estate of the deceased and from the considerations I have detailed can have no application to the present case.

The result in this case is as put by Richardson J, in AKHOY KUMAR PAL v. HARIDAS BYSACK (4), that "the procedure provided by the Negotiable Instruments Act has not been followed and there is nothing which operates as a transfer either under or outside the Transfer of Property Act." It may be remarked that this point though raised in the first Court was only raised by an additional issue and it appears to me that the requirements of the Negotiable Instruments Act should be enforced and should not, except on very strong grounds, be evaded by increasing the category of transfers by operation of law. This category includes marriage, death, execution, bankruptcy and reputed ownership (Chalmer's Bills of Exchange 7th Edition p. 139). For these reasons I think the appeal succeeds on the first point and it is consequently unnecessary to go into the second. The result is that the suit must be dismissed throughout with costs.

Ayling, J.—I agree.

Appeal allowed.

(3) B. and C. 150.

(4) (1913) 18 C.W.N. 494—19 C.L.J. 335—22 I.C. 500.

1923 MADRAS 594

KRISHNAN, J.

(*Archakam*) *Venkatapathi Deekshathulu*. (Counter-petitioner, Plaintiff).—Petitioner.

v.

Kathiramangalam Chenga Reddi and another — (Petitioners—Defendants) Respondents.

Civil Rev. No. 377 of 1922, D. 5th Dec. 1922, praying the High Court to revise the order D. 11th Feb. 1922, of the Court of the Dt. Munsif of Chittoor.

Provincial Small Cause Courts Act S. 17-Mandatory-Nature of security.

.S 17 is mandatory and the Court cannot dispense with the security. The mere word of the defendant, against whom the decree is asked for in the suit, is no security at all. [P. 595 C. 1]

T. K. Srinivasa Thathachariar—for the Petitioner.

S. Jagadesa Iyer — for the Respondents.

Judgment —The Munsif was wrong in thinking that he could dispense with the security required by Sect. 17 of the Provincial Small Cause Courts Act The provision is mandatory as held in *Assan Mohamed Sahib* v. *Rahim Sahib* (1). No doubt there is nothing in the section to prevent personal security being accepted if the Court is satisfied of its sufficiency but it would not ordinarily do so In any case the mere word of the defendant, against whom the decree is asked for in the suit, is no security at all. The order of the Munsif is set aside and he is directed to take the case on to his file and pass fresh orders, accordidg to law. Costs to abide and follow, the result.

Case remanded.

(1) [1920] 43 Mad. 579—27 M.L.J. 273—38 M.L.J. 539—28 M.L T. 17—(1920) M W.N. 376—55 I. C. 977.

✱ 1923 MADRAS 595

SPENCER, J.

Nambia Pillai—Petitioner.

v.

Sudalaimuthu Nadan and others — Respondents.

Criminal Rev. No. 695 of 1922, and Criminal Rev. P. No. 581 of 1922, D. 1st Feb. 1923, from Dt. Mag. of Tinnevelly Dt. 12th June, 1922.

(a) Criminal P. C. S. 17—Criminal Rules of Practice (Mad.) R. 122—Power to stay trial.

A District Magistrate has wide powers of superintendence over his subordinate Magistrates which might be considered to justify special directions being issued by him to stop or go with particular proceedings pending efore them. [P. 595 C.

(b) Criminal trial-Civil suit no bar.

In case of rioting Civil suit to declare titie was held not to bar trial.

C. Narasimhachariar and Chidambaram and Marthandam—for the Petitioner.

Public Prosecutor—for the Crown.

K. V. Luke—for the Respondents.

Order.— It is argued on the authority of the decision of Ayling, J., in Criminal Revision Petition No. 328 of 1922 that the District Magistrate had no power to stay the trial of a criminal case in the Court of a Subordinate Magistrate in his District. It is undeniable that the High Court is under the Government of India Act invested with powers of Superintendence over all the Courts of Justice in the Presidency and it has been held in *Anna Ayyar* v. *Emperor* (1), that those powers include a power, to direct the stay of proceedings in such Courts.

Set 17 of the Code of Criminal Procedure which declares all Magistrates and Benches of Magistrates in any District to be subordinate to the District Magistrate of that District who is invested with powers to make rules and give special orders and R. 122 of the Criminal Rules of Practice which treat of his powers of supervision over the Magisterial work suggest that a District Magistrate has wide powers of superintendence over his subordinate Magistrates which might be considered to justify special directions being issued by him to stop or go on with particular proceedings pending before them.

I therefore do not wish to rest my order on the ground that the District Magistrate's order was entirely without authority but on general reasons of expediency.

As pointed out in *Raj Kumari debi* v. *Bama Sundari Debi* (2) the plaintiff in a Civil Suit has command of it and can within certain limits protract its disposal at his pleasure.

It is not known when the suit instituted by respondents will be disposed of and when judgment is

(1) (1907) 30 Mad. 226—6 Cr.L.J. 131.

(2) (1896) 23 Cal. 610.

given there may be an appeal and even a second appeal. It is undesirable that this complaint of rioting and mischief should remain undisposed of till the Civil Court has pronounced on the question of title, especially when it is realised that the Criminal Court will in any case have to decide questions of possession etc. upon which the judgment of the civil Court will not operate as *res judicata*. The Magistrate will have to decide the question of the criminality of the acts alleged to have been committed by the accused for himself.

I set aside the District Magistrate's order and direct that the Sub Magistrate of Nangunari do proceed with the criminal case pending before him.

Order set aside: Case remanded.

1923 MADRAS 596

VENKATASUBBA RAO, J.

Srinivasa Chetty and another—Accused.

Cr. R. C. Nos. 701 and 806 of 1922, and Cr. R. P. Nos. 586 and 675 of 1922 D. 31st Jan. 1923. from the order of the Court of the Chief Pres. Magistrate Egmore Madras, D. 3rd August 1922.

Prisons Act (IX of 1894) S. 42—Communicating—Abatement of.

The first accused was a prisoner at the Penitentiary and the second accused an uncle of the first. The second accused received a wire from a relation at Coimbatore which contained matters pertaining to the first accused. He wrote a message on the back of the telegram intending that that writing should be read by the first accused, and handed the telegram to a jail warder who was employed to, and did, carry the telegram to the first accused in the jail. The latter, thereupon, read the telegram as well as the communication written on the back of it and wrote a reply on the back of the same telegram and handed it to the warder for being carried to the second accussd. *Held* that the 1st accused was rightly convicted of an offence under S. 42 of the Prisons Act read with S. 107, I. P. C. A prisoner can abet the communication to himself.

[P, 596 C. 2 P. 597, C. 1.]

V. L. Ethiraj—for the Petitioner.

The Crown Prosecutor-for the Government.

Order.—The first accused was convicted of the offence specified in cl. (3) of S. 42 of the Prisons Act, Act IX of 1894. He was a prisoner at the Penitentiary and the second accused an uncle of the first accused who received a wire from a relation at Coimbatore which contained matters pertaining to the first accused, wrote a message on the back of the telegram intending that that writing should be read by the first accused, and handed the telegram to a jail warder who was employed to, and did, carry the telegram to the first accused in the jail. The latter, thereupon, read the telegram as well as the communication written on the back of it and wrote a reply on the back of the same telegram and handed it to the warder for being carried to the second accused. The Chief Presidency Magistrate convicted the first and the second accused of an offence under S. 42 of the Prisons Act and sentenced each of them to pay a fine of Rs. 200.

The material portion of the section is as follows -—

" Whoever.....communicates or attempts to communicate with any prisoner shall, on conviction before a Magistrate, be liable to imprisonment . . . ". Mr. V. L. Ethiraj, who appears for the accused, admits that the second accused has committed the offence but says that the sentence passed on him is unduly severe. As regards the first accused, he contends that it is communication with a prisoner that made it an offence under the section and that it makes only the person who communicates with a prisoner liable to punishment and that a prisoner cannot communicate with himself and that a prisoner cannot, therefore, commit the offence described in cl. (3) of S. 42. But the question still remains whether a prisoner may not abet the offence, for the same section provides that whoever abets any offence shall also be liable to punishment. The word " abet " is not defined by the Prisons Act, but the General Clauses Act X of 1897, provides that the word " abet " shall have the same meaning as in the Penal Code. Under S. 107 of the Indian Penal Code " a person abets

the doing of a thing who intentionally aids, by any act, doing of that thing". It is quite possible for a person to communicate with a prisoner without the latter's aid or co-operation; for instance, a person may walk into the jail and when the prisoner has no intention to speak to him or does not even expect that the stranger will speak to him, the latter may do so, and the prisoner may unintentionally, without even an effort hear the words spoken. Or, to take another instance, the prisoner may find by accident a piece of paper which has been introduced into his cell without his knowledge, and picking it up, he may find that it contains a message for him, In these two instances the person who communicates with the prisoner has committed that offence but the communication is made without the co-operation of the prisoner. But, if the prisoner is aware that a certain piece of paper contains a communication intended for him, receives it from the warder and reads it, I am inclined to think that he has, by his active co-operation, aided the commission of the offence for he, by his acts, facilitated the commission of it, and, in fact, the commission of the offence would have been impossible without the active participation in it of the prisoner himself.

In the present case, not only did the prisoner read the letter but he also wrote a reply and handed it to the warder, who was acting in concert with the accused 1 and 2. In the view I have taken, it is unnecessary to consider what the effect of this additional act on the part of the prisoner is. It may be noted that the first accused pleaded guilty and the Magistrate thereupon convicted him; but altogether apart from this, I am prepared to hold that he was rightly convicted of an offence under S. 42 of the Prisons Act read with S. 107, I. P. C.

As regards the sentences passed, I have just a word to say. I have been told that the act described above constituting a breach of prison discipline by the first accused was adequately punished under the prison rules; and in my opinion, it is not therefore necessary to sentence him to pay more than a nominal fine. I therefore reduce the fine in his case from Rs. 200 to one rupee and direct that, if the fine has already been recovered, the balance shall be refunded to him. As regards the second accused, I am of the opinion that the punishment awarded is unduly severe, and that an imposition of a fine of Rs. 50 will meet the ends of justice and I reduce the fine to Rupees fifty and direct that, if the fine has already been recovered from him, the balance shall be refunded to him.

I may add that the learned Crown Prosecutor has not very properly pressed for severe sentences in the circumstances of the case.

Sentence reduced.

✱ 1923 MADRAS 597

SPENCER, J.

Venkatagurunatha Sastri, in re.

Criminal Rev. No. 807 of 1922, and Criminal Rev. Pet. No. 678 of 1922, and Cr. Rev. C. No. 692 and Case Ref. No. 75 of 1922 D. 16th Feb. 1923, against the judgment of the Court of the Sub-Divisional 1st Class Magistrate of Tinnevelly in Cr. A. No. 36 of 1922.

Penal Code Ss. 420 & 406—Breach of trust in respect of one's own property pledged with another.

The act of the accused in dishonestly inducing the complainant to hand over the promissory notes, which the accused had pledged with the complainant as security for a loan by pretending that he required them to collect money from his debtors with the aid of which he would pay cash to the complainant, would constitute, if proved, an offence of cheating punishable under Sect. 420. It is not impossible under any circumstances for a person to commit criminal breach of trust in respect of his own property. In such a case the complainant has some sort of beneficial interest in the property and when he gives the notes to the accused for a definite purpose and the accused dishonestly disposes of them, there is both entrustment and dishonest misappropriation. [P, 598 C. 1]

A Narsimha Iyer—for the Petitioner.

V. L. Ethiraj (for the Public Prosecutor)—for the Crown.

Order.—The act of the accused in dishonestly inducing the complainant to hand over the promissory notes, which the accused had pledged with the complainant as security for a loan

of Rs. 2,500, by pretending that he required them to collect money from his debtors with the aid of which he would pay cash to the complainant would constitute, if proved, an offence of cheating punishable under Sect. 420 of the Indian Penal Code.

It is argued that it does not constitute the offence of criminal breach of trust (Sect. 406) for which the petitioner has been convicted, for the reason that the promissory notes were his own,

I am not prepared to hold that it would be impossible under any circumstances for a person to commit criminal breach of trust in respect of his own property. The possession of the promissory notes, even without endorsement in the hands of the person with whom they were pledged, was of some value to the complainant, as it gave him control over the accused and so long as they remained with him prevented the accused from using them to discharge the debts due by him to other creditors in preference to him. The complainant thus had some sort of beneficial interest in this property and when he gave the notes to the accused for a definite purpose and the accused dishonestly disposed of them in violation of the legal contract he had made with him there was both entrustment and dishonest misappropriation.

Thus I do not find any legal defect in the conviction. The sentence is no doubt light but considering the circumstances and the absence of a finding as to the extent to which the complainant was damnified, I decline to enhance it.

Both Criminal Revision Cases are dismissed.

Petitions dismissed.

1923 MADRAS 598

OLDFIELD AND RAMESAM, JJ.

(*Kottitheti*) *Hamed Haji and others*-Appellants.

v.

The Crown—Opposite party,

Cri. A. No. 1070 of 1922, D. 22nd Dec. 1922; against the order of the Court of the Special Magistrate of Manjeri in S. C. No. 6 of 1922.

Governor General's Ordinance (Malabar I of 1922) S. 4 (2) (b)-Special Magistrate—Retired Officer's appointmeat invalid.

The only persons, who under Ordinance 1 of 1922 Sect. 4 (2) (b) can legally be appointed Special Magistrates, are "Magistrates who have exercised the powers of a First Class Magistrate for not less than two years." Where the Special Magistrate was, on the date of oppointment retired Deputy Collector, and had before and up to his retirement exercised first class powers for not less than two years. *Held* he had ceased to be a Magistrate and was not one when he was appointed a Special Magistrate under the ordinance. His appointment was therefore invalid. [P 600 C 1]

B. Pocker—for the Appellants.

J. C. Adam (*The Public Prosecutor*)-for the Crown.

Judgment.—We have to deal first with an objection to the competence of the Special Magistrate, by whom the appellants 1 to 6, accused, have been convicted The only persons, who under Ordinance I of 1922, Sect. 4 (2) (b) can legally be appointed Special Magistrates, are "Magistrates who have exercised the powers of a First Class Magistrate for not less than two years." M. R. Ry. Dewan Bahadur C. Gopalan Nayar the Special Magistrate here in question was, as the order appointing him, dated 1st, July 1922, shows, on the date a retired Deputy Collector. It is not disputed by Mr. Pocker for the accused, that he had before and up to his retirement exercised first class powers for not less than two years. His objection to this appointment is that he was not on 1st July, 1922 a Magistrate, because his retirement had determined his magisterial powers.

The learned Public Prosecutor hardly disputes that only a person, who is already a magistrate, is eligible for appointment as Special Magistrate, and that is clearly entailed by the wording of the section. He contends that as M. R. Ry. C. Gopalan Nayar was a Magistrate on the date of his retirement and was never deprived of his magisterial powers, he continued to be one, those powers being merely in abeyance in the absence of any local jurisdiction, wherein they could be exercised and that he was one for the purpose of the section.

The definition of "Magistrate" in the General Clauses Act (X of

1897) Sect. 3 (31) is applicable to the interpretation only of Acts and Regulations, not of an ordinance, and is statedly not exhaustive, and there is no definition in the Criminal Procedure Code. The only references in that Code to the termination of the powers of a person, who has been made a magistrate are in Sect. 26 to the removal of such persons from office and in S. 41 to the withdrawal of the powers, conferred on him by the Local Government, of the District Magistrate; and it is not alleged that any action has been taken in the case of M. R. Ry. C. Gopalan Nayar. But under Sect. 12, Sub Magistrates can be appointed only as Magistrates in a district, their powers, if they are in Government service, being continued under Sect. 40 in case of transfer to a different local area. This is inconsistent with the view, for which the learned Public Prosecutor contends, since it follows from it that Magisterial powers are recognised by the Code as subsisting only so long as the district or local area in which they can be exercised, although not necessarily that for which they were originally conferred, can be ascertained. The suggestion that, where no such district or area is ascertainable, the powers are in abeyance, is not, so far as we have been shown, supported affirmatively by any provision of the Code and it can hardly claim even negative support from the absence of any provision for the lapse of powers, where except in the events to be referred to no necessity for such provision will ordinarily arise. As regards one of such events, the temporary absence of a magistrate on leave, authority is available. For in *In the Matter of Parrssoram Boorooah* (1) the learned Judge who dealt with the point referred to the possibility that "what really vacated an office was not the going on leave, but the appointment of another person to it": although he held on other grounds that the section of the Code then in force, corresponding with the present Sect. 40, was not applicable to the case under decision; and in *Harku* v. *Situram Kaliyan* (2) it was held explicitly that a magistrate's absence on leave made no difference to his right under Sect. 40 to exercise the powers conferred on him in the local areas, to which on his return from various periods of leave he was transferred. The latter decision was reached with reference to the fact, also referred to in the former, that an officer on leave under the Civil Service Regulations retains a lien either on his appointment or on one of similar character; and the conclusion suggested in the one case and reached in the other is by this construction reconcilable with the principle, which Sects. 12 and 41 entail, that magisterial powers continue, so long as connection with a district or local area can be regarded as maintained. Another class of cases, more similar to that under our consideration, consists in those, in which the officer is appointed permanently to other duties in the Secretariat or elsewhere dissociated from magisterial work, and retains no sort of connection with a district or local area, in which he can exercise powers. Authority regarding the necessity for again conferring powers on him on his return to a district is wanting. But we have ascertained that in each of these classes of cases the practice of Government is in accordance with the principle just referred to. That is to say, powers are not conferred again, where an officer has left a district on leave and returned to the same district or another, whilst they are, if his absence on other duty has entailed his dissociation from the work of a magistrate and he returns to it, his appointment to that duty involving an implicit withdrawal of his powers. Such an implicit withdrawal is contemplated in *Harku* v. *Sitaram Kalyam* (2) in the reference to the contingency that the magistrate there in question had by absence without leave or after the end of leave lost his appointment. And such a withdrawal must follow from the resignation of an appointment or its termination, such as occurred in the case of M. R. Ry. C. Gopalan Nayar, in as much as his connection with

(1) [1876] 2 Cal. 117.

(2) [1919] 11 Bom. L. R. 536.

any district or local area, in respect of which his powers could with reference to Sect. 12 be regarded as subsisting, then came to an end. The conclusion must be that M. R. Ry. C. Gopalan Nayar had ceased to be a Magistrate and was not one, when he was appointed a Special Magistrate under the Ordinance. His appointment was therefore invalid.

The result is that the appellants have not been tried by a legally constituted Court, that their convictions must be set aside and that they must be re-tried by the Special Magistrate of Malapuram.

Retrial ordered

✱ 1923 MADRAS 600

AYLING AND RAMESAM, JJ.

Cholancheri Ayamma and Others—Prisoners Appellants

Criminal A. No. 1493 of 1922, D. 8th Jan. 1923, against the order order of the Court of the Special J., Malabar, in S. J. C. No. 151 of 1922.

Evidence Act S. 57 (7)—Signature of a gazetted officer.

The Court can take judicial notice of the signature of gazetted officer of the Br. Government and therefore the genuineness of his signature is not a matter which, unless the Court deems it necessary, need be proved. The applicability of the Sub-section is not contingent on the exhibition of a copy of the Fort Saint George Gazette containing a notification of his appointment as such officer. [P. 600 C. 2]

V. L Ethiraj and M. C. Sridharan—for the Appellants

The Public Prosecutor—for the Crown.

Judgment.— The nine appellants in this case have been convicted of an offence under S. 121, Indian Penal Code, and sentenced to transportation for life. They are said to have formed part of a body of some 3,000 Moplahs who marched on Tirurangadi Cutcherry on 20th August 1921. A small body of police under two European Officers endeavoured to bring them to a stand and the two officers with two head constables advanced to parley with the Moplahs. They were treacherously surrounded and murdered by the vanguard of the Moplahs consisting of about 100 armed men including the present appellants and the small police force was driven to retreat. This was the encounter which inaugurated the Moplah rebellion and there can be no doubt that if the evidence is accepted all those who took part in the attack on the police were guilty of an offence under S. 121 Indian Penal Code (waging war against the King.

A preliminary objection was taken by Mr. Ethiraj on behalf of the appellants that the sanction order (Ex. A.) required by S. 196 Criminal Procedure Code has not been properly proved. The order purports to be signed by Mr. R. A. Graham as Chief Secretary to Government and it is argued that the genuineness of his signature should be proved by evidence. It appears to have been the custom in cases of this nature to examine a witness to speak to the genuineness of the Chief Secretary's signature; but the learned Public Prosecutor points out (and in our opinion rightly) that under S. 57 (7) of the Evidence Act, the Court can take judicial notice of this Officer's signature just as of his accession to office, name, title and functions and the genuineness of his signature is not a matter which, unless the Court deems it necessary, need be proved.

To this Mr. Ethiraj replies with reference to the closing words of cl. (7) that its applicability is contingent on the exhibition of a copy of the Fort Saint George Gazette containing a notification of Mr. Graham's appointment as Chief Secretary.

We do not think this is the intention of the section. All that appears to be meant is to limit the application of the clause to what is known a "Gazetted Officers" that is, Officer whose appointments are notified in the Gazette of India or Local Government Gazette. Of course if there is any question or doubt as to whether the Officer of whose signature, accession to office, name, title or functions the Court is asked to take judicial notice, falls in this category, it would be the duty of the Court to satisfy itself on the point by the best evidence available. But where as in the present case, no doubt has ever been raised as to the fact of Mr. Graham's appointment and its notification in the Fort Saint George Gazette, we do not

think that the exhibition of a copy of the latter was a necessary legal preliminary to the Court taking judicial notice of the genuineness of his signature.

We may add that our attention has been drawn in Court to a notification in the Fort Saint George Gazette of 25th April 1922 (nearly a month before the date of Ex. A) appointing Mr. Graham as Chief Secretary to Government and that if we had held that the exhibition of the Gazette containing this notification was necessary we should have admitted it under S. 428 Criminal Procedure Code to cure the defect. As authority for such a course we are content to rely on the observations of the learned Chief Justice in *Varadarajulu Naidu* v. *King Emperor* (1).

Passing to the merits of the case, the only question is whether we can rely on the evidence adduced to show that the appellants formed part of the band which fell upon and butchered these four servants of the Crown. We have the evidence of four eye-witnesses (prosecution witnesses Nos 1, 2, 3 and 4) who all agree that the officers were murdered by a band of about 100 persons armed with knives, swords, and sticks, and that the appellants were among these 100 persons although they cannot speak to any individual action. Prosecution witnesses Nos. 1, 2 and 3 are constables forming part of the small force who saw what occured from a distance of twenty or thirty yards. Prosecution witness 4 is an amshom peon who witnessed it from a verandah only three or four yards away. The occurrence was at mid-day and the appellants are persons well known to all these witnesses so that there is no reason why they should not have noticed and recognised them and been able to speak with certainty to their identity.

There is corroborative evidence of two other witnesses, prosecution witnesses Nos. 5 and 9 who did not witness the actual encounter but depose to the presence of the appellants in the mob which gathered at Kizhakepalli and was harangued by the notorious Moplah leader Ali Musalari before proceeding to Tirurangadi. A. third witness, prosecution witness No 6, who gives similar evidence has not been relied on by the Special Judge and although we should not ourselves reject his evidence as without value, it is inferior to that of the others, and we may leave it out of consideration.

If prosecution witnesses Nos. 5 and 9 are speaking the truth the direct evidence of prosecution witnesses Nos. 1 to 4 as to the participation of appellants in the crime is very powerfully corroborated whether we look to the possibility of a mistake or deliberate false testimony on the part of the latter. For there can be no doubt that it was the same assemblage which Ali Musaliar harangued at Kizhakepalli which attacked the Police at Tirurangadi.

Endeavours have heen made to discredit the testimony of both sets of witnesses on the score of private enmity as a motive for false testimony. The special Judge has carefully dealt with this in his judgment and has in our opinion come to a right conclusion. Such prior feeling as has been established in evidence is limited to prosecution witness No. 2 and P. W. 9 who may be in a position to influence prosecution witness No. 5. Prosecution Witnesses Nos. 1, 3 and 4 are unaffected by it. No cause of ill-feeling of a really serious nature is elicited in the case of prosecution witness No. 9: and although the alleged enmity in the case of prosecution witness No. 2 has its origin in a murder case of 1917, in which the latter's father-in-law was one of the accused, we agree with the Judge in thinking that it is hardly a likely cause for the malicious implication of the accused in this case.

The suggestion that accused have been falsely implicated merely as being notorious rebels concerned in other incidents of the rebellion is too flimsy for serious consideration.

In our opinion the evidence of the above witnesses may be safely accepted.

We confirm the oonviction and sentences and dismiss the appeal.

——— *Appeal dismissed*

(1) (1918) 42 Mad. 885-36 M. L. J. 64—(1919) M. W. N. 669—20 Cr. L. J. 455—51 I. C. 343.

✱ 1923 MADRAS 602

OLDFIELD AND KRISHNAN. JJ.

Raja Rajeswara Sethupathi-Petitioner.

v.

Arunachalam Chettiar—Respondent.

C. M. P. Nos. 1642 and 1643 of 1922, D. 30th November 1922.

(a) *ivil P. C. S. 110—Suits decided by the same judgment.*

The two suits in question involved substantially the same questions for determination, and were determined in first Court by two distinct judgments but in the High Court, they were no doubt originally heard together and decided by one judgment But afterwards in one appeal there was an application for review of that judgment and eventually that appeal wes reheard on review and another judgment was given; *Held* the suits cannot be said to be decided by one judgment, though the judgment on review did not in any way modify the other portion of the earlier judgment in any way. [P. 602 C. 2]

(b) *Civil P. C. S. 109 (c).—Question of law of general interest-Leave granted in other similar appeals.*

The effect on a particular case of S. 47 C. P. C. as debarring the plaintiff from proceeding by suit instead of in execution of a decree already obtained, is not a question of law of general interest. The fact that leave has already been granted in respect of another case, involving the same question as the one in question, does not render it a fit case. 5 I. C. 583 Not Foll. [P. 603 C. 1]

A. Krishnaswami Iyer—for the Petitioner.

K. V. Krishnaswami Iyer—for the Respondent in No. 1642

N. Swaminatha Iyer—for the Respondent in No. 1643.

Order:—These are applications for leave to appeal to His Majesty in Council against the decision of this Court in Appeal No. 374 of 1919 and for consolidation of the suit in question in that appeal and the suit in question in Appeal No. 373 oi 1919, in respect of which leave to appeal has already been given, the latter application being made under O. 45 R. 4 C. P. C. This consolidation is asked for purposes of valuation; and it is not disputed that, unless consolidation is allowed, the case in Appeal No. 374 of 1919 will not fulfil the requirement of S. 110 C. P. C. in respect of the amount of the subject matter of the suit in the Court of first instance or the subject matter in dispute in appeal.

Under O. 45, R. 4 consolidation is admissible only when the suits in question involve substantially the same questions for determination and have been decided by the same judgment. We can easily hold that the two suits in question before us do involve substantially the same questions for determination. As regards however the second requirement in the Order, the facts are that the suits were determined in the Court of first instance by two distinct judgments. In this Court the appeals Nos. 373 and 374 of 1919, were no doubt originally heard together and decided by one judgment. There was however afterwards in Appeal No. 374 of 1919 an application for review of that judgment and eventually that appeal was reheard on review and another judgment was given on the 3rd November, 1921. The judgment on review of that date no doubt did not in any way modify the other portion of the earlier judgment, in respect of which leave to appeal has been granted and is now asked for That however does not, in our opinion, affect the character of the judgment of the 3rd November, 1921. As the judgment is in Appeal No. 374 of 1919 and as that judgment is distinct from the judgment in Appeal No 373 of 1919, the earlier judgment was of course adopted, so far as it still stood, in the later judgment in Appeal No. 374 of 1919. But that did not entail that the later judgment was not the judgment in that appeal and the final adjudication, against which a further appeal would have to be taken. In these circumstances we cannot hold that the second requirement of O. 45, R. 4, that the suits to be consolidated were decided by the same judgment has been met, since the judgments deciding them were, in our opinion, certainly different in the Court of first instance and were distinct in this Court. There is, therefore, no room for the application of such an authority as *Bhagwan Singh* v. *Bhavani Das Bhagwan Das* (1). The

(1) (1921) 43 All. 223—18 A.L.J. 1119—59 I.C. 794.

petition for consolidation failing, it is not possible for us to treat the valuation in Appeal No. 374 of 1919 as fulfilling the requirement of S. 110 C. P. C.

We are then asked to certify the case as a fit one for appeal under S. 109 (*c*), C. P. C. The decisions as to fitness for appeal with reference to that provision are no doubt wide. But it seems to be well established that there must be some substantial question of law of general interest involved [See *Moti Chand* v. *Ganga Prasad Singh* (2) and *Sadagopachariar* v. *Krishnamoorthy Rao* (3)]. We cannot see how such a question arises in the case before us, since the matter for appeal is only the effect on a particular case of S. 47, C. P. C. as debarring the plaintiff from proceeding by suit instead of in execution of a decree already obtained.

It is then suggested that the case is covered by S. 109 (*c*) C. P. C. because leave has already been granted in respect of another case. Appeal No. 373 of 1919 involving the same question as this. The only authority for this very wide construction of S. 109 (*c*) is *Makund Sarup* v. *Richard Ross Skinner* (4). We are not prepared to act on the principle suggested without more and better authority.

In these circumstances the petitions must fail, and must be dismissed with costs.

Petitions dismissed.

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(2) (1901) 24 All. 174—29 I.A. 40—6 C.W.N. 362—8 Sar. 247—4 Bom. L. R. 159 (P.C.)

(3) (1906) 30 Mad. 185—34 I.A. 93—9 Bom. L.R. 663—4 A.L.J. 333—11 C.W.N. 585—17 M.L.J. 240—2 M.L.T. 204—5 C.L.J. 566. (P. C.)

(4) (1909) 5 I.C. 583.

1923 MADRAS 603

KRISHNAN. J.

Venkattasubbaiar and others—Accused-Petitioners.

v.

The Crown — Respondent.

Cr. R. C. No. 395 of 1922, D. 15th December 1922, from the judgment D. 27th Feb. 1922 of the Court of the Sub-Magistrate of Erode in Criminal A. Nos. 23 and 25 of 1922.

Penal Code S. 147—Violence—Meaning.

Where the accused were found to have gone and beaten on the door, when the complainant, fled away to save himself from being beaten and shut himself up in his room. *Held* that they used violence. The word violence was not restricted to force used against persons only but extends also to force against inanimate objects. 40 C. 367 Foll. [P. 603 C. 2]

D. Swaminathan—for the Petitioners.

The Public Prosecutor—on behalf of the Crown.

Order :— It is argued that the conviction under S. 147, Indian Penal Code, was wrong as no force or violence was used to any person and that the accused are guilty under S. 143 only. The definition of force is given in S. 349 of the Indian Penal Code. Now these accused are found to have gone and beaten on the door when the complainant fled away to save himself from being beaten and shut himself up in his room. Whatever difficulty there may be in bringing the action of the accused within the definition of force it is clear they used violence which is sufficient under S. 146 of the Indian Penal Code to make their offence rioting. This view is supported by the ruling in SAMA RUDDI v. EMPEROR (1) where it was held that the word violence was not restricted to force used against persons only but extends also to force against inanimate objects. The accused were therefore rightly convicted under S. 147 of the Indian Penal Code.

The fines however seem to me to be excessive in the case of Pariah

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(1) (1912) 40 Cal. 367—13 Cr.L.J, 821—17 I. C. 565.

accused Nos. 4 to 14. Their fines will be reduced to Rupees 10 each; in default two weeks rigorous imprisonment. The sentences of the others are confirmed. Excess fines if collected would be refunded.

Petition partly allowed.

1923 MADRAS. 604

OLDFIELD AND VENKATASUBBA RAO. JJ.

(*Sri Sri Sri*) *Ramchandra Deo Maharajulu Garu*—Petitioner.

v.

Sri Rajah Chetrucherla Gangaraju and others—Respondents.

Civil Mis. Pet. No. 2076 of 1922, D. 9th Feb. 1923.

Vizagapatam Agency Rules—(1920) Rs. 14 and 2 (3)—Equal or superior jurisdiction.

The High Court being superior to the Court of the Agency Commissioner, can transfer a case therefrom to its own file, but not to the file of a District Court which is not equal or superior: 23 M 329 Dist. [P 606 C 1]

P. Somasundaram—for the Petitioner.

Y. Suryanarayana—for the Respondents.

Order—In O. S. No. 5 of 1921 on his file the Judicial Assistant Commissioner of the Agency Division dismissed an application for the appointment of a receiver; and the petitioner before us appealed against that order of dismissal to the Agency Commissioner. The Commissioner, on the ground that one of the parties to the proceedings was his ward, obtained an order from this Court, transferring the appeal to the District Court, Vizagapatam. We are now asked to transfer it from that Court to the High Court.

The transfer to the District Court was made by us administratively and without notice to the petitioner, no dispute as to the correctness or sufficiency of the ground on which it was proposed being possible; and there is accordingly no reason why it should not be reconsidered at his instance. He urges that it should be, because this Court had no power to make it or transfer a case from the file of the Commissioner to that of any Court except the High Court. This contention no doubt involves that our order of transfer to the District Court was *ultra vires* and ineffective and therefore the relief required is a transfer from the file of the Commissioner, from which the appeal has never been removed in any legal way, to the file of this Court, although that is not what is actually asked for in the petition before us. But it is not suggested by respondents that there is any substance in the difference. We therefore turn to the law to ascertain our powers in the matter, observing only that neither side disputes the necessity for a transfer to some Court other than that of the Agent with reference to his position as guardian of a party.

The general power of the High Court to transfer from the file of a Court, such as that of the Agency Commissioner, which is not subject to the Civil Procedure Code is conferred by Sect. 107 of Government of India Act (5, 6, Geo. V. Ch. 61) and is exerciseable thereunder subject to fulfilment of two conditions, that (1) the Court from which the transfer is made is subject to the High Court's appellate jurisdiction; (2) the transfer is to another Court of equal or superior jurisdiction. The first of these conditions is in our opinion complied with, because under R. 14 of the Agency Rules at present in force an appeal lies to the High Court from "all decrees passed by the Agency Commissioner upon original suits," and the conclusion founded directly on this comprehensive wording cannot be affected by the fact, relied on by respondents as inconsistent with the application of Sect. 107 (a) and therefore of the section as a whole, that R. 19 provides for the submission to the High Court of returns, since that provision may have been made simply for convenience and completeness or with reference to Sect. 107 proviso.

The respondents have been referred to the decision in MAHARAJAH OF JEYPORE v. PAPAYAMMA (1) as nega-

(1) (1900) 23 Mad., 329.

tiving this Court's power to transfer, not only to the District Court (consistently with petitioner's contention). but also to its own file. It is not material that this decision was given under Sect. 15, Indian High Courts Act (24, 25, Vict., Ch. 104), because that section has been re-enacted in almost identical terms in the section of the Government of India Act above referred to; but it is material to both the points above stated that a different set of Agency Rules was promulgated on 9th November, 1920, in the Fort St. George Gazette, Part. 1, page 1425, and governs the present case. For as regards the point at present under consideration the appellate jurisdiction of this Court was sustained in the judgment of White, C. J., with reference to R. 21 and was negatived by Benson J., mainly with reference to the exclusion from that jurisdiction of the class of suits referred to in R. 22 of the Rules then in force, transfer of a suit of that class being (it may be added) in fact in question. Whilst however the former R. 21 is reproduced without substantial difference in the present R. 14, the proviso to the present R. 2 (3) which deals with cases of the nature of those dealt with in the former R. 22, those in which the succession to or an interest in the estate of a Chief is in dispute, differs from it materially, because it entirely excludes such cases from the jurisdiction of the Courts and from trial as suits, was maintained, but, the fact on which Benson, J., to some extent relied, the appeal was to the Governor-in-Council and, if it was (as the rule provided) referred to the Sadder or High Court for decision, the decree could be carried into execution only with his permission. No such derogation from the High Court's appellate jurisdiction is recognised in the present Rules, and accordingly we have not to take into consideration the main ground on which Benson, J's., conclusion was founded. It may be true that the suit in connection with which in the present case the appeal to the Commissioner was filed, is (as respondents contend) of the description referred to in the former R. 22 and in the present R. 2 (3). But, if so, that is merely possible ground for objection to the Court's jurisdiction at the trial; it cannot be urged on the present application and is not material to the disposal of the general question of construction at present under discussion. On that question we must hold that the High Court has appellate jurisdiction over the Court of the Agency Commissioner.

The learned Judges in *Maharajah of Jeypore* v. *Papayamma* (1) were agreed in holding on the second question stated above that a District Court was not of "equal or superior jurisdiction" to that of the Agent (corresponding with the Agency Commissioner in the present Rules), White, C. J., referring apparently in this connection only to an argument based on the policy of the legislature, on which Benson, J., had relied generally, and also expressing an opinion against the general power of High Court to transfer suits from an Agency Court to itself. Regarding the merits of this argument, which has also been pressed on us, that the policy of the legislature is indicated as being against any power of transfer by its provision of special statutes and statutory rules adopted to the backward condition of the agency tracts, to which the developed procedure of the ordinary Courts would be unsuited, it would with all respect be sufficient to say that the true inference from the existence of such provision is in favour of discrimination in the use of the power of transfer, not of its absence and of the absence of any means of protecting an Agency litigant against a disqualified Judge. But we need not pursue this consideration further, because, whatever its weight when (as those learned Judges thought) the language of the Rules they were construing admitted of doubt or a secondary interpretation, it is inadmissible to control the clear language, with which we are concerned.

The conclusion already reached with reference to the comprehensive wording of Rule 14, that the High Court has appellate jurisdiction over the

Court of the Agency Commissioner, in fact precludes all doubt that the one is superior to the other, the exercise of appellate jurisdiction being the clearest test of superiority, and only the position of the District Court remains for consideration. In favour of equality (superiority is not alleged) between it and the Court of the Agency Commissioner there is, so far as we have been shown, only the fact that the original pecuniary jurisdiction of both is unlimited. On the other hand the powers, which each can use in disposing of cases differ widely, as the learned Judges have shown in *Maharajah of Jeypore* v. *Papayamma* (1); and those differences remain under the Rules now in force. There can be no comparison and no question of equality between Courts so differently constituted. The conclusion must accordingly be that the High Court, being superior to the Court of the Agency Commissioner, can transfer a case therefrom to its own file, but not to the file of a District Court which is not equal or superior.

This being so, we hold that the Appeal numbered in C M. A. No. 2 of 1922 on the file of the District Court of Vizagapatam has never been legally transferred from the file of the Agency Commissioner and transfer it to the file of this Court for disposal.

Case transferred to the High Court

1923 MADRAS 606

ODGERS, J.

Marimuthu Naidu and others—Accused Petitioners.

Criminal Rev. No. 546 of 1922, and Criminal Rev. P. No. 468 of 1922, D. 8th Feb. 1923, from the judgment of the Court of Sessions of East Tanjore Division, at Negapatam in Cr. A. No, 13 of 1922.

Penal Code S. 141 and S. 146-Violence use by some.

A toddy shop was pulled down; and spathes of toddy trees of considerable value were cut and destroyed. There was no evidence of force being used to any other person; but violence was certainly used. *Held* that though the petitioners were not the actual persons responsible for the violence used, yet they were rightly convicted under S. 146 being members of an unlawful assembly. [P. 606 C. 2]

T. V. Muthukrishna Iyer—for the Petitioners.

The Public Prosecutor—for the Crown.

Judgment.-In this Revision petition it is urged that the learned Sessions Judge has not considered the defence evidence or more accurataly, has confirmed the conviction of the petitioners on insufficient or no evidence. I have carefully considered the evidence on which the Sessions Judge's findings are based; and I cannot say there is no evidence to support them. It is a question of inference from the evidence and in my opinion the Sessions Judge was entitled to draw an inference from it against the petitioners. It is admitted that the accused were members of an unlawful assembly under Sect. 141, but it is urged that the conviction for rioting under Sect. 146 cannot stand as no force or violence was used. A toddy shop was pulled down; and spathes of toddy trees of considerable value were cut and destroyed. True there is no evidence of force being used to any other person; but in my opinion violence was certainly used and I agree with the observations in *Samaruddi* v. *Emperor* (1). I am also in agreement with the findings of the learned Sessions Judge as to the common object of the unlawful assembly. It was to propagate the temperance campaign by such means as were in fact employed. It is not necessary to show that the petitioners were the actual persons responsible for the violence used though there is evidence which might support such a position. In my opinion, the conviction is right and there is no ground to interfere with it in revision. As to Sect. 106, the argument is that as the petitioners were not guilty of rioting

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(1) (1913) 40 Cal. 367—13 Cr. L. J. 821—17 I. C. 565.

but only of being members of an unlawful assembly, actual breach of the peace must be proved. There is no room for this contention if the petitioners were rightly convicted of rioting which is expressly provided for in Sect. 106. The order as to security is therefore right and this and the sentence are confirmed.

Petition dismissed.

✱ 1923 MADRAS 607

OLDFIELD AND VENKATTASUBBA RAO, JJ.

Rajagopala Iyengar—Petitioner.

v.

Ramanuja Iyengar and others—Respondents.

Civil Rev. Petition No. 1 of 1923, and Civil Mis. Petition No. 7 of 1923 D. 2nd Feb. 1923, to revise the order of the Sub. Judge of Tanjore D. 30th October 1922.

(a) *Evidence Act S. 163—Scope.*

Section 163 does not render proof of the document to be exhibited unnecessary or alter the normal incidence of that burden. [P.608 C.1]

(b) *Civil P. C. S. 115—Wrong view as to burden of proof.*

The defendants in response to the plaintiff's petition for discovery produced certain accounts and at a later date produced further accounts. Those accounts were before the Court and, the suit being for an account of the profits of properties which had been in the possession of the defendants and their father, they would have been most material in arriving at the amount, to which the plaintiffs were entitled. The plaintiffs having inspected the accounts, brought to the notice of the lower Court that they did not admit their genuineness or completeness. The case standing thus the lower Court held that as the accounts had been inspected by the plaintiffs, the defendant's vakil was entitled to insist on their being exhibited in spite of the objection from the other side that they were not genuine, and ought not to be exhibited without proof. *Held* the burden of proof was on the defendants and the Court committed a material irregularity, which should be set aside.

T. R. Ramchandra Iyer and K. R' Rangaswami Iyengar—for the Appellants.

C. V. Ananthakrishna Iyer and A. Srinivasachari—for the Respondents.

Judgment.— That the general course of the proceedings in this case has been deplorable will be clear, when it is stated that, although they began in 1914, they still are not within measurable distance of any conclusion. We however are particularly concerned only with the order, which we are asked to revise and which was passed on 30-10-1922.

The facts shortly are that much earlier in the case the defendants in response to the plaintiff's petition for discovery produced certain accounts and at a later date produced further accounts. Those accounts were before the Court and, the suit being for an account of the profits of properties, which had been in the possession of the defendants and their father, they would have been most material in arriving at the amount, to which the plaintiffs were entilled The plaintiffs, having inspected the accounts, brought to the notice of the lower Court that they did not admit their genuineness or completeness. The case standing thus, the lower Court has held, that as the accounts have been inspected by the plaintiffs, the defendant's vakil is entitled to insist on their being exhibited in spite of the objection from the other side that they are not genuine and ought not to be exhibited without proof.

The lower Court justified this with reference to Section 163 Indian Evidence Act and, if it meant simply that the defendants were entitled to have the accounts exhibited, subject to proof and that, as they relied on them, they would be bound to prove them, the plaintiffs being entitled to adduce counter evidence, we could find no fault. But the plaintiffs in the first page of the affidavit " of 31-10-21 say (and it is not contradicted) that the lower Court at once

called upon them to adduce evidence about the genuineness or otherwise of the said accounts " That was in no way justified by section 163 of the Evidence Act. For section 163 does not in our opinion, render proof of document to be exhibited unnecessary or alter the normal incidence of that burden. We do not think it necessary to decide in these proceedings whether section 163 is applicable to accounts produced under the discovery procedure or only to accounts produced after the trial has begun. It is sufficient that it includes nothing relating to the burden of proof or the necessity for the proof, prescribed in the other sections of the Act.

We are, of course, unwilling in revision to interfere with an order passed by the lower Court in a pending trial and we should not do so in the present case, if it were not possible to isolate the point, on which our interference is asked for. Here however we think that, in ruling as it did and deviating from the usual course, in accordance with which the burden of proof was on the defendants, the lower Court committed a material irregularity, which we should set aside.

The application before us for a transfer of the case is founded on the alleged perversity of the lower Court's order and procedure and on certain oral observations, which it is alleged to have made. We do not think those observations, if they were made, merit serious notice ; and we can find nothing except a mistake, which there is no reason for doubting was made in good faith. There is accordingly no reason for a transfer.

Our attention has been invited to the memo by defendants dated 30—10—22, in which the 1st defendant declined to supplement the evidence already given. They did so, so far as we can understand in consequence of the lower Court's ruling just dissented from. They must be allowed, if so advised, to reconsider their refusal to adduce further evidence.

C. R. P. No. 1 of 1923 is allowed to the extent stated. C. M. P. No. 7 of 1923 is dismissed. Costs will be costs in the cause and will be provided for in the lower Court's decree.

Revision allowed.

1923 MADRAS 608

SPENCER. J.

Kama Kondiah and others—Accused.

Criminal Rev. No. 857 of 1922, and case R. No. 88 of 1922 D. 26th Jan. 1923.,

Cattle Trespass Act S. 24—'Rescue'

Driving cattle by shouts and cries does onstitnte rescuing them under Sect. 24.

The Public Prosecutor—for the Crown.

Order

The Sub-Division Magistrate's opinion that driving cattle by shouts and cries does not constitute rescuing them under Sect. 24 of the Cattle Trespass Act is erroneous. Inducing an animal to move may even amount to using force (see definition in Sect. 349 of the Indian Penal Code and illustration (h) to that section) so that even if the Magistrate is right in saying that the word "rescue" implies the use of force or violence, it does not follow that there was no force used in this case.

The reasons given for acquitting the accused are unsound, the acquittal is set aside, and the appeal must be reheard, and disposed of according to law.

Order set aside ; Case remanded.

✱ 1923 MADRAS 609

Full Bench

SCHWABE C.J., PHILLIPS, DEVADOSS, VENKATASUBBA RAO AND WALLACE, JJ.

Varisai Rowther and another —Petitioners.

v.

The Crown —Opposite Party

Cr. R. C. No. 384 of 1922 and Cr. R. P. No. 333 of 1922 D/- 22nd December 1922, to revise the judgment of the Sub-Divisional Mag. of Ramnad in Cr. A. Nos. 10 & 15 of 1922.

Criminal P. C., Ss. 342 & 537— Questioning the accused after examining the re-called prosecution witnesses—Omission not illegal.

Cross-examination of re-called prosecution witnesses under S. 256 is not an examination of prosecution witnesses within the meaning of S. 342 and therefore omission to question the accused after this examination of re-called prosecution witnesses is not an illegality. This cross-examination is rather an evidence for the defence than evidence for the prosecution 1922 M. 512- 45. Mad. 820-Overruled 6. P.L.J, 644 Diss. [P 611 Cs 1, 2]

Devadoss J.—The contention that, if an accused person cross-examines any of the prosecution witnesses under S. 256, the Magistrate is bound once more to examine the accused generally on the case seems untenable. S. 342 means only that the examination of the accused should take place after the prosecution has placed its whole case before the Court. The accused in a warrant case has three opportunities of cross-examining the prosecution witnesses; once before the charge is framed, secondly under S. 256 and thirdly after he has entered on his defence. The words in S. 342 "after the witnesses for the prosecution have been examined," cannot reasonably be interpreted to mean " after the accused has chosen to exercise his right of cross-examination at the very end of his defence." [P 613 Cs 1, 2]

Venkatsubbarao J.—(Dissenting). The decision in 1922 Mad 512-45 Mad 820 is correct. [P 618 Cs 2]

S. Swaminathan — for the Petitioner.

The Public Prosecutor—for the Crown.

Order of Reference to a Full Bench.

Krishan, J.—The point taken here is based on *Maruda Muthu Vannian and others, in re* (1). This point is being taken in a good many cases and it is argued that the trial in the lower Courts is vitiated entirely by the omission to question the accused after the taking of the prosecution evidence is completed. I am inclined to think this requires further consideration. The case is referred to a Bench.

Order.—This petition will be dismissed. We propose now only to say that the Court are of opinion that the recent decision of Oldfield and Ramesam, JJ in *In re Maruda Muthu Vannian and others* (1) is wrongly decided and cannot be relied on a future occasion. What our reasons are for that judgment will be stated later on. *Maruda Muthu Vannian In re* (1) is wrong and as there are many cases pending, it is right that the view of the Court should be stated as soon as possible though there must be some slight delay in formulating our reasons.

Order of the Full Bench.

Schwabe, C. J.—This Criminal Revision Petition has been ordered to be referred to a Full Bench by reason of a large number of similar cases pending in which decisions of Magistrates throughout the Presidency would be vitiated if the recent decision of this Court in *In re Maruda Muthu Vannian* (1), was correctly decided.

The facts are that the accused were charged by the police in a warrant case for receiving stolen property before the Second Class Magistrate of Paramakudi. The procedure adopted by him was the following. Witnesses for the prosecution were examined. The accused being given the opportunity to cross-examine the witnesses when their examination was completed, did not avail themselves of that opportunity. The accused were then questioned generally on the case for the purpose of enabling them to explain the circumstances appearing from the evidence against them, and they stated that they would put in a written statement. The Magistrate then, under S. 254 of the Criminal Procedure Code, being of opinion that there was ground for presuming that the accused had committed an offence which is triable as a warrant case and which he was competent to

(1) 1922 Mad 512—45 Mad 820—16 M.L.W. 420—43 M.L.J. 402—1922 M.W.N. 601—71 I.C. 252.

try, framed in writing a charge against the accused under S. 411 of the Indian Penal Code. The accused pleaded not guilty and the case was adjourned At a later date, at their request, and in exercise of their rights under S. 256 Criminal Procedure Code, the prosecution witnesses were recalled for cross-examination by the accused, and where necessary, were re-examined. Evidence was then called for the defence and the accused through their counsel addressed the Court. The accused were not further questioned generally on the case after the cross-examination and re-examination of the prosecution witnesses. It is contended that the omission to question the accused again at this stage was an illegality, being a failure to comply with S. 342 and vitiated the whole trial. The point was not taken before the Magistrate who heard the case or on appeal before the Sub-Divisional Magistrate of Ramnad who affirmed the conviction, but comes before us in Revision.

S. 342, Criminal Procedure Code, requires in all cases that the accused shall be questioned generally on the case in order to enable him to explain any circumstance appearing in the evidence against him, and this has to be done, in the words of the section, "after the witnesses for the prosecution have been examined and before he (the accused) is called on for his defence." That this is mandatory and not discretionary has been held in many cases and I think by all the High Courts in India, and this must be taken as established. That failure to comply with the terms of the section is an illegality vitiating the trial and not a mere irregularity which can in a proper case be excused under S. 537 of the Criminal Procedure Code has also been held in many cases, though that has not been with such unanimity. In my judgment, failure to comply with the provisions of S. 342 is an illegality and that must be considered as established in this Presidency.

The question remains as to the point of time at the trial when this questioning of the accused has to take place. Under the section it must be *after* the prosecution witnesses have been examined and *before* the accused is called on for his defence. In my judgment " after the prosecution witnesses have been examined " means when the prosecution has finished calling evidence. Generally speaking, in most cases, the examination will include the cross-examination and re-examination of the prosecution witnesses, if there is any.

In Sessions cases this will always be the case as the witness remains in the witness-box until the re-examination is complete. But the position is different in proceedings before Magistrates. In a warrant case, which is all we are concerned with here, the procedure authorized by the Code is that the prosecution witnessess are called and can then be cross-examined on behalf of the accused and if necessary re-examined. The prosecution witnesses called at this stage are generally the whole prosecution evidence and the prosecution is closed. The Magistrate then either dismisses the case on the ground that no case is made out or, after questioning the accused generally to enable him to explain any circumstance appearing against him from the evidence, formulates a charge under S. 254, Criminal Procedure Code. The charge is then read over and explained to the accused under S. 255 and he is asked whether he is guilty or has any defence to make. This procedure is directly in accordance with the Code, and it is difficult to see how any other is possible It may be that the accused is not going to ask that the witnesses for the prosecution be recalled for cross-examination under S. 256, but proposes at once to call his evidence; or it may be that he is not going to call any evidence, but to rely only on his address to the Court. In either event he will have been called on for his defence and by the words of the statute, the questioning has to be after the termination of the prosecution evidence and before he is called on for his defence. It is true that, under S. 256, although he has not availed himself of the first opportunity of cross-examining prosecution

witnesses, he can ask for them to be recalled for that purpose. That does not in my judgment make that cross-examination part of the examination of the prosecution witnesses within the meaning of S. 342. Nor does re-examination generally amount to giving fresh evidence for the prosecution, but is merely explanatory of the cross-examination. If new and material matter in support of the prosecution case is elicited in cross-examination or in the re-examination, it is desirable that the accused should again be questioned on the case and asked generally to explain the circumstances, and, indeed, if fresh evidence on material matters in support of the prosecution case were elicited in re-examination, it would probably be obligatory on the Court to question the accused on that It is open to the prosecution to call fresh evidence after the formulation of the charge, and if this is done, on the termination of that evidence, the accused must be questioned generally under S. 342 after this further examination of the prosecution witnesses. This procedure provides a reasonable method of carrying out the obligation of the statute in the interests of the accused, the object being that he should have an opportunity of explaining the prosecution evidence after it is completed That this is the proper interpretation and in fact the only workable one seems clear from an examination of S. 257, because that section provides that after the accused has entered upon his defence, the Magistrate may on the application of the accused have the prosecution witnesses re-called for examination. The questioning of the accused under S. 342 has to take place before the accused is called on for his defence, and it follows that if this cross-examination of re-called prosecution witnesses is examination of prosecution witnesses within-the meaning of S. 342, it would be impossible to comply with the statute, because the questioning would then be taking place after the accused had been called on for his defence and not before as the section requires. It was probably for this reason that the word "examination" is used in S. 342, so that in warrant cases, in which under the earlier section the cross-examination of prosecution witnesses might take place after the accused had been called on for his defence, the time occupied in this cross-examination should not be included in the time before which questioning was to take place. Nor is there anything unreasonable in this because the accused has already had an opportunity of cross-examining and knows the whole force of the prosecution case, and if he chooses to exercise his right of cross-examination at a later stage, this cross-examination can be fairly treated for the purpose of this section as being rather evidence for the defence than evidence for the prosecution.

Direct authorities against this view are *Mitarjit Singh* v. *Emperor* (2) in which it was held that examination under S. 342 means examination-in-chief, cross-examination and re-examination, and *In re Maruda Muthu Vannian* (1) to the same effect, but with neither of these, for the reasons given above, do I agree.

In the result, this petition will be dismissed.

Phillips, J.—I agree.

Wallace, J.—I agree.

Devadoss, J.-The question referred to the Full Bench is whether a trial is "vitiated entirely by the omission to question the accused after the taking of the prosecution evidence is completed." The objection that the trial is vitiated by such an omission is based upon a recent decision of a Bench of the High Court in *In re Maruda Muthu Vannian* (1) which, in the opinion of Krishnan, J,, required further consideration.

[After dealing with the facts his Lordship proceeded:]

It may be taken as settled law that the omission to examine the accused under S.342, Criminal Procedure Code, generally on the case after the prosecution witnesses have been examined is an illegality and not an irregularity, which vitiates the whole trial. Two questions have to be settled in this case. The first is, when should

(2) [1921] 6 P.L.J. 644—2 P.L.T. 520—22 Cr. L. J. 697—63 I.C. 825

the examination of the accused take place in order to comply with the mandatory provisions of S. 342, and the second, whether the examination prior to the close of prosecution case will fulfil the requirements of S. 342. The first clause of S. 342 consists of two portions. The first is optional with the Court and the second is obligatory on the Court.***

The non-compliance with the first portion does not render a trial illegal or the proceedings irregular; and under the second portion it is the duty of the Court to question the accused, and that after the witnesses for the prosecution have been examined and before he is called on for his defence. Chapter XX of the Criminal Procedure Code relates to the trial of summons cases by Magistrates, Chapter XXI relates to the trial of warrant cases by Magistrates, Chapter XXII relates to summary trials, and Chapter XXIII relates to trials by High Courts and Courts of Session. Under S. 245, the Magistrate may, if he thinks fit, examine the accused, but he is not bound to do so. Under S. 253, the Magistrate may examine the accused if he thinks necessary. S. 342 is in the Chapter containing general provisions as to inquires and trials. Under S. 209, which is in the Chapter relating to inquiry preliminary to commitment, the Magistrate may if he thinks necessary " examine the accused for the purpose of enabling him to explain any circumstances appearing in the evidence against him." S. 342 makes the examination of the accused obligatory only in cases where the accused is called on for his defence. A Magistrate may discharge an accused without framing a charge, in which case his non-examination would not vitiate the proceedings. But where a Magistrate, or Judge in a sessions trial, finds that the prosecution has made out a case which the accused has to meet then it is incumbent upon the Magistrate or Judge to question the accused generally on the case for the purpose of enabling t e accused to explain any circumstances appearing in the evidence against him. It may be taken that the stage at which the examination is to be held is before the accused is called on for his defence. In the chapter relating to the trial of warrant cases, provision is made in S. 254 for the framing of a charge against the accused before the whole of the prosecution evidence is completed, if there is ground for presuming that the accused has committed an offence triable under the Chapter. The difficulty in interpreting S.342 is caused by the amendments to Ss. 254 and 256, which were made in the Criminal Procedure Code of 1898. Under the Code of 1882, under S. 252 the Magistrate was required to "take all such evidence as may be produced in support of the prosecution," and under S. 254, "If when this evidence and examination have been taken and made, the Magistrate is of opinion that there is ground for presuming that the accused has committed an offence triable under this Chapter, he should frame a charge in writing against the accused." Under the Code of 1882 therefore the Magistrate could not frame a charge against the accused till the evidence for the prosecution was completed. Under the Code of 1898 the Magistrate could frame a charge before the prosecution evidence is completed, if he thinks there is ground for presuming the accused has committed an offence. Under S. 256 of the old Code after the charge was framed the accused had the right to cross-examine any of the witnesses for prosecution present in Court or its precincts. But under S. 256 of the Code of 1898 the duty was cast upon the Court to ask the accused whether any of the prosecution witnesses should be recalled for cross-examination. He has, therefore, an undoubted right to have all or any of the prosecution witnesses recalled for cross-examination after the charge is framed and after he exercises such right the evidence of any of the remaining witnesses for prosecution should be taken and after cross-examination and re-examination they should be discharged. So then, if a Magistrate frames a charge against the accused before the examination of all the prosecution witnesses is over, he shall ask the accused whether he wishes to recall any or all the pro-

secution witnesses for cross-examination, and after such cross-examination he shall take the evidence of the remaining prosecution witnesses. It is only after that, that the accused shall be called upon to enter upon his defence and he can be said to enter upon his defence only when he begins to adduce evidence on his behalf. The contention that, if an accused person cross-examines any of the prosecution witnesses under S. 256, the Magistrate is bound once more to examine the accused generally on the case seems untenable. S. 342 says "the Court shall question the accused after the witnesses for the prosecution have been examined and before he is called on for his defence." That can only mean that the examination of the accused should take place after the prosecution has placed its whole case before the Court. If the accused chooses not to cross-examine or reserves his right to cross-examine the prosecution witnesses after a charge is framed, I do not think the Magistrate is bound to question him after cross-examination of the prosecution witnesses is over, provided he questions him after the prosecution has placed its whole case before him. If the Magistrate frames a charge before the whole of the prosecution evidence is placed before him, he should examine the accused under S. 342 after the remaining witnesses for the prosecution have been examined and cross-examined. The accused in a warrant case has three opportunities of cross-examining the prosecution witnesses, once before the charge is framed, secondly under S. 256 and thirdly after he has entered on his defence. He can apply to the Magistrate under S. 257 to issue process for compelling the attendance of one or more of prosecution witnesses for cross-examination It cannot be the intention of the legislature to make it obligatory on the Magistrate to question the accused if he chooses to cross-examine any of the prosecution witnesses after all the defence evidence has been taken. Such cross-examination could only be to help him in his defence, and therefore it must be taken that such cross-examination is part of his defence. The words in S. 342 are, "after the witnesses for the prosecution have been examined," and the expression cannot reasonably be interpreted to mean "after the accused has chosen to exercise his right of cross-examination at the very end of his defence." If the prosecution applies to the Court to allow it to adduce fresh evidence after the charge is framed and if such evidence is adduced, then it is the duty of the Court under S. 342, to question the accused generally, for, it cannot be said that the witnesses for the prosecution have been examined till the whole of the prosecution case is before it. But where the prosecution has let in all the evidence it wishes to rely on, and if the Magistrate questions the accused after taking all such evidence before framing a charge, whether the accused has cross-examined the witnesses or not, I think the mandatory provisions of S. 342 must be held to be substantially complied with. It therefore follows that any examination of the accused, which is made before all the evidence for the prosecution has been let in cannot satisfy the mandatory provisions of S. 342.

I shall briefly deal with the cases quoted in argument before us. The cases quoted fall under three heads :

1. Cases in which the Sessions Judge did not question the accused generally, on the case after the close of the prosecution. In those cases the High Court held that the whole trial was vitiated by the failure to question the accused to explain the circumstances appearing in evidence against him even though his statement before the Magistrate was read as part of the prosecution evidence. They are reported in *Fatu Santal* v. *The King Emperor* (3), *Raghu Bhumij* v. *The King Emperor* (4), *Emperor* v. *Sawalya* (5) *In re Nainamalai Konan* (6) and *Raja Padayachi In re* (2 Weir 405.)

(3) [1921] 2 P.L.T. 288—6 P.L.J. 147—22 Cr.L.J. 417—61 I.C. 705.
(4) [1920] 1 P.L.T. 241—5 P.L.J. 430—21 Cr L.J. 705—58 I.C. 49.
(5) [1907] 9 Bom. L.R. 356—5 Cr.L.J. 332.
(6) [1921] 14 L.W. 418—69 I.C. 377.

2. The following are the cases in which a Magistrate did not question the accused generally, and the High Court held that the trial was vitiated by the omission to comply with the mandatory provisions of S. 342. *Suraj Panday* v. *Emperor* (7) *Gulam Rasul* v. *The King Emperor* (8) *Emperor* v. *Harischandra* (9), *Emperor* v. *Gulabjan* (10), *Emperor* v. *Basapa Ningapa* (11) and *Mahomed Hossain* v. *Emperor* (12).

3. In the following cases the Magistrate examined the accused before framing the charge, but did not question the accused generally on the case under S. 342 ; after cross-examination under S. 256 was over, the High Court held that the trial was vitiated by the omission to comply with the mandatory provisions of S. 342. *Mitarjit Singh* v. *King Emperor* (2). *Tilak Gope* v. *Bhaya Ram* (13) *Ramanath Rai* v. *Emperor* (14), *Emperor* v. *Nga Porza* (15), *Abbas Ali* v. *Emperor* (16) and *Emperor* v. *Fernandez* (17).

In *Raghu Bhumij* v. *King Emperor* (4) Mr. Justice Jwala Prasad of the Patna High Court observed : "The accused adhered to the retraction of their confessions. They were not examined as to the circumstance disclosed in the prosecution evidence which the learned Sessions Judge has used against the accused and this, to my mind, amounts to an omission to examine the accused under S. 342 and to prepare a proper record thereof under S. 364. So much is essential in a sessions trial where an accused is entitled to have his statement considered by assessors and the appellate Court." This omission was held by the learned Judge to vitiate the whole trial. In 62 I. C. 870 Mr. Justice Bucknill held that "this omission to examine the accused after the case for the prosecution has been closed, or rather after all the witnesses for the prosecution have been examined, is a vital defect and cannot be cured by trying to bring into operation the provisions of S. 537 Criminal Procedure Code." In that case, after the accused had been examined by the Magistrate, one witness at any rate for the prosecution was subsequently examined. The learned Judge qualified his first statement, "after the case for the prosecution has been closed" by adding the words, "or rather after all the prosecution witnesses have been examined." S. 342 makes it obligatory on the Magistrate to examine the accused after the witnesses for the prosecution have been examined, and does not require the Magistrate to wait till the accused has exercised his right of cross-examination of the prosecution witnesses after the charge is framed. As I said above, the amendments to Ss. 254 and 256 were made in 1898 without in any way altering the wording of S. 342, and a reasonable construction must be put upon the words without attributing to the legislature the fault of enacting inconsistent provisions. It is a well known canon of construction that where a reasonable construction would reconcile the provisions of an enactment, that construction ought to be adopted.

In 63 I. C. 825 a Bench of the Patna High Court held that "until the witnesses have been cross-examined and re-examined it cannot be said what the exact case that the accused will have to meet is, and if he is forced to disclose his defence before cross-examination it might very well be that the prosecution witnesses would be on their guard and the value of the cross-exami-

(7) [1920] 1 P.L.T. 641—21 Cr.L.J. 793—58 I.C. 521
(8) [1921] 6 P.L.J. 174—2 P.L.T. 390—22 Cr.L.J. 427—61 I.C. 715.
(9) [1907] 10 Bom.L.R 201—7 Cr.L.J. 194.
(10) 1922 Bom. 290—46 Bom. 441—23 Bom. L.R. 1203—23 Cr.L.J 45—64 I.C. 669.
(11) [1915] 17 Bom. L.R. 892—16 Cr. L.J. 765—31 I.C. 365.
(12) [1914] 41 Cal. 743—18 C.W.N. 1247—15 Cr.L.J. 190—22 I.C. 766.
(13) [1921] 22 Cr.L.J. 598—62 I.C. 870.
(14) [1921] 2 P.L.T. 549—22 Cr.L.J. 460—61 I C. 844.
(15) [1917] 3 U B.R. 18—11 Bur. L.T. 134—18 Cr L.J. 944—42 I.C. 176.
(16) [1904] 3 L.B.R. 208—4 Cr.L.J. 471.
(17) [1921] 45 Bom. 672—22 Bom. L.R. 1040—22 Cr.L.J. 17—59 I.C. 129.

nation to a great extent destroyed. Considering both the wording of the section and its intention it appears to me clear that the Court must question the accused generally on the case after the cross-examination and re-examination of the prosecution witnesses." No doubt, this is a direct authority for the contention of the petitioner, but with great respect to the learned Judges it is not easy to conceive how an accused person would be prejudiced by disclosing his defence after the whole of the prosecution evidence has been taken and before he exercises the right to re-cross-examine them. No doubt, if before the whole of the prosecution evidence is taken he is asked to disclose his defence the prosecution witnesses who remain to be examined may change their version in order to meet the defence of the accused. But where the prosecution has definitely put forward the whole of its case the mere fact that the prosecution witnesses are not subjected to a second cross-examination would not in any way prejudice the accused, if he discloses his defence before such cross-examination. It is open to the accused not to make any statement. The law does not cast upon him the duty of making a statement. If he feels that by disclosing his defence before the whole of the cross-examination is over his case will not suffer, he need not answer the Court questions. We are only concerned with the duty of the Court under S. 342, and not with the option of the accused. It may be said that his answers to the questions put to him by the Court even after the whole of the cross-examination is over might prejudice him. But that is left to the discretion of the accused and his legal advisers. The Court is not asked to cross-examine the accused but its duty is only to ask the accused to explain the circumstances appearing in evidence against him. I therefore consider, with all respect, that the reasoning of the learned Judges does not militate against the view that I take that the duty of the Magistrate under S. 342 is discharged if he questions the accused generally after the prosecution has placed its whole case before the Court.

In *Shamlal Kalwar* v. *Emperor* (18), after the examination and cross-examination of the prosecution witnesses a charge was framed against the accused. The accused were asked if they would cross-examine any of the prosecution witnesses, but they declined, and then they were called on to enter upon their defence. On a subsequent date, at the instance of the Public Prosecutor, a charge under S. 325, I. P. C. was added to one of the accused and the charge under S. 147, I. P. C. was verbally altered. The prosecution witnesses were then re-called and cross-examined. It was not disputed that the prosecution evidence was closed when the accused were called on to enter upon their defence. It was contended that after the alteration of the charge under S. 147, I. P. C. and the addition of a charge under S. 325, I. P. C. the accused should have been examined and the omission to do so contravened the mandatory provisions of S. 342. Mr. Justice Jwala Prasad and Mr. Justice Adami held: "The trial does not commence *de novo* so that if the accused had already been called on to enter upon his defence there is no further obligation upon the Magistrate to examine the accused under S. 342 of the Code." They also observe "The authorities of which we are so well cognisant do not at all apply to the present case."

In *In re Maruda Muthu Vannian* (1), the Magistrate in trying a warrant case examined the accused before framing the charge, but did not examine the accused generally on the case after cross-examination. The learned Judges held that the omission of the Magistrate vitiated the whole trial. If the whole of the prosecution case had been before the Magistrate before he framed the charge and if he questioned the accused generally on the case before framing the charge, I

(18) 1922 Pat. 393—1 Pat. 54—3 P. L.T. 91—23 Cr.L.J. 146—65 I.C. 610.

think he satisfies the mandatory provisions of S. 342. It is not necessary that the accused should make a statement by word of mouth. No doubt, S. 364 requires the Magistrate and a Court other than the High Court to record the whole of the examination "including every question put to him (accused) and every answer given by him in the language in which he is examined, or, if that is not practicable, in the language of the Court or in English, and such record shall be shown or read to him, or, if he does not understand the language in which it is written, shall be interpreted to him in a language which he understands, and he shall be at liberty to explain or to add to his answers." S. 256 cl. (2) makes provision for the accused putting a written statement and the Magistrate filing it with the record. When the Magistrate questions the accused if he says, "I will put in a written statement," I think it is the duty of the Magistrate to take the written statement as an answer to his questions. In other words, in such a case accused does not wish to answer by word of mouth questions put to him, but prefers to put in a written answer.

In the present case after the examination of the witnesses for the prosecution, a charge was framed against the accused on 3-9-1921. The accused were examined by the Magistrate on the same date. They cross-examined the prosecution witnesses on 3-10-1921 and 21-10-1921. The examination of the accused by the Magistrate after the prosecution had let in all their evidence, satisfied the provisions of S. 342, and therefore the trial is not vitiated by any omission to examine the accused after the cross-examination of the prosecution witnesses was over. The accused did not answer the questions put by the Magistrate but said they would put in a written statement, and the default, if any, is on their part. The Magistrate did what was required of him under S. 342, and if the accused did not choose to put in any written statement, they could not contend that the proceedings before the Magistrate were vitiated by an illegal omission.

The petition, therefore, ought to be dismissed.

My answer to the question referred to the Full Bench is that a trial is not vitiated by the omission to question the accused generally on the case after re-cross-examination of all the prosecution witnesses is completed, provided the Magistrate examines the accused after the whole of the prosecution case has been placed before him.

Venkatasubba Rao, J.—I regret I am not of the same opinion and as I venture to take a different view I shall very briefly state my grounds.

The Magistrate says in his judgment:—"Accused 1 and 2 who were questioned after the prosecution evidence was heard, preferred to put in a written statement, but no such statement was filed. There were grounds for presuming that the accused had committed an offence under S. 411, I.P.C., a charge was accordingly framed." * * * *.

This happened on 3-9-1921. There was further cross-examination of the prosecution witnesses on 3-10-1921 and 21-10-1921. The accused was not further examined and he commenced to produce evidence in his defence on the latter date.

S. 342 consists of two parts. The first part leaves it to the option of the Magistrate to put such questions to the accused as he considers necessary. The accused may be similarly examined under Ss. 209, 210, 245, 253 and 254. Whereas the latter sections indicate the stage when the examination may, at the discretion of the Magistrate, be made; the first part of S. 342 gives the Magistrate a wider discretion, as it permits him to put questions to the accused at any stage of the enquiry or trial.

Then, we come to the second part of S. 342. The provision here is mandatory. It is agreed on all hands that it is the duty of the Court to make the examination of the accused at some stage of the case. The more difficult question remains:—At what stage is this examination to be made? The point of time is indicated by the

words "after the witnesses for the prosecution have been examined and before he (the accused) is called on for his defence."

Comparing these words with the words used in the last portion of S. 256 which runs thus: "The evidence of any remaining witnesses for the prosecution shall next be taken and after cross-examination and re-examination (if any) they also shall be discharged. The accused shall then be called upon to enter upon his defence and produce his evidence....." the conclusion seems irresistible that the point of time indicated is between the close of the prosecution case and the entering by the accused upon his evidence.

It is said that an examination of the accused immediately upon the taking, under S. 252, of the evidence in support of the prosecution, complies with the mandatory provision contained in S. 342. I am unable to accept this view. In the first place, at that stage it cannot be said that all the witnesses for the prosecution have been examined; because S. 256 contemplates further evidence likely to be forthcoming on behalf of the prosecution. In the second place, the accused is not called upon to enter upon his defence upon the taking of the evidence referred to in S. 252. Far from the accused entering on his defence at that stage, if the Magistrate is of the opinion that there is ground for presuming that the accused has committed an offence, the Magistrate is required to frame a charge against the accused. It cannot be said that the stage preceding the framing of the charge is the point of time conveyed by the words "before the accused is called on for his defence."

The words used in S. 342 are "called on for his defence." I may notice in this connection two other sets of words. S. 255 (1) runs thus:—The charge shall then be read and explained to the accused and asked whether he has "any defence to make." S. 256 contains the following sentence:-- "Accused shall then be called upon to enter upon his defence and produce evidence." In my opinion the words in S. 342 "called on for his defence" are used in the same sense as the words "to enter upon his defence" in S. 256. I must point out that neither side has attempted to argue that the stage when the accused should be examined under S. 342, is after the charge has been framed, read and explained and before the accused is asked under S. 255 whether he has "any defence to make." The rival contentions before us were (1) on behalf of the Crown—the examination indicated in S. 342 should be made after the taking of the evidence in support of the prosecution mentioned in S. 252 and before the framing of the charge-under S. 254; (2) on behalf of the accused—the said examination should be made after the entire evidence for the prosecution mentioned in S. 256 is given and before the accused is called upon to enter upon his defence. I am clearly of the opinion that the right construction is that contended for on behalf of the accused. If the other construction were right, it would follow that the accused would be "called on for his defence" before a charge against him is framed, that is, at a point of time which is anterior to his being asked whether he "has any defence to make" I see no warrant for this position in the section to which I have referred.

I have so far given my reasons for construing the section in the manner I have done. The learned Public Prosecutor has argued that this interpretation should be avoided, as it would lead to consequences inconvenient and unjust. I think, on the contrary, this construction alone carries out the object underlying the enactment of S. 342.

Under S. 342 it is only one examination that is made imperative. The other view will lead, in certain events, to the result that the Court will be bound to have a double examination of the accused; once when the evidence referred to in S. 252 has been taken and again when further witnesses for the Crown, if any, have been examined under S 256. Moreover, the object of S. 342 can be most effectually carried out, only if the accused is examined at the very close of the case for the Crown and previous to his entering

upon his defence. Not only may very materail evidence be given in examination-in-chief of any further witnesses examined under S. 256 but matters unfavourable to the accused may be elicited in the cross-examination and re-examination of the witnesses already examined under S. 252.

It is intended that the accused should have an opportunity, in answer to a general-question "What have you to say" to explain any circumstances appearing in the evidence against him.

This seems to me a very useful provision.

It must also be noted that the accused cannot give evidence on oath. Whether this is a privilege which he enjoys or a disability under which he labours, the statement, if any, that the accused makes under this section corresponds, as nearly as possible, to his evidence on oath and it is distinctly provided by cl. 3 of S. 342 that the arswers given by the accused may be taken into consideration by the Court. A mere statement of the accused at this stage may conceivably lead to his acquittal without any production of evidence on his behalf.

It seems to me that this view alone makes S. 342 consistent with S. 253. Otherwise the words in the latter section vesting a discretion in the Magistrate "Of making such examination (if any) of the accused as the Magistrate, thinks necessary" will be not only redundant but positively misleading because, at that point, the Magistrate, according to the other view, is under an obligation to examine the accused.

It has been said on behalf of the Crown that S. 257 lends some support to the view contrary to what I have taken. I am unable to agree. It is no doubt true that S. 257 gives a further opportunity to the accused to cross-examine any prosecution witnesses even after he has entered upon his defence. But this circumstance can have no bearing upon the right interpretation of the terms of S. 342. The latter section fixes a point of time not only with reference to the examination of the witnesses for the prosecution but also with reference to the accused being "called on for his defence." The mere fact that some prosecution witnesses may be cross-examined at the instance of the accused even after he has entered upon his defence cannot alter the interpretation which the plain words in S. 342 should receive

Then turning to S. 537, I am of the opinion that the infringement of the rule enacted in S. 342 is not a mere error, omission or irregularity. Assuming for a moment that the disregard of the rule amounts only to an error, omission or irregularity, how can it ever be ascertained that such an error, &c, has in fact or has not occasioned a failure of justice? We shall be left to speculate what the statement of the accused would have been or in what manner it would have influenced the mind of the trying Judge. I would for that reason assume in every instance that the non-observance has in fact occasioned a failure of justice.

The result is that in my view the decision in *In re Maruda Muthu Vanninan* (1) on both the questions is correct. I would therefore set aside the conviction of the accused and order a re-trial.

Conviction set aside.

✱ 1923 MADRAS 618

SPENCER, J.

Ramaswami Thevan and another — Appellants.

v.

The Crown—Respondent.

Criminal A. No. 1600 of 1922, D/- 25th Jan 1923, against the order of the Court of Sessions of the Tinevelly Division in Case No. 51 of 1922.

Criminal P. C., S. 106–Offence involving breach of peace.— Finding as to breach.

The expression "Other offences involving a breach of the peace" would embrace offences *ejusdem generis* with the offences of assault and rioting which are specified in the section. It is not necessary that the lower Court should record a finding that a breach of the peace was involved in order to invest itself with power to make an order under S. 106 (1). Where the Judge has recorded his opinion that it is necessary in a case to require the convited persons to execute a bond for keeping the peace that is all that the section in terms demands. [P. 619 C. 1,2]

F. S. Vaz — for the Petitioner.

Public Prosecutor—For the Crown.

Judgment.—The only question argued at the hearing of this appeal is whether the order under S. 106, Criminal Procedure Code, requiring the accused to give security to keep the peace is a legal order. It is argued (1) that the offence of voluntarily causing hurt (S. 323 I. P. C.) is not one of those specified in S. 106. Criminal Procedure Code and does not of itself necessarily involve a breach of the peace and (2) that there ought to be a finding by the Session Judge that a breach of the peace was actually caused before the Court made the order under this section.

On the first point I find that the accused's act included an assault on prosecution 9th witness in a public place, and assault is one of the offences specified in S. 106. The expression "Other offences involving a breach of the peace" would embrace offences *ejusdem generis* with the offences of assault and rioting which are specified in the section. It is only because the accused's act was more serious than one of petty assault that they were not convicted of that minor offence.

But the circumstances spoken to by the witnesses as those in which hurt was caused to prosecution 9th witness were such that there can be no doubt that there was a breach of the peace on that occasion.

On the second point I do not think it is necessary that the lower Court should record a finding that a breach of the peace was involved in order to invest itself with power to make an order under S. 106 (1) Criminal Procedure Code.

If the offence of which the accussed were convicted was one which did not of itself necessarily involve a breach of the peace such as criminal trespass, mischief, or unlawful assembly, it would be proper that the Magistrate or Judge should in his order make it clear that a breach of the peace was committed.

But the section does not require such a finding to be recorded, and when the offence of which the accused is convicted is one which implies the use of violence it would be superfluous to say more. The Judge has recorded his opinion that it is necessary in this case to require the convicted persons to execute a bond for keeping the peace, and that is all that the section in terms demands.

The order will therefore stand. The appeal is dismissed.

Appeal dismissed.

✱ 1923 MADRAS 619

OLDFIELD AND VENKATASUBBA RAO, JJ.

Ramanathan Chettiar and others—Appellants.

v

Venkatachelam and others—Respondents.

Appeal against Order No. 59 of 1920, D/-24th January 1923, passed by the Sub. J., Ramnad at Madura in E. P. No. 142 of 1919. D/- the 21st Jan. 1920.

Civil P. C., O. 21 R. 2—Agreement after decree of the first Court but before the decree of the Appellate Court—Evidence of certification.

O. 21 R. 2 relates to adjustment subsequent to the decree and not to adjustment made or agreement entered into before the decree to be executed was passed in appeal, as such an agreement is superseded by the decree of the appellate Court made after it. The mere fact that payments are mentioned in the execution application as having been made consistently with the adjustment is certainly not a certification. [P 620 C 2]

S. Subramania Iyer and T. G. Ramaswami Iyer—for Appellants.

T. M. Krishnaswami Iyer, M. Subbaraya Iyer and M. S. Vaidyanada Iyer—for Respondents.

Judgment.—In this case the 1st defendant appeals against the order of the lower Court sanctioning the proclamation of sale, fixing the upset price and the date of sale. The appeal is on the ground that under an agreement dated 20th July, 1918, the decree cannot be executed against the 1st defendant. The lower Court's reasons for rejecting this contention are not clear, but it appears to have rejected it with reference to O. 21, R. 2 of the Code of Civil Procedure. In

fact the agreement was made after the date of the decree of the Court of first instance, but before the date of the appellate decree of this Court, that appellate decree being one dismissing the appeal as the matter had been settled out of Court.

It is urged with reference to *Chidambaram Chettiar* v. *Krishna Vathiyar* (1) that the 1st defendant should have been allowed to prove the agreement. The terms of the agreement are that of the decree amount of Rs. 36,000 only Rs. 33,750 shall be recovered, the recovery to be made as regards half of that sum from the second defendant and half from the 3rd defendant within specified periods. In case of default at the end of those periods the decree is to be executable, against at least those two defendants, for it is said (though this is disputed) that it is by another term of the agreement that there is to be no recovery from the 1st and 4th defendants. It is not necessary to settle that dispute because the question is whether that agreement can be proved at all. We think that it resembles the agreement dealt with in *Arumugam Pillai* v. *Krishnasami Naidu* (2) and not that dealt with in *Chidambaran Chettiar* v. *Krishna Vathiyar* (1). It no doubt contains provision for postponing the liability and it also contains a provision, this is its main provision, for the relinquishment of the right to recover Rs 2,250 odd out of the decree amount. It had been suggested that *Arumugam Pillai* v. *Krishnasami Naidu* (2) was wrongly decided and that we should refer the case before us to a Full Bench with reference to an alleged conflict between those decisions. We do not think that there is any sufficient reason for distinguishing the present case from *Arumugam Pillai* v. *Krishnasami Naidu* (2) or doubting the correctness of that decision. In fact, if necessary, we should have been prepared to consider the propriety of making a reference in respect of *Chidambaram Chettiar* v. *Krishna Vathiyar* (1). We may, before parting with this portion of the case, observe that there is no question of the application of O. 21, R. 2 as the lower Court appears to have supposed, because that rule relates to adjustment subsequent to the decree and Ex A was before the decree to be executed was passed in appeal, and the ground on which the agreement is useless to the 1st defendant in these proceedings is that it was superseded by the decree of the appellate Court made after it.

Taking this view, we turn to the other contentions which have been relied on, that the agreement can be regarded by an effect of construction as in fact an agreement made subsequently to the decree since it had in fact been certified to the executing Court under O. 2 R. 2. We are unable to understand how an agreement made on one date can be regarded as having been made on another date or how there has been any certification, such as would be necessary to support the argument. Reliance has been placed on *Baroo Gorain* v. *Mustt. Jimurat Koer* (3). But we are unable to follow the course of that decision and can only suppose that it was justified by the apparently exceptional circumstances of the case dealt with in it. We further cannot understand how even if this agreement could be treated as made after the decree, there has been anything resembling a certification of it. The mere fact that payments are mentioned in the execution application as having been made consistently with it is certainly not a certification.

The appeal failing on this ground also, there remains only an obj ction to the figure, which the lower Court fixed as the upset price at which the sale was to be held. *Sivagami Achi* v. *Subrahmania Iyyer* (4) and *Ramanathan Chetty* v. *Somasundara Chettiar* (5) negative the right of a party to

(1) [1917] 40 Mad. 233—21 M. L. T. 24—5 L. W. 132—(1917) M. W. N. 44—32 M. L. J. 13— 37I. C. 836 (**F. B.**)

(2) [1920] 43 Mad. 725—39 M. L. J. 222—12 L. W. 41—56 I. C. 976.

(3) [1912] 16 C. W. N. 923—16 C. L. J. 174—13 I. C. 65.

(4) [1904] 27 Mad. 259—14 M. L. J. 57 (**F. B.**)

(5) [1917] M. W. N. 141—37 I. C. 897.

execution proceedings to raise any such question by appeal at this stage.

The result is that the appeal against the order fails and is dismissed with costs of the legal representatives of 1st plaintiffs.

The memorandum of objections are not pressed and are dismissed. There will be no order as to costs in them.

Appeal dismissed.

1923 MADRAS 621

COUTTS TROTTER AND RAMESAM, JJ.

Ranganayaki Ammal—Defendant — Appellant.

v.

Virupakshee Rao Naidu—Plaintiff—Respondent.

O. S. No. 107 of 1920, and C. M. P. No. 659 of 1922, D/- 11th January 1923, from the Judgment of Phillips, J. in C. S. No. 431 of 1919 D/- 8th October 1920.

Registration Act, S. 17—Mere statement of facts—'Declare', meaning.

A document purported to be a deed of compromise dated the 28th December 1918. In that document there was a statement that house No. 27 belonging to the appellant and one other house which were in possession and enjoyment of the appellant from the date of purchase, shall be enjoyed by her with power to make gift and sell away. *Held* the word 'declare in S. 17 implies a declaration of will and not a mere statement of fact and therefore this document being a mere statement of fact is admissible in evidence either as a contract to acknowledge an existing title or perhaps as evidence in the nature of an admission. [P. 622 C. 1,2]

A Krishnaswami Iyer and *K. Venkatavaradachariar*—for Appellant.

V. Radhakrishnayya—for Respondent.

Judgment.—The learned trial Judge in this case, which is a claim by a grandson against his grandmother, was asked to take into consideration a document which purports to be a deed of compromise dated the 28th December, 1918. In that document there is a statement that house No. 27 in Tatha Muthiyappan Street belonging to the said Ranganayakamma, that is the grandmother, and another house, with which nobody in this case is concerned, which are in possession and enjoyment of said Ranganayakamma from the date of purchase, shall be enjoyed by the said Ranganayakamma with power to make gift and sell away. The learned vakils have argued this case with great preciseness and Mr. Krishnaswami Aiyar for the appellant does not ask us to say that there is any magic about this document because it is in the nature of a nominal settlement which would excuse it from registration. It has been held by the learned trial Judge on the argument of the respondent that it does require registration and to test that, I must look at the section of the Registration Act which is material, and that is S. 17. By S. 17 (1) (b), among documents which require registration, are non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future any right, title or interest, whether vested or contingent, of the value of Rs. 100 and upwards, to or in immoveable property. Now it is said that this part of this document is a declaration of a right in immoveable property and that therefore by virtue of S. 49, the document would create no rights in the property in question It is said on the other side that this is not a document which purports to create or modify in any way anybody's title to immoveable property. It is simply a statement of fact, as I said in the course of the argument, that Johnson's house is Johnson's house. To my mind this matter cannot be put better than in the words of West, J., in the case of *Sakharam Krishnaji* v. *Madan Krishnaji* (1), where the learned Judge says thus:

"Here, however, the document is not itself one which declares a right in immoveable property, in the sense probably intended by S. 17. There 'declare' is placed along with 'create' 'assign' 'limit' or 'extinguish a right, title or interest' and these words imply a definite change of legal relation to the property by an expression of will embodied in the document referred to. I think this is equally the case with the word

(1) [1880-81] 5 Bom. 232.

'declared'. It implies a declaration of will not a mere statement of fact, and thus a deed of partition, which causes a change of legal relation to the property divided amongst all the parties to it, is a declaration in the intended sense; but a letter containing an admission, direct or inferential, that a partition once took place, does not 'declare' a right within the meaning of the section. It does in one sense 'declare' a right: that is, the existence of the right is directly or indirectly stated by the writing, but it is not the expression or declaration of will by which the right is constituted."

I wish to associate myself with all that the learned Judge says on the point. It does not appear to me that any of the later decisions, whether of the Privy Council or of the other High Courts in India, have in any way modified it, and indeed in one case, in which in its initial stage I was concerned, the case of *Varada Pillai* v *Jeeva athnammal* (2) it appears to me that the judgment of the Board entirely recognises and proceeds on the principle laid down in the Bombay case by West, J. Now it is said by Mr. Krishnaswami Aiyar that the document is conclusive of the rights of the parties, if not as to moveable property, certainly as to immoveable property, and he relies mainly on the decision in *Khunni Lal* v. *Gobind Krishna Narain* (3) a Privy Council case. The passage he relies on is a sentence which runs as follows:

"In the present case, Khairati Lal acquired no right from the daughters of Daulat, for 'the compromise' to use their Lordships' language in *Rani Mewa Kuwar* v. *Rani Hulas Kuwar* (4) is based on the assumption that there was an antecedent title of some kind in the parties and the agreement acknowledges and defines what that title is".

Turning to *Rani Mewa Kuar* v. *Rani Hulas Kuwar* (4) I find their Lordships say at page 166 after the sentence quoted in *Khunni Lal* v. *Gobind Krishna* (3):

"the claim does not rest on contract only, but upon a title to the land acknowledged and defined by the contract, which is part only of the evidence of the appellant to prove her title and not all her case."

That seems to me to allow that the document is admissible in evidence either as a contract to acknowledge an existing title or perhaps as evidence in the nature of an admission. At any rate, in my opinion, it is only part of the case of the appellant and is not a conclusive document on which we can declare rights with regard to immoveable property.

With regard to moveable property in the suit, no doubt the registration objection would not apply, but I gather from the learned Judge's judgment that, besides the plea of want of registration, it was alleged that the document was executed by the next friend in consequence of a misrepresentation made to her and of her negligence. That being so I think we must send the case back for rehearing, although the learned Judge has dealt with most of the other evidence. We think that for this Court satisfactorily to deal with the matter, we ought to have the opinion of the learned Judge on the force of the evidence as a whole, and it may be that, considered in the light of the document which we have now held admissible, his former opinion as to the rest of the evidence would perhaps require modification and we think that this is a process which ought to be gone through by the Court of First Instance.

We therefore remand the case for re-hearing. The appellant will have his costs of this appeal and the costs incurred in the Court below will be in the discretion of the trial Judge.

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(2) [1920] 43 Mad. 244—46 I.A. 285—38 M.L.J. 313—10 L.W. 679—27 M.L.T. 6—22 Bom.L.R. 144—18 A.L.J. 274—24 C.W.N. 346—(1919) M.W.N. 724—53 I.C. 901 (P.C.)

(3) [1911] 33 All. 356—38 I.A. 87—15 C.W.N. 545—8 A.L.J. 552—13 C.L.J. 575—13 Bom L.R. 427—10 M.L.T. 25—(1911) 1 M W.N. 432—21 M L.J. 645—10 I.C. 477 (P.C.)

(4) [1874] 1 I.A. 157—13 B.L.R. 312—3 Sar. 314 (P.C.)

Judgment.—The re-hearing will be confined to items 3, 5, and 6 of Schedules I and II. As regards the other items in the plaint schedule the decree of the Original Side will be confirmed.

The parties will pay and receive proportionate costs.

Case remanded.

1923 MADRAS 623

SPENCER AND VENKATASUBBA RAO, JJ.

Javvadi Soorayya and others — Defendants—Petitioners.

v.

Tavvala Suryarao Naidu and others—Plaintiffs—Respondents.

Civil Rev. Pet. Nos. 657 to 673 of 1920, D/- 13th December, 1922, revising the orders of Sub. J. of Kistna at Ellore in Mis. A. Nos. 46, 47, 50, 51, 52, 54, 55, 58, 59, 60, 62 to 66, 68 and 70 of 1918.

Madras Estates Land Act (1908), S. 189—Grant—Construction—Grant of whole village—Presumption as to grant of melwaram only.

The grant of a whole village will not be presumed to be the grant only of melvaram interest unless it is shown that the kudivaram interest was already in the hands of some one else than the donee. The division of produce between the Agraharamdars and the cultivators, throws light on the system then prevalent of paying cist to the land owner, but it is no indication whether the tenant had or had not occupancy rights. The word 'mouza' does not necessarily import the meaning that there were occupancy ryots on the land. The word 'Kadim' does not convey anything as to the existence of occupancy rights.

[P. 623 C. 2 ; & P. 624 C. 1, 2]

A. Krishnaswami Iyer—for Petitioners.

P. Narayanamurthi and *N. Rama Rao*—for Respondents.

Order.—The order sought to be revised is an order of the Subordinate Judge of Ellore remanding certain suits for disposal by the District Munsif. The question whether the Civil Court had jurisdiction to try these suits, which were for rent and ejectment of tenants depends on the question whether the Agraharam of Pentapad in the Zamindari of Nuzvid was an estate within the meaning of the Madras Estates Land Act. The Subordinate Judge has found that the grant in question was a grant of both melwaram and kudivaram. In this case the original grant is before us and is marked as Ex. D. It purports to be a grant by Apparayanimgaru, Zamindar of Nuzvid, in the year 1744 of the Menza village of Patta Pentapad to a Brahmin named Tirumalasingarcharyulu Ayyavarlamgaru.

Reliance is placed for the appellants on the fact that this is a grant to a Brahmin and that it is described as a mauza village also on the fact that in Ex. IX, an abstract of Revenue collections in the years 1777 to 1781 the existence of 300 inhabitants is mentioned, also that there was a division of produce between the Brahmin Agraharamdars, and the cultivators, also that in Ex. O, which is a statement made by Agraharamdars before the Inam Commissioner, the Agraharamdars declined any interest in the communal lands of the village, and lastly on the mention in Ex. XV (j) of 23 Kadims among the population of the village.

As regards the existence of 300 inhabitants 33 years after the grant, the words of the Privy Council in *Suryanarayana* v. *Patanna* (1) are most apposite. They are these :

"It is not proved, nor is there any evidence to suggest, that at the date of the grant there were any tenants in the village holding lands with any rights of occupancy by custom or otherwise."

In other words, the grant of a whole village will not be presumed to be the grant only of melwaram interest unless it is shown that the kudivaram interest was already in the hands of some one else than the donee. The division of produce between the Agraharamdars and the cultivators, throws light on the system then prevalent of

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(1) [1918] 41 Mad. 1012—45 I.A. 209—25 M.L.T. 30—(1918) M.W.N. 859—23 C.W.N. 273—9 L.W. 126—29 C.L.J. 153—36 M.L.J. 585—21 Bom. L.R. 547—(1919) M.W.N. 463—48 I.C. 689 (P.C.)

paying cist to the land owner, but is no indication whether the tenant had or had not occupancy rights. Mr. Wilson's definition in his glossary of the word 'Mouza' has been referred to in several decisions. It is "a village, understanding by that term one or more clusters of inhabitations, and all the lands belonging to their propriety inhabitants". It is not clear whether the word "propriety" is intended to refer to the habitations or to the lands.

In *Venkata Sastrulu* v. *Sitaramudu* (2) Sadasiva Aiyar, J., interpreted Monje village as meaning a village in which there were peasant proprietors owning cultivable lands. The value to be attached to the learned Judge's definition has been considerably diminished by the remarks of the Judicial Committee in the appeal in *Venkata Sastrulu* v. *Seetharamudu* (3), when Sadasiva Aiyar, J's. decision was reversed. That case was one of a grant of an inam called Billapadu Agraharam in 1748 by the same Zamindar of Nuzvid who was the donor in the present case. The latest pronouncement regarding the meaning of the expression 'Mouza' is that of the learned Chief Justice in *Subramanya Somayajulu* v. *Seethayya* (4). He observed that on the material before him it was not possible to say that this word necessarily imported the meaning that there were occupancy ryots on the land. With this observation I respectfully agree, and I apply it to the same expression occurring in the present case.

The word 'Kadim' is defined by Mr. Wilson as "an old inhabitant of a village, one holding by hereditary descent." In the Glossary to the 5th report, "Kadim" is defined as a headman. The word is uncommon so far as my experience goes. But it does not seem to convey anything as to the existence of occupancy rights. On the other hand a large number of muchilikas (Exs. E,F,J, S,K, W series) have been filed in these suits in which the tenants agree to vacate their holdings on the expiry of the terms of their tenancy. There is no express admission that the tenants have no jiroyiti rights as there was in the muchilikas in *Suryanarayana* v. *Patanna* (1). But their undertaking to quit the lands at the end of their terms implies absence of occupancy rights. There is also the further fact referred to by the Subordinate Judge that in some cases where lands have been acquired by the Government compensation has been paid to the Agraharamdars as shown in Ex. Q series, without any claim being made by the tenants to share in such compensation. For these reasons, I consider that the lower Court was right in deciding that the jurisdiction of the Civil Courts had not been ousted by Section 189 of the Madras Estates Land Act.

The Civil Revision Petitions are therefore dismissed with costs.

Venkatasubba Rao, J.—I agree.

Petition dismissed.

(2) [1915] 38 Mad. 891—26 M.L.J. 585—24 I.C. 224.

(3) [1920] 43 Mad. 166—46 I.A. 123—17 A.L.J. 725—37 M.L.J. 42—21 Bom. L.R. 925—26 M.L.T. 175—30 C.L.J. 441—10 L.W. 633—24 C.W.N. 129—51 I.C. 304 (P.C.)

(4) 1923 Mad. 1—46 Mad. 92—16 M.L.W. 462—31 M.L.T. 347—70 I.C. 729 (F.B.)

1923 MADRAS 624

OLDFIELD AND RAMESAM, JJ.

Ussam Kasim Sait—Plaintiff—Appellant.

v.

Secretary of State for India — Defendant—Respondent.

S. A. No. 2129 of 1920, D/- 8th February, 1923, against the decree of the District Judge of South Malabar in A. S. No. 901 of 1919.

Adverse possession—Use of land by public—Whether owner's title affected.

Plaintiff sued for a declaration of his right to the property outside his boundary wall. The Government had registered the land as pramboke at the recent survey, and he claimed it as his jenmam property. The land had been used as a cart stand by the public freely and the plaintiff used to go over it from road to gateway.

Held that there can be no adverse possession by public and the use of land by them cannot affect plaintiff's title or possession. No rule can be laid down that acquisition of a right by the public will be equivalent to its acquisition by the Secretary of State, as the public or a portion of it sometimes prescribes or attempts to prescribe against Government.

[P. 626 C. 1]

C. V. Ananthakrishna Iyer—for Appellant.

The Government Pleader (*C. Madhavan Nair*)—for Respondent.

Judgment.—The property in dispute in this case is a small piece of vacant ground outside the boundary wall of the plaintiff's premises, those premises having access to it and the adjoining road by a gate.

The suit by plaintiff is for a declaration of his right to the property outside his boundary wall. The Government registered the land as poramboke at the recent survey, and he claims it as his jenmam property. Issues were framed as to the sustainability of the suit for mere declaration, the defendant, the Secretary of State, denying the plaintiff's possession, as to the ownership of the property, and as to the title set up by Government by adverse possession

The first objection to the lower appellate Court's judgment is that it contains no distinct finding as to the title, its discussion of the evidence being confined to a conclusion, that the measurements in the plaintiff's documents could not be accurate, although the question whether they could be trusted as to any part of the disputed land was left open. If the measurements could not be trusted, the lower appellate Court should have considered whether it could not act on the principle that title goes with possession and it should have decided whether the plaintiff had discharged the burden of proof, which in view of his failure to establish his alleged right in connection with the survey was, it is not disputed, on him That, however, matters comparatively little, for the lower appellate Court has in fact found in favour of the defendant's possession and against that of the plaintiff in connection with the plea of prescription; and it would presumably have, if it had looked at the case in the manner suggested, applied that finding to support a conclusion in favour of the defendant's title and also against the plaintiff's right to sue only for a declaration.

Its decision on prescription is based on findings that first the public has prescribed, and second, the defendant, Secretary of State represents the public and can have the benefit of its prescription.

As regards the first of these points, the lower appellate Court's treatment of the evidence is summary. It mentions only that the land has been used as a cart stand and that the public has occupied it freely, the plaintiff's user by taking goods to his gate-way being no more than any member of the public might have done. The case may really be stronger than appears from the judgment. In fact we have been shown evidence that there was once a pond on the site. But the stronger objections to the lower appellate Court's findings are that, if the public can prescribe at all, a point which we turn to, the lower appellate Court has not referred to any evidence, that, those who used the land did so on behalf of the public and not in their individual capacity or to any exclusion of the plaintiff or anything inconsistent with the continuance of his ownership, subject to a right against him of the description referred to in Sect. 2 (b) of the Easements Act V of 1882. And a right of that description is not what defendant claimed, and, it it were claimed, it could be no defence to the suit. These distinctions are exemplified by *Lutchmeeput Singh* v. *Sadaulla Nushyo* (1) where however the form of the plaint prayer admitted of enquiry into the existence of such a right as a defence.

In fact however the lower appellante Court and the parties were wrong in considering the possibility of prescription by the public at all, for the public cannot prescribe. No doubt no authority as regards prescription by it for ownership has been produced. But the principle applicable to such prescription will be the same as that recognised in connection with prescription for easements or profits *a prendre*. As regards prescription of the latter kind authority is clear: *Smith* v. *Andrew* (2) and *Attorney-General* v. *Esher Linoleum* &

(1) [1883] 9 Cal. 698—12 C.L.R. 382.
(2) [1891] 2 Ch. D. 678—65 L.T. 175.

Co. Limited (3) and this position is assumed in the Indian case last mentioned. As was said in the second English case "it is necessary to remember that the thing to be established is dedication, not user." What can be proved is that the public has acquired an easement or a profit a *prendre* by a grant or dedication, actual, if direct evidence of one is available, or to be prisumed in case such evidence is not, and in the latter alternative evidence of enjoyment will be relevant and may go far towards supporting the inference that a grant or a dedication which is lost at some time was made. The lower appellate Court must at the rehearing which we are about to direct, bear this in mind. It will also bear in mind the necessity for proof that the dedication, if any, was to the public at large and not to any section of it, *Roole* v. *Huskinson* (4) and *Muhammad Rustan Ali Khan* v. *Mushtaq Husain* (5).

There will still however be one more question for the lower appellatte Court to consider. In its judgment it has assumed that acquisition of a right by the public will be equivalent to its acquisition by the Secretary of State. That case was not put forward in the written statement, and its sustainability is not obvious for we know that the public or a portion of it sometimes prescribes or attempts to prescribe against Government. The lower appellate Court has given no particular reasons for this part of its decision and at the rehearing we must ask it to consider the matter more fully, if its other findings at the rehearing render it necessary.

The lower appellate Court has misconceived the law at every point. We set aside its decision and remand the appeal for readmission and rehearing in the light of the foregoing. Costs to date here and in the lower appellate Court will be costs in the cause and will be provided for in its decree.

Stamp value on the appeal memorandum in this Court will be refunded on application.

Appeal allowed : Case remanded.

(3) [1901] 2Ch. 647—70 L.J.,Ch. 808—85 L.T. 414—50 W.R. 22—66 J. P. 71.

(4) 11 M and W. 827.

(5) [1920] 42 All. 609—47 I.A. 224—32 C.L.J. 471—1 P.W.R. 1921—18 A.L.J. 1089—39 M.L.J. 263—(1920) M.W.N 565—12 L.W. 539—28 M.L.T. 220—57 I C. 329 (P. C.).

1923 MADRAS 626

PHILLIPS AND DEVADOSS, JJ.

Janu Sait—Plaintiff—Appellant.

v.

Ramaswami Naidu — Defendant—Respondent.

Appeal No. 56 of 1921, D/-2nd February, 1923, against the decree of the Addl. Sub. J., Tanjore in Original Suit No. 75 of 1919.

Contract Act, Ss. 19, & 23—Licensed vendor of rice—Contract against the terms of licence.

The defendant, under the terms of his licence, was forbidden to sell his rice to other wholesale merchants in the port on entry than those who were approved by the Collector of the District. The plaintiff who was not one of those approved dealers and was a wholesale merchant, contracted to purchase rice from defendant and paid the price. The contract was "I have settled price with you at the controllers rate for the rice coming for me by the Viravu Steamers and marked "N.R.". If perhaps the Madras Director of Supplies should ask the said bags from me and if I should have to give the bags to him, I shall return to you the money you have given with one per cent interest." The rates agreed upon were much higher than the controlled rates.

Held, Plaintiff being a big merchant in the place must have known that he could not purchase rice except by permission from Government and, therefore, he was probably very willing to pay defendant these higher rates in order to secure the rice. When there was control of rice imports and rice sales set up in Negapatam as in other places, it is impossible to believe that the plaintiff, who was himself a big rice merchant did not know of these facts. The mention in the contract of the probability of the rice being taken by the Director of Civil Supplies is quite suffieient to put him upon notice of the control and of the various regulations which had been prescribed with reference to the sale of rice. And therefore unde sections 23 and 24 of the Contract Act, the contract is void and the plaintiff can base no claim upon it. [P. 628 C. 1,2]

T Narasimha Iyengar and *N. Srinivasachari*—for the Appellant.

C. Varada Chari—for Respondent.

Phillips, J.—The plaintiff and the defendant are both merchants of Negapatam and the plaintiff entered into a contract for the purchase of rice from the defendant on the terms of Exhibits A and A 1. At the time when the contract was entered into, namely, July 1912, the import of rice was controlled by Government and rules were framed in accordance with which alone import and transport of rice was permitted. The defendant obtained a licence from Government to import certain rice from Burma and it was this rice which he agreed to sell to the plaintiff. The rice was delivered to plaintiff's but shortly afterwards 2123 bags were commandeered by Government and the plaintiff received only the actual controlled price, whereas he had paid to defendant a considerable larger sum. The balance of 1320 bags had already been re-sold by the plaintiff and Government took no action in regard to them. The plaintiff now claims damages that he has sustained by this action on the part of Government and alleges that he sustained this loss owing to the fraudulent representations of the defendant.

A question has now been raised in appeal as to whether the plaint contract was not one that was void as being (1) opposed to public policy and (2) illegal. The question was not raised in the pleadings in the lower Court, it is evident from the Subordinate Judge's judgment that it was, at any rate, raised at the time of arguments, and when a question of this sort is raised, I think that a Court should take notice of it, even though it does not appear in the pleadings [Vide *Scott* v. *Brown* (1)] and this case can, I think, be disposed of upon this ground. When the contract was entered into, the defendant, under the terms of his licence, Exhibit III, was forbidden to sell this rice to other wholesale merchants in the port on entry who were approved by the Collector of the district. Admittedly the plaintiff was not one of those approved dealers and he was a wholesale merchant. Thus, these restrictions have been contravened by the sale to the plaintiff. It is contended for the plaintiff that he was not aware of these restrictions, and the lower Court has found in somewhat peculiar language that "there is no doubt that defendant was a party in *pari delicto* so far as his obligations were concerned to the Director of Civil Supplies. But there are no convincing circumstances to show that plaintiff was aware, on the date of the suit contract, that defendant was committing a breach of a legal duty by entering into the suit transaction * * * and I am not prepared to hold that both parties are in *pari delicto* though one of them is and that is the defendant." It is unnecessary to discuss here whether a contract would only be void if the plaintiff entered into it, knowing that it was in breach of a public policy, or illegal for I think that, on the evidence on record, there is sufficient to establish plaintiff's knowledge.

The contract. Exhibit A, reads as follows:—"I have settled price with you at the controller's rate for the rice coming for me by the Viravu Steamer and marked 'N. R'. If perhaps the Madras Director of Supplies should ask the said bags from me and if I should have to give the bags to him, I shall return to you the money you have given with one per cent interest. Similar conditions appear in the counterpart executed by the plaintiff to the defendant, Exhibit A 1. The rates are not specified in these two documents, but a separate document bearing the same date was written by the defendant to the plaintiff in which the rates of the various kinds of rice are set forth. It is plaintiff's case that these were the agreed rates, he being informed by the defendant that they were the Controller's rates; but the defendant states that these rates were only given by him approximately as he did not know the exact rates fixed by the Controller until the 15th of July. On this point I think it is clear that the plaintiff's case is correct and that the rates were agreed

(1) [1892] 2 Q.B. 724—61 L. J., Q. B. 738—4 R. 42—67 L. T. 782—41 W. R. 116—57 J. P. 213.

upon as per Exhibit B. The defendant knew that he was not allowed to sell to the plaintiff and naturally would want some higher profit than the four annas a bag allowed to him by Government and, if he entered into such a contract he would naturally fix the prices at something higher than the controlled rates. Plaintiff being a big merchant in the place must have known that he could not purchase rice except by permission from Government and, therefore, he was probably very willing to pay defendant these higher rates in order to secure the rice. When there was control of rice imports and rice sales set up in Negapatam as in other places, it is impossible to believe that the plaintiff, who was himself a big rice merchant did not know of these facts. The mention in the contract of the possibility of the rice being taken by the Director of Civil Supplies is quite sufficient to put him upon notice of the control and of the various regulations which had been prescribed with reference to the sale of rice. The plaintiff's contention that he did not know that the rates in Exhibit B. were not the controlled rates is somewhat futile for no man of reasonable prudence would have entered into such a large contract without taking some steps to ascertain what were the proper rates and it is unlikely that he would have been content with this simple document Exhibit B. If the plaintiff was aware of the conditions governing the sale of rice, conditions which had been enacted by Government for the good of the country generally, it is obvious that, in entering into this contract in contravention of those conditions, the plaintiff knew that he was inducing the defendant to sell the rice to him, and that such sale was undoubtedly opposed to public policy, if not actually illegal. No evidence has been let in to show hat were the actual notifications of Government at the time, or whether the licence, Exhibit IV, was based upon those notifications, and, therefore, it is perhaps doubtful whether the contract was actually opposed to law, but, when it was in contravention of regulations imposed for the good of the country and the general public, it is clear that the contract was opposed to public policy. Under sections 23 and 24 of the Contract Act, the contract is therefore, void and the plaintiff can base no claim upon it.

It is, however, contended that his action is not based upon the contract but upon this fraud of the defendant; but even if such fraud had been established-and I have held above that I do not think it has been—the plaintiff must have been aware of the conditions governing the sale of rice when he entered into the contract and this plea would still not be good; for, even if the claim is based upon fraud there can be no claim apart from the contract. When both parties are in *pari delicto* the maxim in *pari delicto potior est condita possidentis* applies and, the Courts will not assist the plaintiff to recover in such a case.

If it were necessary to do so, I would hold that the payment by the plaintiff of the sum of Rs. 3,000 on the 21st of July to the defendant is proved. The lower Court has, no doubt, found that it is not proved but unfortunately only one of the plaintiff's accounts was translated in that Court and, although P. W. 3. in the witness-box produced the accounts and on reference to them mentioned the details, the lower Court has held that there was no corroborative proof. We have the evidence not only of the plaintiff but of P. W. 5 as to the payment and it is strongly corroborated by the plaintiff's accounts which there seems to be no reason to distrust.

His omission to examine two of the defendant's gumastahs to whom the money was paid cannot have much importance, for, although they are said to have left the defendant's service one would have expected defendant to examine them to contradict the alleged payment to them. There is also a considerable ground for suspecting the truth of the defendant's accounts; but, as this point is not necessary for the determination of the appeal, I will not go into this question in detail but merely state that I consider that the payment of Rs. 3,000 is proved.

The plaintiff's suit must, however,

fail and this appeal be dismissed. Considering defendant's conduct each party will bear his own costs.

Devadoss, J.—The plaintiff appeals against the decree of the Temporary Subordinate Judge of Tanjore who dismissed his suit. The plaintiff's case as disclosed in the plaint is that he contracted with the defendant to buy 300 tons of rice at price noted in Exhibit B, that he incurred certain charges for removing the bags of rice from the wharf to his godown, that a good portion of the rice was commandeered by the Director of Civil Supplies, Madras, and that he sustained loss thereby and the defendant being guilty of fraud is liable for the loss sustained by him. The defendant's case is that the plaintiff contracted with him to buy imported rice at the rate fixed by the Director of Civil Supplies and he paid only the price of the rice supplied less a small amount, that he gave delivery at the wharf, that he is not guilty of any fraud and that he is not liable to make good any loss the plaintiff may have sustained by a portion of the rice sold being commandeered by the Director of Civil Supplies.

The main contention urged by the appellant is that a sum of Rs. 3000 paid by him on 21-7-1919 was not given credit to in the defendant's books. According to his case he paid a sum of Rs. 48,996 and the defendant admits all the payments but a sum of Rs. 3000. The question is whether this sum was paid by the plaintiffs to the defendant on 21-7-1919. The plaintiff's evidence is that it was paid to the defendant's clerk on the 21st July 1919 in two sums of Rs. 1,9000 and Rs. 2,000 and he is corroborated by his accounts. The defendant's books do not show the receipt of Rs. 3000. In order to determine whether the amount was paid by the plaintiff or not, we have to see what the rates at which plaintiff contracted to buy the rice imported by the defendant were. If the contract rates were those mentioned in Exhibit B, the plaintiff's case is rendered very probable. In this connection a few facts have to be remembered. At that time there was rice control in this Presidency. The defendant was given a permit or licence by the Director of Civil Supplies Madras to import rice from Rangoon and according to the terms of the lieence, Exhibit III, he could sell only to licenced dealers at the rates fixed by him, and should not sell to any whole-sale merchant in Negapatam and according to the terms of the licence granted by the Director a whole-sale merchant could not buy in Negapatam, rice. imported by any rice dealer Therefore he must have consented to pay a higher price than the Director's price in order to secure a large quantity of rice which he could sell at a considerable profit.

The defendant having sold to the plaintiff who is not a licensed dealer in contravention of the terms of Exhibit III. the Director of Civil Supplies ordered the forfeiture of the deposit of Rs, 5,000 made by the defendant and the defendant petitioned the Director as will be seen from Exhibit XII, to reconsider his case and to pass orders cancelling the order of forfeiture by trying to make out that he was not guilty of wilful breach of the condition of the licence. In these circumstances, it is unlikely that he would admit that he sold the rice at the prices mentioned in Exhibit B. His explanation is that Exhibit B. gives only tentative prices in order to enable the plaintiff to have money to be paid as soon as the ship bringing the rice arrived in port. Exhibit A is the contract signed by the defendant and Exhibit A 1 is the counterpart signed by the plaintiff. If the defendant's case is true he could very well have mentioned in Exhibit B that these prices were only tentative prices and the real price would be those fixed by the controller. If his case were true why was not Exhibit B made a part of Exhibit A or Exhibit AI. It is on a separate sheet of paper which could be suppressed if the parties wished. His explanation therefore that these prices were only tentative price cannot be accepted, and from the conduct of the parties it is quite clear that Exhibit B contains the real

contract prices as settled between them for it is unlikely that the plaintiff would have paid a large sum of money nearly amounting to half a lakh of rupees without ascertaining what the prices fixed by the Director were.

Considerable argument was advanced as regards the state of the accounts of the defendants. There is a sum of Rs. 3,000 credited on 21-7-1919 in his books for which he does not give a satisfactory explanation. His evidence on that point is very unsatisfactory and therefore I have no hesitation in holding that Rs 3,000 was paid to him by the plaintiff on the 21st of July 1919.

The next point argued is as regards the charges incurred by the plaintiff for removing the bags of rice from the wharf to his godown. The agreement is silent as to the place of delivery. It is not clear why the plaintiff should have paid the charges for removing the bags from the wharf without requiring the defendant to deliver the goods at his godown, or asking him to meet the costs of the removal. There is nothing in the documents to show that the defendant undertook to bear the charges of carting the rice from the wharf to the plaintiff's godown. The plaintiff not being a licensed dealer and knowing he was violating the terms of the licence Exhibit III, he was anxious evidently to remove the bags as soon they were landed and it is likely that he took delivery at the wharf There is evidence on the side of the plaintiff that the delivery was to be at the wharf. Whether that was so or not, the plaintiff volunteered the payment of the charges for the removal of the rice from the wharf to the godown and he cannot in law claim them from the defendant.

He claims damages on the ground of loss caused by the rice being commandeered by the Director of Civil Supplies and his being paid a sum less than that contracted for by him. It is unnecessary to deal with this question at length in the view I take of the question of law in this case. Two questions arise for consideration in this case. (1) Is the contract entered into by the plaintiff with the defendant legal or not ? and (2) if it is illegal, can the plaintiff get back the amount paid by him ? The defendant evidently did not plead the illegality of the contract as he was trying to get back from the Director of Civil Supplies the amount of deposit made by him for obtaining the licence Exhibit, III, which that Officer had directed to be forfeited. It is urged by the appellant that this point was not raised before the lower Court. There is some indication in the judgment of the learned Subordinate Judge that the question was argued before him. Otherwise I fail to see how he could have referred to *Nathu Khan* v. *Sewat Koeri* (2). and distinguished it from the present Whether the point was specifically raised in the lower Court or not, this Court has to see whether the plaintiff should be given any help in getting back the money which he paid under a contract which is illegal as being opposed to public policy. In *Scott* v. *Brown* (1), the Court of Appeal held that a contract between two parties for the purchase of shares in order to induce other person to buy shares believing that the shares were selling at a premium when there was no *bona fide* market for them was an illegal transaction and could be made the subject of an indictment for conspircy and no action could be maintained in respect of such agreement or purchase of shares. Lindley, L. J. observes at page 728 "No Court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the Court, and if the person invoking the aid of the Court is himself implicated in the illegality, or where he is not if the evidence adduced by the plaintiff proves the illegality, the Court ought not to assist him. If authority is wanted for this proposition, it will be found in the well known judgment of Lord Mansfield in the *Holman* v *Johnson*" (2a) The facts appearing in the evidence in this ase being clear, namely,

(2) [1912] 15 C.W.N. 408—9 I.C. 161.
(2a) Cowp. 341.

that the defendant was not authorised to sell to the plaintiff and that he was not authorised to sell at rates higher than those fixed by the Director of Civil Supplies and the plaintiff was not a person licensed to buy wholesale at Negapatam controlled rice, I have no hesitation in holding that the contract is an illegal one as being opposed to public policy. The next question is whether the plaintiff should be helped by the Court in getting back the money paid in execution of an illegal contract. No doubt in this Court the respondent relied upon the illegality of the contract in resisting the appellant's claim. His contention is that he is entitled to get relief on the ground that he does not seek to enforce the terms of the contract but only to get back money paid by him to the defendant for a consideration which failed. In *Javeerbhai Jorabhai* v. *Gordhan Narsi* (3) certain alienations were made in contravention of the Bhagdari and Narwadari Tenures Act and the High Court held that though the alienations were illegal and void as contravening the terms of the Act, yet the money advanced for the alienations could be recovered. Though at first sight it may appear that the case supports the plaintiff's contention, yet, on a close perusal of the judgment it would be clear that the learned judges rest their decision on a separate covenant whereby the mortgagor undertook to repay to the plaintiff the amount lent. At page 366 the learned judges observe. "But there still remains the question whether the plaintiff is not entitled to recover for breach of a separate covenant contained in the deed of mortgage. That covenant was passed by the defendant mortgagor in the following terms:—'If there should be any hindrance or obstruction concerning the house or if the house should be taken out of your possession, that we and our property and our heirs and representatives are liable for any loss you may suffer and for your moneys advanced.....Here the covenant covers as well the cases where hindrance or obstruction should occur in taking possession as the case where possession, after having been obtained, is afterwards taken away from the purchaser." In the present case there is no separate covenant for the return of any money that may be due to the plaintiff as the difference between the price that may be paid by the Controller of Civil Supplies and the contract price. Whether such a contract would be legal or not it is unnecessary to consider as there is none set up in this case. The next case relied upon by the appellant is *Mathure Mohan Saha* v. *Ram Kumar Sabha* (4), where it was held that where a corporation receives money or property under an agreement, which turns to be *ultra vires* or illegal, it is not entitled to retain the money. The obligation to do justice rests upon all persons natural and artificial; if one obtains the money or property of others, without authority, the law, independently of express contract, will compel restitution or compensation." In that case there was no performance of the contract entered into by the corporation and the learned judges held that "the relief is granted not upon the illegal contract nor according to its terms, but on an implied contract by the corporation to return or failing to do that to make compensation for property or money which it has no right to retain". In the present case the contract was fully performed by the plaintiff taking delivery of the 300 tons of rice contracted for and he only claims compensation for the difference in price between that paid by him to the defendant and that paid to him by the Director of Civil Supplies. In the first place there is no covenant by the defendant to make good any loss that might occur to the plaintiff by the rice being commandeered and in the next the contract has been fully performed. The plaintiff contracted to buy at the rates mentioned in Exhibit B and paid accordingly. The Director of Civil Supplies commandeered the rice as he was entitled to do and paid the plaintiff

(3) [1915] 39 Bom. 358—17 Bom. L.R. 259—28 I.C. 442.

(4) [1915] 43 Cal. 790—23 C.L.J. 26—20 C W.N. 370—35 I.C. 305

according to the terms of the license under which the rice was imported. The case might be different if the rice had been commandeered before the plaintiff took delivery but when once the contract is completed by delivery, it is difficult to understand how the plaintiff could seek relief against the defendant on the ground that the Director of Civil Supplies commandeered the rice from him. He no doubt relies on the alleged fraud of the defendant in not disclosing the contents of Exhibit I by which the Director of Civil Supplies informed the defendant to hold the goods at his disposal as the shipment was under the license granted to him. Granting that Exhibit I was not shown to the plaintiff he has no reason to complain. Exhibit I does not import a new condition which is not to be found in Exhibit III. It cannot be contended with any show of reason that the plaintiff was unaware of the contents of Exhibit III. Exhibit III makes it clear that the licensee should hold the quantity imported at the disposal of the Director and the explanation of the clause "that the whole rice imported on this license must be placed at the disposal of the Government" is, that "it can only be sold to merchants or dealers selected or approved by the Director of Civil Supplies or some one authorised by him in this behalf". That being so Exhibit I does not import any new clause or put any restriction upon the defendant with regard to his dealing with the imported rice, which was not contained in Exhibit III. It is therefore not clear how the plaintiff could contend that the defendant is responsible for the loss sustained by him, by the nondisclosure of the contents of Exhibit I. In *Sreenivasa* v. *Sesha* (5) it was held "a marriage brokerage agreement is unlawful and void and brokerage paid thereunder is recoverable if the agreement or a substantial part of it is not performed." Oldfield J. relies upon *Taylor* v. *Bowers* (6) and observes "the exception to the general rule based on the absence of any, or of any substantial, performance is clearly recognised without reference to the distinction proposed in a case later than the majority of those relied on by the learned Judges, in *Taylor* v. *Bowers*(6) in which the object of the agreement, a fraud on creditors, would, if persisted in, have resulted in the frustration of the insolvency law". The learned Judges gave relief to the plaintiff on the ground that the agreement or a substantial portion of it was not performed. In the case of *Taylor* v. *Bowers* (6) the facts were "the goods were made over to Alcock for the purpose of defrauding the plaintiff's creditors. But they were made over by Alcock to the defendant without the plaintiff's authority, and not in furtherance of the fraudulent purpose for which they had been assigned to him. And while the fraud on the plaintiff's creditors originally contemplated remained wholly unaccomplished, the plaintiff repudiated what had been done, and claimed to have the goods restored to him, which done, they would have been again available to the creditors". Cockburn C. J. held, "Now it seems to us well established that where money has been paid, or goods delivered under the unlawful agreement, but there has been no further performance of it, the party paying the money or delivering the goods may repudiate the transaction, and recover back his money or goods". In the present case, as I have observed that there has been a complete performance of the contract the case in 41 Mad. 197 (5) does not help the appellant In *Bhikan Bhai* v. *Hiralal* (7) there was a condition in a lease of the tolls that the lessee should not sublet the tolls without the permission of the Collector. The plaintiff, the lessee sued the defendant, the sub-lessee for certain meneys due to him under the sub-lease. The defendant contended that the contract was void and no money was recoverable. The learned Judges held that the restriction as regards the sub-lease was in the interests of revenue and not for the

(5) [1917] 41 Mad. 197—34 M.L.J. 282—6 L.W. 42—42 I.C. 783.

(6) [1876] I Q.B.D. 291—46 L.J.,Q.B. 39—34 L.T. 938—24 W.R. 499.

(7) [1900] 24 Bom. 622—2 Bom L.R. 483.

benefit of the public. They observe at page 625 "The Act imposing tolls is an Act passed for the benefit of the revenue and not an Act for the protection of public morals such as the Abkari and Opium Acts are in this country and the licensing Acts are in England, and to which different considerations apply". They gave a decree to the plaintiff on the ground that the defendant was liable to make good the amount due to the plaintiff. But here the rice control was established during the war conditions and was continued for the benefit of the public after the war was over on account of the economic conditions prevailing then and it cannot be therefore contended that the control was in the interest of revenue and the violation of the rule would not stand in the way of the plaintiff getting relief. It is not suggested by the appellant that the rules under which rice was imported from Rangoon were *ultra vires* or that the rice control was not under proper statutory provisions. Under the Ordinance promulgated, during the war and afterwards rice control was established in various parts of the country and the Director of Civil Supplies, Madras, was authorised to issue permits and licenses and the licensees or permit holders could only deal according to the terms of the license. The rice control was for the benefit of the public and any violation of the rules is opposed to public policy. It is unnecessary to notice all the cases relied upon by the parties as it is quite clear that the Court should not render its aid for the purpose of helping the plaintiff to get back money which he paid under a contract which was opposed to public policy and therefore void. In this case, the contract has been fully completed and the plaintiff who seeks relief on the ground of fraud is not entitled to it as I find on the evidence that he was not deceived as regards the terms of the license and his conduct in getting rice without a license to buy in Negapatam was in violation of the rules framed in the interests of the public. This point is fatal to the plaintiff's case and he is entitled to no relief. The defendant's conduct was grossly improper in having sold the rice imported by him under the license granted by the Director of Civil Supplies to an un-licensed person and therefore he is not entitled to his costs.

The appeal is dismissed and in the circumstances of the case both parties should bear their own costs.

Appeal dismissed.

✱ 1923 MADRAS 633

COUTTS-TROTTER AND RAMESAM, JJ.

Ammakannu Ammal and others—Appellants.

v.

Narayanaswami Mudaliar and others—Respondents.

City Civil Appeal No. 27 of 1921, D/- 7th December 1922, against the decree of the City Civil Judge, Madras in O. S. No. 153 of 1920.

Adverse possession—Original owner staying as a guest—Nature of rights of the parties.

The mere fact that the original owner came and stayed for a few days as a guest, will not operate to make the possession of the intruder less exclusive, so as not to extinguish the rights of the original owner in the property. The person who has completed the statutory prescription is entitled to eject any person with no title who seeks to retain possession of the premises. *Tichborne v. Weir* (1892) 67 L.T. 735 Dist. [P. 634 C. 1, 2]

K. S. Jayarama Iyer—for Appellants.

Md. Ibrahim Sahib, G. Ramakrishna Iyer and *S. V. Narayana Iyer*—for Respondents.

Judgment.—In this case the plaintiffs founded their title in their pleading upon an adoption of one Toolasi Naicken by Thathappa Naicken Toolasi Naiaken being the person from whom the plaintiffs derived their title through the first three defendants. The learned Judge, in fact, decided in favour of the plaintiffs not on the adoption, the existence of which he disbelived, but on a supposed title by prescription acquired by Toolasi Naicken, for the benefit of the joint family, of which he was a member with survivorship to his sons, the first three defendants. No issue is

raised as to that, and indeed, we think it is very doubtful whether he really clearly found that, because he does not clearly say that Toolasi Naicken acquired it for any interest wider than his own. However, an issue will be framed 'Whether the joint family of which Toolasi Naiken was a member acquired title to the property in suit by prescription ?'

Finding should be submitted in two months and seven days will be allowed for filing objections. Fresh evidence may be taken.

[The finding having been returned, Court delivered the following]

Judgment.—The finding which we have called for in this case has been returned and the learned Judge finds that the joint family of which Tholasingam was a member acquired a title to the property in suit by prescription. That finding of fact is challenged on the ground that though the old lady (5th defendant Kullammal) had married and gone away to Royapuram and never again resided in the property in the ordinary sense, she is to be held to have kept alive her rights in it, against the accrual of prescription by the fact that occasionally she came and stayed a few days as a guest. That seems to be so, but that will not operate to make the possession of the family of defendants 1 to 3 less exclusive, so as not to extinguish the rights of the old lady in the property. This contention does not require discussion.

It is next argued that the suit is not maintainable, because at the time it was brought the plaintiffs were not in possession of the property and that no stranger, even after the completion of the prescription, can sue anybody for possession, because he had not got an iota of title at all. as he is merely a man whe has prescribed against the title of the true owner and who is left with nothing, unless by mere brute force he can succeed in holding the property against anybody who tries to come up. To my mind this is an absolutely untenable argument and is based on what to my mind is a complete misunderstanding of the decision of the Court of Appeal in the case of *Tichborne* v. *Weir* (1). There a tenant had a lease and somedody, a stranger, came and stood for thirty years in the shoes of the tenant and paid rent to the landlord. It was sought, at the end of a very long period, to enforce against the person in occupation of the premises by the landlord the performance of a covenant to repair, and the argument on which it was sought to base that contention was this: the statute in effect transferred the estate of the person prescribed against to the hands of the person in occupation. Their Lordships observed that it was an incorrect interpretation of the law and that what the statute did was not to transfer the title of the person prescribed against with all its burdens to the person in occupation but to extinguish the whole title and to create, not by transfer but by an act of creation, a new title in the person who completed the prescribed statutory term. That being so, that case has no application to the present circumstances and we must hold that the person who has completed the statutory prescription is entitled to eject any person with no title who seeks to retain possession of the premises.

The result is that the appeal fails and is dismissed with costs of the first respondent.

Appeal dismissed.

(1) [1892] 67 L.T. 735.

1923 MADRAS 634

SPENCER AND KRISHNAN, JJ.

Muthukumara Mudaliar—Defendant—Appellant.

v.

Chockalinga Mudaliar — Plaintiff — Respondent.

S. A. No. 52 of 1921, D/- 29th January 1923, against the decree of the Dt. Court of Tanjore in A. S. No. 111 of 1919.

Limitation Act, S. 19—Existing liability—Implied acknowledgments.

In a previous suit the defendant had deposed as a witness " I am the 3rd defendant. I and

the 2nd defendant purchased some land from the 1st defendant. For the balance of price due to her, Ex. A. was executed."

Held: that this was not an acknowledgment of a liability subsisting at the date when the witness deposed. As the witness did not speak of the price as being still due to the 1st defendant at the time, no implied acknowledgment of liability can be spelt out of the mere statement that the witness on some prior date executed a certain bond. 1922 Mad. 104=45 M. 443; 26 M. 34; 16 M. 220, Foll. 14 L. W. 148 Doubted. [P. 635 C. 1.]

K. Subramania Pillai and S. Muthiah Mudaliar—for Appellant.

C. V. Ananthakrishna Iyer—for Respondent.

Judgment—The statement which the Courts below have taken to be an acknowledgment of liability sufficient to save limitation, is the statement made by the present 2nd defendant who was 3rd defendant in O. S. No. 28 of 1911. When examined as 2nd witness for plaintiff he said "I am the 3rd defendant. I and the 2nd defendant purchased some land from the 1st defendant. For the balance of price due to her, Ex. A was executed".

We are unable to accept the view that this was an acknowledgment of a liability subsisting at the date when the witness deposed.

The witness did not speak of the price as being still due to the 1st defendant at the time.

We hold, following *Kandasami Reddi* v. *Suppammal* (1), *Ittappan Kuthiravattat Nayer* v. *Nanu Sastri* (2), and *Venkata* v. *Parthasaradhi* (3), that no implied acknowledgment of liability can be spelt out of the mere statement that the witness on some prior date executed a mortgage bond.

The witness was 3rd defendant in O. S. No. 28 of 1911 but did not defend that suit. At the time of giving evidence he had no necessity to mention anything about his liability.

For the respondent reliance has been placed on *Subbarama Aiyar* v. *Veerabadra Pillai* (4). In that case there were certain endorsements on the promissory note in question and the defendant stated as a witness in a criminal case when the promissory note was shown to him that he executed it and that the contents of it were correct.

We are inclined to doubt whether that case was correctly decided but it is unnecessary to say more as the words in which the supposed admissions were made are different from the words used in this case.

We allow the second appeal and set aside the direction that plaintiff may have a personal remedy against appellant with costs in the lower appellate Court and here.

Appeal allowed.

(1) 1922 Mad. 104—45 Mad. 443—15 M.L.W. 325—1922 M.W.N. 168—42 M.L.J. 268—32 M.L.T. 166—70 I.C. 576.

(2) [1903] 26 Mad. 34—12 M.L.J. 101.

(3) [1893] 16 Mad. 220—3 M.L.J. 35.

(4) [1921] 14 L.W., 148—41 M.L.J. 217—(1921) M.W.N. 475—70 I.C. 593.

1923 MADRAS 635

SCHWABE, C.J. AND WALLACE, J.

P. V. Raghavachariar—Plaintiff—Appellant.

v

Murugesa Mudali and others—Defendants—Respondents.

Original Side Appeal No. 83 of 1921, D/-20th January 1923, from the order of Kumarasami Sastri, J., D/- 2nd May 1921.

Execution Sale—Setting aside — Material facts suppressed—C. P. Code, O. 21 R. 92—Madras High Court Original Side Rules, R. 205.

The Court, has an inherent power to refuse to allow the sale to be carried out if it is satisfied that the Court has been misled either in giving leave to bid or in fixing the reserve price. In order to show that the Court has been misled it is necessary to show either actual mis-statements to the Court or non-disclosure to the Court of relevent facts unknown to the Court and which there was a duty to bring before the Court. Where the decree holder put in an affidavit of which the tenor was that it was very doubtful whether the judgment debtor had any interest in the property at all which was proposed to be sold, that they had claims to it which were subject to litigation and the outcome of the litigation, like most litigation, was uncertain, and that it

was impossible, therefore, to give any idea of the market value, and further added that the market value of the lot in question might be fixed at Rs. 3000, but suppresesd a fact well known to him, namely, that the property, in respect of which the judgment d btors claimed. and had since been held by the Court to have, a two-thirds interest, had been put up for sale by the Court before and that the Court had fixed Rs. 45,000 as the reserve price and a bid of Rs. 36,000 had been refused on the ground that it was not great enough, *Held* that there were all the elements necessary for the Court to act on its inherent powers and that the confirmation of sale was rightly refused. [P. 636 C. 1; P. 637 C. 1,2]

T. Narasimha Iyengar—for Appellant.

C. Narasimhachari and *V. S. Govindachari*—for Respondents.

Schwabe, C. J.—This is an appeal from an order of Kumaraswami Sastri J. refusing to confirm a sale made at court-auction. He has refused to confirm the sale on the ground that all the facts were not placed before him when the reserve price was fixed and when the plaintiff obtained leave to bid. There is a misapprehension on the part of the learned Judge in that the application for leave to bid was to him, but the application to fix the reserve price was to the Registrar and not to him. I do not think it is enough to say, in order to refuse to confirm a sale that all the facts were not put before the Court on the two occasions referred to. But, in my judgment, the Court, has an inherent power to refuse to allow the sale to be carried out if it is satisfied that the Court has been misled either in giving leave to bid or in fixing the reserve price. This is only an instance of the inherent power possessed by all Courts to prevent an abuse of the processes of the Court, but, of coure, the Court will not use that inherent power unless it has had all the facts fully before it and is satisfied that it has been misled. I think the principle is that, in order to show that the Court has been misled, it is necessary to show either actual mis-statements to the Court or non-disclosure to the Court of relevant facts unknown to the Court and which there was a duty to bring before the Court. How far that duty goes, in applications for leave to bid and in applications to fix the reserve price may, I think, be found in the judgment of the Privy Council in *Mahomed Mira Ravuthur* v. *Savasi Vijaya Raghunadha Gopalar* (1) quoting passages from the judgments of Lord Selborne and Lord Fitzgerald in *Coaks* v. *Baswel* (2) and they came at least to this that, if a party professes to give the Court information on any particular subject with a view to guide its discretion and obtain its approval, he is bound to lay before the Court all the material information he possesses on that particular subject.

There were two stages in which the present plaintiff gave information to the Court. The first to the Judge himself on his application for leave to bid and I am not prepared to say that there were materials, relevant to the consideration as to whether he should be allowed to bid or not, known to him which he did not disclose. I think he did give a very meagre statement of facts on that occasion, but I am not convinced that the statement of facts was relevant for the consideration of the Court in deciding whether he should bid or not, because on that application certainly the main question for the Court to consider is whether it is to the advantage of every one concerned, in order to obtain the highest price, that the plaintiff should be allowed to bid or not. The second stage in which he gave information was on his second application which was to the Registrar, and that was under Rule 205 of the Original Side Rules, by which the applicant for sale has to put an affidavit stating what, in his opinion, is the best time and place of sale and method of advertising the same, the lots, if any, into which the property should be divided, and the market value of, and the reserve price to be fixed for, the property. Then under Rule 216 the Registrar is to determine the various matters and, in the event of any objection being raised to the lots, the market value or reserved value mentioned in the affidavit, the question

(1) [1900] 23 Mad. 227—27 I. A. 17—4 C. W. N. 226—10 M. L. J. 1—2 Bom. L.R. 640—7 Sar. 661 (P.C.)

(2) 11 A. C. P. 232—55 L. J. Ch. 761 55 L. T. 32.

is to be determined by a Judge in Chambers Now an affidavit was put in of which the tenor was that it was very doubtful whether the judgment-debtor had any interest in the property at all which was proposed to be sold, that they had claims to it which were subject to litigation and the outcome of the litigation, like most litigation, was uncertain and it was impossible, therefore, to give any idea of the market value. The Registrar not being satisfied that that was a proper compliance with the Rule, a further paragraph was added by the plaintiff that, under the circumstances stated in the rest of the affidavit, the market value of lot No. 1 which is the lot in question might be fixed at Rs. 3000, and so the reserve price was fixed The matter did not go before the Judge because no one seems to have taken any objection to the reservation of that price. It is true that on those proceedings one of the judgment-debtors was represented and the other had been served with a notice ; but that fact does not, in my judgment, in any way relieve the plaintiff from the obligation to set out the relevant facts in his affidavit, nor reduce the liability on him, when he does state facts, to lay before the Court all the material information he possesses about those facts. In this case I am quite satisfied that he did not comply with that obligation There was a fact well-known to him. namely, the property in respect of which the judgment-debtors claimed, and have since been held by the Court to have, a two-thirds interest, had been put up for sale by the Court before and that the Court had fixed R. 45,000 as the reserve price and a bid of Rs. 36,000 had been refused on the ground that it was not great enough. It might have been a question for argument before the Registrar that, notwithstanding that fact, a very low price with no reserve price should be fixed in this case because of the doubt as to the judgment-debtors' title, but the Registrar was not given the opportunity of making up his mind upon that or receiving any such argument because the fact was entirely suppressed from his knowledge. I am convinced that, whatever the result might be, any Tribunal that had to make up its mind as to what the reserve price should be would, in fact, be greatly influenced by such information as was in this case suppressed, namely, that the Court itself, for the property in dispute, had on a previous occasion fixed a very high price as the reserve price and refused the bid of an amount such as was refused in this case. I think, therefore, that there were all the elements necessary for the Court to act on its inherent powers. The plaintiff had taken upon himself to give the Court imformation as to the value. He had told the Court certain facts, and not told the Court other facts relevant for the Court's consideration and unknown to the Court. I am satisfied that the learned Judge's order was right. It seems to me that it is not, as I have pointed out, correct to say that he was deceived in respect of the price, and I doubt if he was right in the view he took that in respect of allowing the plaintiff to bid he ought to have had that information before him. I am satisfied on the other application, namely the application before the Registrar, that there was a suppression of a material fact, and, therefore, the sale cannot be confirmed.

This appeal must be dismissed with costs.

Wallace, J.—I am of the same opinion. I am not satisfied that knowledge of the facts of the previous auction, in which the property was valued at Rs. 45,000 and as being the joint family property of the plaintiff's two judgment-debtors and another, would have led the executing Court to refuse the plaintiff permission to bid but I am satisfied that that knowledge would, in the case of this second sale. in which the property was again advertised as the joint family property of the plaintiff's two judgment-debtors and another, in all probability, have restrained the officer of this Court, whose duty it was to fix the upset price from fixing an upset price at any figure so low as Rs. 3,000 and would, therefore, have resulted in preventing the selling

officer from knocking down the property for Rs. 3,000. The suppression of this fact by the plaintiff was, therefore, a suppression of a material fact. Further, it was clearly his duty, when the Court had to fix this upset price, and he elected to put before it such facts as he knew, relevant to that point, to put forward all the material facts within his knowledge on that point, to enable the Court to fix the value for the purpose of settling that price. In fact, it was his duty to put before the Court those facts which he chose to put forward at length in his subsequent affidavit of the 5th of March, which he chose to put forward only when the question of confirming his sale arose. In his affidavit of the 3rd November 1920, which does discuss the difficulties in fixing the value, the plaintiff withheld deliberately, I am satisfied, the very material fact of the prior auction, and did not fairly and openly state to the Court the factors in the problem which he put to himself and which he himself was aware and the Court was not. That the Court officer was not aware of it seems to me obvious. The judgment-debtors had added nothing in the plaintiff's affidavit to put the Court on notice of this previous auction. Thus, the ingredients necessary to prove misrepresentation necessary to justify the setting aside of the sale are present. O. 21, Rule 92 and the Privy Council ruling in *Birj Mohun Thakur* v. *Rai Oma Nath Choudhry* (3) are in my view no bar to the Court interfering to cancel the sale, even though no party has applied for cancellation when the Court discovers, in the course of the proceedings, that the decree-holder (auction purchaser) deliberately misled it, and profited thereby to the disadvantage of the judgment-debtor or the judgment-debtor's creditors.

Appeal dismissed.

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(3) [1892] 20 Cal. 8—19 I. A. 154 (P. C.)

✱ 1923 MADRAS 638

OLDFIELD AND VENKATASUBBA RAO, JJ.

Y. S. Venkatanarayana—Defendant—Appellant.

v.

Puvadda Narasimha Row—Plaintiff—Respondent.

A. A. O. No. 360 of 1921, D. 7th February 1923, against the order of Sub. J. of Rajahmundry, D. 28th April, 1921 in E. P. No. 16 of 1921.

Civil P. C., O. 21 R. 19—Division of interest of a deceased party between two legal representatives.

Venkatasubba Rao, J.—The section does not exclude the case of a decree-holder on whose death his interest devolves on two different individuals. "Two parties" referred to in R. 19 are the parties to the suit. The words do not refer to two different representatives of the same party. 40 B. 60 Ref. [P 640 C 1]

Oldfield, J.—The difficulty arising from the division of the interest of a deceased party to a decree between two legal representatives does not seem to have been contemplated in rule 19 since it does not include even a provision similar to R. 18 (3) (a). 40 B. 60 Not App. [P 638 C 2]

G. Lakshmanna and *V. Viyanna*—for Appellant.

P. Narayanamurthi—for Respondent.

Oldfield, J.—I have had the advantage of reading my learned brother's judgment and I am not prepared to dissent from his interpretation of O. 21, R. 19, Civil Procedure Code. In accepting it, however, I observe that the difficulty arising from the division of the interest of a deceased party to a decree between two legal representatives does not seem to have been contemplated in that rule, since it does not include even a provision similar to R. 18 (3) (a); and that I am, with all respect, unable to apply the language used by Batchelor, J., in *Madappa Ganappa* v. *Jaki Ghosel* (1) to the present case since that difficulty was not there under consideration. But the language of R. 19 in my opinion is consistent only with the conclusion reached by my learned brother and I accept his conclusion that the agreement set up between 1st and 4th defendants was subject to a condition which is not shown to have been fulfilled and is therefore ineffective. I therefore concur in the order proposed.

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(1) [1916] 40 Bom. 60—17 Bom L. R. 689—30 I. C. 893.

Venkatasubba Rao, J.—This is an appeal from an order of the Subordinate Judge of Rajahmundry allowing execution against the 4th defendant at the instance of the husband of the plaintiff who claimed to be the plaintiff's legal representative. The 4th defendant was directed by the decree to pay to the plaintiff a sum of Rs. 385-4-0 as mesne profits in respect of some property. The plaintiff's husband applied for execution in respect of this sum of money. The 4th defendant objected to execution on the ground that under the same decree the plaintiff was directed to pay him Rs. 2,000 with interest at 12 per cent., from a certain date and that the amount due to him being much larger than the sum payable by him, the plaintiff's representative was not entitled to take out execution for the smaller sum. The Subordinate Judge overruled this contention and the 4th defendant is the appellant before us.

The respondent, the plaintiff's husband, has sought to support the judgment of the lower Court on the ground that the decree was obtained by the plaintiff in respect of certain properties which she claimed as the heir of her mother, that the amount payable to the 4th defendant under the decree was payable by the plaintiff as representing the estate of her mother, that the amount which the plaintiff was to get from the 4th defendant was her *stridhanam* property, that the respondent as her husband inherited that property and that he was, therefore, entitled to recover by execution the sum which the plaintiff was to get under the decree without reference to the amount which the plaintiff was directed to pay to the 4th defendant. It was further argued that the 1st defendant in the suit, who was the brother of the plaintiff became the plaintiff's representative in respect of her mother's estate and that the 1st defendant was, therefore, liable to pay the amount which the plaintiff was decreed to pay to the 4th Defendant. In short, the argument on behalf of the respondent was that the 4th defendant was bound by pay him Rs. 385-4-0 and the 4th defendant's remedy in respect of Rs. 2,000 and interest thereupon lay against the 1st defendant.

We have to determine which of these two contentions is correct. O. 21, R. 19 Civil Procedure Code runs as follows :—

"Where application is made to a Court for the execution of a decree under which two parties are entitled to recover sums of money from each other, then—(a) if the two sums are equal, satisfaction for both shall be entered upon the decree; and, (b) if the two sums are unequal, execution may be taken out only by the party entitled to the larger sum and for so much only as remains after deducting the smaller sum, and satisfaction for the smaller sum shall be entered upon the decree."

The decree under consideration is 'a decree under which two parties are entitled to recover sums of money from each other.' The plaintiff was entitled to recover Rs. 385-4-0 from the 4th defendant, and the latter Rs. 2,000 and interest thereupon from the plaintiff. There can be no doubt that the plaintiff and the 4th defendant answer the description of "two parties" in the Rule That being so, the provision is clearly applicable, because an application has been made to the Court for the execution of a decree of the nature described by R. 19. Cl. 1 (b) provides that where application is made to a Court for the execution of such a decree satisfaction for the smaller sum shall be entered upon the decree. Now, such an application has been made and under the Rule, the Court has no option but to enter up satisfaction for the smaller sum, that is, in this case the sum due to the plaintiff. When the satisfaction has been so entered there can be no sum payable to the plaintiff and the plaintiff, therefore, will not be able to execute the portion of the decree which awards him the smaller amount, if the plaintiff during lifetime attempted to execute the decree. O. 21, R. 19 would be an effective bar against her. The respondent has argued that the provision does not automatically of its own force render the decree for the smaller sum inexecutable; in other words, that the effect of R 19 is not to convert a

decree with two distinct provisions into a singla decree enforceable only for the difference between the two sums; but on the contrary, that the point of time, when operation is to be given to the provision under question, is when application is made for execution and that, when as in the present case on the date of the execution application the plaintiff's interest became split up, the Rule has no application. It is no doubt true that the provisions of the section come into operation only "Where application is made to a Court for the execution of a decree"; but that condition has been satisfied in the present case. The application has been made. The section does not exclude the case of a decree-holder on whose death his interest devolves on two different individuals. "Two parties" referred to in R. 19 are the parties to the suit. The words do not refer to two different representatives of the same party On a strict construction of O. 21, R. 19, I have no hesitation in coming to the conclusion that the appellant's contention is correct and that the plaintiff's husband is not entitled to take out execution for the smaller sum awarded to the plaintiff under the decree.

Moreover, I am at a loss to understand why the defendant should suffer because on the death of the plaintiff her interest devolved on two different representatives. I fail to see why, if, as the result of the set-off, the 4th defendant was entitled to recover from the plaintiff the difference between the two sums, he should immediately upon her death be obliged to pay into the hands of one representative the smaller sum and parhaps be unable to recover the larger sum from the other representative. This seems to me clearly opposed to justice and I find no justification for this view in the terms of the section to which reference has been made.

Four cases were cited by the appellant's learned vakil as bearing on the question; *Bhagwan Singh* v. *Ratam* (2), *Sankara Menon* v. *Gopala Pattar* (3). *Annada Mohan* v. *Atul Chandra* (4) and *Madapa Ganappa* v. *Jaki Ghosal* (1). I shall refer only to the last cited decision, because I think it alone has a material bearing upon the case on hand. There the applicant applied to execute a decree for recovering Rs. 445-8-0 which he was entitled to recover from the opponents as mesne profits. Under the same decree, the opponents were entitled to claim the sum of Rs. 855 as costs from the applicant; but they were prevented from recovering it as the right to it was barred by limitation. They, however, claimed to set off the amount against the amount sought to be recovered by the applicant. It was held that the applicant could not be allowed to execute his decree for the smaller sum without reference to the larger sum which the decree awarded to the opponents. Batchelor, J. observed at page 63:

> "For, as I read the rule, it contemplates that the decree should be regarded as a single indivisible order of the Court enforceable only for the balance, that is the difference between the two sums awarded, and that the balance becomes awardable by the Court without the intervention of the parties as soon as the amount of the balance is determined.

There remains one point to consider. It is said that the 4th defendant entered into an agreement with the 1st defendant in respect of the amount payable by the plaintiff to the 4th defendant. The respondent has argued that the 4th defendant has thus precluded himself from setting up that an amount is due to him under the decree. In answer to this argument it is sufficient to say that it is admitted that the agreement relied upon is a conditional agreement and that the condition has not been fulfilled The amount due to the 4th defendant. has not been paid and the respondent cannot therefore contend that the portion of the decree relating to payment to the 4th defendant has been satisfied. In this view, it becomes unnecessary to determine the other question, namely, whether the adjustment referred to not having been certified under O. 21, R. 2 may or may not be recognised by the Court executing the decree.

The appeal should therefore in my judgment be allowed with costs.

——— *Appeal allowed.*

(2) [1894] 16 All. 395—(1894) A.W. N. 133.

(3) [1900] 23 Mad. 121.

(4) [1920] 24 C.W.N. 465—56 I. C. 753.

✱ 1923 MADRAS 641

OLDFIELD AMD VENKATASUBBA RAO, JJ.

D. Śriramulu—Petitioner.

v.

Ponaka Vira Reddi—Respondent.

Civil Rev. P. No. 697 of 1921, D/-21st February, 1923 to revise the order of the Dt. Court of Nellore D/-14th Jan. 1921 in Civil Mis. A. S. No. 20 of 1919.

Provincial Insolvencey Act, Ss. 36 and 37—Debt due from insolvent—Validity challenged by another creditor—Transaction entered into 4 years before—Voluntary transfer, setting aside of.

When a creditor of the insolvent challenges the validity of a debt set up by another creditor, the Judge is bound to enquire into the truth of the allegation in insolvency and the parties should not be referred to a regular suit. The insolvency Court has jurisdiction to record a finding as to the existence of the debt alleged to be due to a creditor and alleged to be contracted 4 years before the adjudication. Sections 36 and 37 enact special rules of substantive law to be followed by the Courts in the exercise of insolvency jurisdiction. The law enunciated in the said sections is not a part of the general law and is to be applied only in cases which come up before the tribunals exercising powers conferred by the Insolvency Act. The mere fact that a transfer is voluntary will not justify the insolvency Court in setting aside the transfer. It must be found that the transfer amounted to a fradulent transfer under section 53 of the Transfer of Property Act, or that the transaction was fictitious or was a mere pretence and there was no intention to transfer; that is to say, that there was in effect no transfer at all, in other words, that the transferee was a mere benamidar for the transferor.

[P. 645 C. 2, P. 646 C. 1, 2 and P. 647, C. 1]

M. Patanjali Sastri—for Petitioner.

K. Rajah Iyer—for Respondent.

Oldfield, J.—In concurring in the order which my learned brother proposes, I do not desire to follow him further than is necessary to support his conclusion.

The decision under appeal is in terms that the District Munsif erred in removing the name of 5th creditor, here respondent, from the list of creditors: and we have to consider whether he had power to do this and if so, whether we can accept the order made in the exercise of that power. By an irregular and confused course of procedure and pleading, to which my learned brother has referred, that order invovled the conclusion, not only that 5th creditor's debt was not proveable in the insolvency, but also that the mortgage securing it was invalid. The objection thus allowed was taken as follows in a counter-petition of 1st creditor :—" The mortgage for Rs. 500 said to have been executed by petitioner (the insolvent) and his father in favour of 5th creditor was created for the benefit of the insolvent and with the intention of evading payment of the debts due to 1st creditor and others and nominally, but is not a true debt. Nothing is payable to the 5th creditor"

This, it is contended, means only that Ex. A, the mortgage, offends against section 53, Transfer of Property Act, and that, as it does not come within section 35 or 36 of Act III of 1907, which is applicable to this insolvency, there could be no adjudication on its validity by the District Munsif in insolvency or otherwise than in a separate suit, because shortly, the insolvency Court cannot adjudicate on claims by or against third parties. The question thus raised is of some difficulty in connection with Act III of 1907 owing to the absence therefrom of anything corresponding with section 4 of the present Act V of 1920 or section 105 of the English Act or the corresponding provisions of previous statutes.

This contention, it is urged, can be met by reading the objection to Ex. A as being that there was no debt and no transfer at all, but only a pretence, which could be disregarded and not that there was a transfer, which offended against section 53, Transfer of Property Act, and had to be set aside; and, if the question were of property to be reduced to the possession of the Receiver on behalf of the creditors, I should be prepared to adhere to my opinion expressed in *The Official Receiver, Tinnevelly* v. *Sankaralinga Mudaliar* (1) and hold that, so far as for the objection to Ex. A was of the former description and the question was of discovery within the purview of section 18 (1) and (3), the

(1) [1921] 44 Mad. 524—40 M. L. J. 219—14 L. W. 505—1921 M. W. N. 236—62 I. C. 495.

insolvency Court was competent to decide it. But in fact, Ex. A being a simple mortgage, there is no question of possession; and there is the further difficulty that the language already quoted from the 1st creditor's counter-petition is elastic enough to express objections of both the descriptions above referred to

It is a better argument and one which, I agree, must prevail, that the question is of a claim, not by or against a third party or stranger to the proceedings, but by a creditor, a necessary party to them, which can be made and which the respondent in the present case has chosen to make in the insolvency and with which the Court under section 24 must deal after hearing other creditor's ojections; and, as there is no restriction there or elsewhere on the grounds, on which objections may be made, the Court must adjudicate on them, whether they are that the transaction relied on resulted in no debt or that resulting in a debt, it should be annulled. This of course involves that a secured creditor is before the Court primarily to obtain inclusion of his debt in the schedule and only secondarily because the receiver on behalf of the creditors is concerned to claim the interest in the insolvent's property, constituting the security, for their benefit. But the reply attempted is that, if the objection to the decision of the insolvency Court binding a secured creditor, can be met in this manner, it has still to be shown how that Court is empowered to reach a decision at all as to the validity of a transfer like Ex. A in the present case, to which owing to its date sections 36 and 37 cannot be applied.

It can serve no useful purpose to repeat my learned brother's treatment of the English and Indian authorities on this question. For the English Courts were interpreting provisions in successive Acts, in which nothing in the Indian Law applicable to the present case corresponds; and it is therefore inconclusive that in *Ex parte Cohen* (2) the power of the insolvency Court to adjudicate on a secured creditor's transfer was sustained, that decision having (as I understand it) been in no degree discredited by the subsequent very generally expressed statement in *Ellis* v. *Silber* (3), to which my learned brother has referred for the principle to be followed. The Indian authorities also are indecisive because it does not appear that any is based on comprehensive argument and some at least are consistent with the view that the insolvency Court has power to enquire into the validity of all transfers, the question having been only whether it had in the particular case exercised a proper discretion in doing so or refusing to do so. In these circumstances I can add nothing to the conclusion in *The Official Receiver of Tinnevelly* v. *Sankaralinga Mudaliar* (1) already referred to, except that there the general power of the Court was exercisable under section 18, whilst here it is under section 24, and that accordingly the Court's power to enquire into the validity of a secured debt exists independently of sections 30 and 37, those sections being, as they were there referred to, only rules of evidence or, as my learned brother puts it, special rules of substantive law applicable to particular kinds of transfer by the insolvent.

Taking this view, I concur in setting aside the lower appellate Court's order and, as I agree with my learned brother's criticisms on the District Munsif's disposal, also in the remand proposed. But I cannot part with the case without observing that much of the time taken over its disposal might have been saved, if the latter Court had made an attempt to appreciate and adhere to the proper course of insolvency procedure. It is unnecessary to refer again to points noticed in my learned brother's judgment: but I add that, although the present appellants, the 19th creditor, was, as we have ascertained, appointed receiver on 27-7-1918, he has never been impleaded in these proceedings in that capacity and was allowed to

(2) [1872] 7 Ch. 20—41 L. J., B. K. 17—25 L. T. 473—20 W. R. 69.

(3) [1873] 42 L. J., Ch. 666—L. R. 8 Ch. 83—28 L. T. 156—21 W. R. 346.

take the very questionable course of selling the property, the subject of Ex. A, whilst the validity of that document was still in dispute. It is fortunate that, although according to the record what is described as a final dividend has been distributed, the proceeds of the sale have been retained in Court and are, we are told, sufficient to satisfy any claim which can be made under Ex. A.

Venkatasubba Rao, J.—The District Munsif of Kavali in the exercise of his insolvency jurisdiction expunged the debt alleged to be due to Veera Reddi, the respondent before us, from the schedule of the insolvent's creditors.

About 4 years previous to the date of the adjudication the insolvent had executed a deed of mortgage in favour of the respondent, and the order of the District Munsif was made on an objection raised by several of the other creditors to the validity of the transaction evidenced by the said instrument. On appeal, the District Judge held that the insolvency Court had no jurisdiction to set aside the deed of mortgage on the ground that section 36 of the Provincial Insolvency Act III of 1907, has no application in the case of transfers beyond two years of the adjudication. One of the creditors has filed this Civil Revision Petition questioning the correctness of the order of the District Judge.

The arguments covered a wide ground, and the question that was raised was whether the insolvency Court has jurisdiction under the Provincial Insolvency Act III of 1907 to adjudicate upon claims of third parties as against the insolvent or his estate represented by the receiver. I must state at once that, in my opinion, this question does not arise at all in the present case, and that the matter before us can be decided on a ground very different from the one stated.

On the general question argued, there has been a great divergence of judicial opinion. In *Narasimhaya* v. *Veeraghavulu* (4), a purchaser from the receiver who had been obstructed by a third party applied to the insolvency Court, and it was held that the Court had no jurisdiction to decide questions of title. Abdur Rahim, J. makes the following observations: " * * * It would be going much too far to say that a Judge in insolvency in the mofussil has powers by a summary proceeding to decide questions of title with respect to property which is claimed by third persons." In *Maddipoli Peramma* v. *Gandarapu Krishnayya* (5) the learned Judges held that an order passed by the insolvency Court on the application of the purchaser from the Official Receiver directing a third party to deliver possession of the property purchased, to the applicant, was without jurisdiction. Bakewell J expressed the view that the power conferred by section 18 (3) was not intended to provide for determination of questions of title as between the insolvent and third parties; whereas Krishnan, J., was of the opinion that the insolvency Court has jurisdiction in a proper proceeding instituted by the receiver to enquire into and decide on the merits of an adverse claim set up by a stranger. It must be observed however that the observations of Krishnan, J, were *obiter*.

In *The Official Receiver, Tinnevelly*, v. *Sankaralinga Mudaliar*, (1) the question that arose was of a very different character. After the receiver had been appointed for the estate of an insolvent, the latter's properties were sold in auction by a District Munsif's Court in execution of a decree for money passed by the latter Court prior to the order of adjudication. It was held that the insolvency Court was competent on the application of the receiver to annul the sale and direct delivery of possession to the Receiver. The sale was held after the date of adjudication, but the receiver was not a party to the proceedings, and the ground of the decision seems to be that a dealing with the property which had vested in the receiver without notice to him was unauthorised and that under section 18 (3) the Court

(4) [1917] 41 Mad 440—6 L.W. 694—1917 M.W.N. 857—42 I.C. 525.

(5) [1918] M.W.N. 479—24 M.L.T 106—8 L.W. 136—47 I.C. 308.

was competent to direct delivery of possession of the property to the receiver on his application.

On the general question of the power of the insolvency Court to decide claims of, or against, a third party, the Judgment contains some observations and the *dictum* especially of Seshagiri Aiyar, J. "I am of opinion that section 4 declares what has been the law all through", was strongly pressed upon us, but the observations were not necessary for the determination of the question before the Court and the decision cannot be said to be authority either way.

In *Ramaswami Chettiar* v. *Ramaswami Iyengar*, (6) on facts similar to those that existed in 41 Mad 440, and (1918) M W.N. 479 it was held that the Insolvency Court had jurisdiction to deal with claims of third parties, but it was a decision under the Provincial Insolvency Act of 1922.

Turning to the cases decided by the Calcutta High Court we have first *Satya Kumar* v. *Benares Bank* (7). I understand the effect of this decision to be that the question of title can be decided only in a regular suit and not in insolvency I may however state that there is a passage in the judgment which may lend support to the argument that the learned Judges did not decide that the Insolvency Court had no jurisdiction, but merely held that it had a discretion and that the proper exercise of the discretion would be to refer the parties to a regular suit. The passage to which I refer is this:

"If the question of title is seriously in dispute we state for the information of the Judge that we think he should direct the receiver to bring a suit to have the question determined."

In *Nilmoni Choudhury* v. *Durga Charan Chowdhury* (8) the transfer having been admitted not to be within two years of the adjudication it was held that section 18 (3) did not authorise the removal of a person whom the insolvent could not remove without the aid of legal preceedings. Again I must add that the observation in the judgment "if the veil is transparent the Court may order the delivery of the property to the receiver" impairs the value of this decision and in this respect this case bears a strong resemblance to the case already referred to, 22 C.W.N. 700.

Joy Chandra Das v. *Mahomed Amir* (9) is more direct on the point A creditor alleged that the insolvent's wife was merely a benamidar of the insolvent, and the question was whether the insolvency Court had jurisdiction to summon the insolvent's wife to examine her and direct her to transfer to the receiver the property which stood in her name if the property was proved to belong to the insolvent. It was held that the insolvency Court had no power to adjudicate upon the title of a third party under the provisions of the Provincial Insolvency Act III of 1907.

To the same effect was the decision of another Bench of the Calcutta High Court in *Amina Khatun* v. *Nafar Chandra Pal* (10)

Mt. Gaura v. *Nawab Mahammad Abdul Majid* (11) is a decision of the Allahabad High Court but it contains only a non-committal statement and it cannot be regarded as an authority on the subject.

Bansidhar v. *Kharagjit* (12) decided that the insolvency Court had jurisdiction to adjudicate upon claims against third parties.

On a review of these decisions it seems to me that the preponderance of authority is in favour of holding that under Act III of 1907 the Court in exercise of its insolvency jurisdiction cannot decide questions relating to adverse claims by, or against, third parties,

In my opinion, however, as I observed at the outset, the case before us can be decided with reference to altogether different considerations. Section 16 (5) of Act III of 1907 saves

(6) 1922 Mad 147—45 Mad 434—42 M.L J 185—1922 M.W.N. 110—15 M.L.W.273—31 M.L.T. 86—65 I.C. 394.
(7) [1916] 22 C.W.N. 700—46 I. C. 335
(8) [1916] 22 C.W.N. 704—46 I.C. 377.
(9) [1916]22 C W N. 702 -44 I.C. 143.
(10) [1919] 45 I.C. 180.
(11) 1922 All 442—64 I.C. 523.
(12) [1914] 37 All. 65—12 A.L.J. 1273—26 I.C. 926.

the right of secured creditors, but the Court has in certain circumstances to decide questions in relation to secured creditors in the course of its administration of the insolvent's property. Section 21 (c) is an instance in point. Section 24 deals with proof of debt, and section 38 enumerates the debts which are provable in insolvency. Secured debts are not excluded. Section 31 relates to proof of debts due to secured creditors. It will be seen from the section to which I had adverted that a secured creditor may tender proof of his debt subject to certain conditions and limitations. Section 26 empowers the Court when a debt has been improperly entered in the schedule to expunge the debt in its entirety or reduce the amount of the debt. The power is expressed in general terms and no distinction is drawn between the debts unsecured and debts secured. The Court has to prepare a schedule of creditors which may be amended from time to time and this function cannot be properly or adequately performed unless the Court has equal power to deal with secured as well as unsecured debts. To a proceeding appropriate to this enquiry the parties are not a person subject to the insolvency Court and a stranger. On the other hand, the secured creditor whose debt is attacked is as much subject to the jurisdiction of the insolvency Court as any other creditor, the receiver or the insolvent. The authorities to which reference has been made deal with claims as between the insolvent's estate and third parties. But the respondent before us is not a third party. On the contrary, he alleges himself to be a creditor and it is impossible to frame a proper schedule without determining the existence of his debt and the extent of it.

In *Ellis* v. *Siber* (3) the distinction I have indicated is clearly set forth in the following passage in the judgment of Lord Selbourne, L. C. The passage is at p. 86 : [8 Ch. App.]

"That which is to be done in bankruptcy is the administration in bankruptcy. The debtor and the creditor, as the parties to the administration in bankruptcy, are subject to that jurisdiction. The trustees or assignees, as the persons intrusted with that administration, are subject to that jurisdiction. The assets which come to their hands and the mode of administering them are subject to that jurisdiction and there may be, and I believe are, some special classes of transactions, which, under special clauses of the Acts of Parliament, may be specially dealt with as regards third parties. But the general proposition, that whenever the assignees or trustees in bankruptcy or the trustees under such deeds as these have a demand at law or in equity as against a stranger to the bankruptcy, then that demand is to be prosecuted in the Court of Bankruptcy, appears to me to be a proposition entirely without the warrant of anything in the Acts of Parliament, and wholly unsupported by any trace or vestige whatever of authority."

In this connection I may refer to *Khushali Ram* v. *Bholar Mal* (13). It was held that when a creditor of the insolvent challenged the validity of a debt set up by another creditor, the Judge was bound to enquire into the truth of the allegation in insolvency and the parties should not be referred to a regular suit. The case would be exceedingly valuable as an authority but for the fact that the mortgage deed which was questioned was within two years of the adjudication and the decision could therefore be founded on the express terms of section 36 of the Provincial Insolvency Act, but the observation at page 253 "whether the application is to be regarded as one asking for the removal of the name of Bholar Mal from the schedule of creditors, or as one falling under the provisions of section 36 of the Provincial Insolvency Act (III of 1907), the matter was one which required investigation" and certain other similar observations to the same effect at page 254 lend support to the view I am inclined to take.

(13) [1914] 37 All. 252—13 A.L.J. 270—28 I.C. 573.

I am therefore of the opinion that the insolvency Court has jurisdiction to record a finding as to the existence of the debt alleged to be due to the respondent.

But then it is argued that sections 36 and 37 confer a limited jurisdiction upon the insolvency Courts and that to hold that the Court possesses the power in question will be inconsistent with the assumption involved in the said provisions. In my opinion, these two sections enact special rules of substantive law to be followed by the Courts in the exercise of insolvency jurisdiction. The law enunciated in the said sections is not a part of the genaral law and is to be applied only in cases which come up before the tribunals exercising powers conferred by the Insolvency Act. A comparison of the terms of section 53 of the Transfer of Property Act with the terms of section 36 of the Provincial Insolvency Act III of 1907, will make the point clear. A statement made by a person whose solvency is beyond question, but who owing to unforeseen circumstances, becomes an insolvent within two years of the date of the settlement, cannot be set aside under the general law which is contained in section 53 of the Transfer of Property Act. But it can be annulled under section 36 of the Provincial Insolvency Act. I have said that sections 36 and 37 enact rules of substantive law for the insolvency Courts. Looking at the sections from a slightly different point of view, that may, in my opinion be described as laying down rules of evidence. Wherever a voluntary transfer or a preference of a creditor on the one hand and adjudication of transferor or the debtor on the other hand, are brought into contiguity, the law peremptorily required a certain inference to be made,—enquiry is altogether excluded—and the inference will not be allowed to be displaced by any contrary proof however strong. The insolvency Courts shall presume that the transfer was made or preference shown by the insolvent with the intent to defeat his creditors. The presumption to be made is absolute or irrebuttable like the presumption contained in section 112 of the Indian Evidence Act as to the paternity of a child whose parents had access to each other.

In this view, sections 36 and 37 do not deal with the jurisdiction of the insolvency Courts, and if on a reference to other sections of the Act the Courts are found to possess certain powers, the jurisdiction is not affected by anything contained in the two sections above referred to.

Here I must turn to the unfortunate course the proceedings took before the District Munsif. The insolvency petition was presented by the debtor. His adjudication was opposed by several creditors and they filed what are described as counter-petitions. Some of the creditors objected that the amount due to the respondent (Secured creditor) was considerably less than what was alleged by the insolvent to be due to him. Others took a different line and made an allegation which is very indistinct in character but which is practically tantamount to an attack on the genuineness of the mortgage transaction. Although one of the creditors had by then been appointed a receiver, he in that capacity took no action to question the debt. The District Munsif however proceeded to enquire into the existence or otherwise of the debt upon the petition and the counter-petitions before him thus adpoting a course which has been condemned in *Appireddi* v. *Appireddi* (14). In his judgment he states that the only point to be considered was whether the deed of mortgage was supported by consideration. He is alive to the fact that section 36 had no application because the transfer was made about 4 years previous to the date of adjudication. Still having recorded a bare finding that the deed was not supported by consideration he directed that the name of the respondent should be deleted from the list

(14) 1922 Mad. 246—45 Mad. 189—14 L.W. 639—41 M.L.J. 606—1921 M.W.N. 816—66 I.C. 271.

of creditors. This course was obviously wrong. The mere fact that a transfer is voluntary will not justify the insolvency Court in setting aside the transfer. The District Munsif has not found that the mortgage amounted to a fraudulent transfer under section 53 of the Transfer of Property Act. He has not found that the transaction was fictitious or was a mere pretence and there was no intention to transfer; that is to say, that there was in effect no transfer at all, in other words, that the transferee was a mere benamidar for the transferor.

It is argued before us that there is a distinction between a transfer intended to defeat creditors and "a sham transfer so intended," and reliance was placed on *Swaminadha Iyer* v. *Rukmani Ammal* (15). I do not feel myself called upon to express my view of this ruling because in the present case it is immaterial whether the transfer is merely declared fictitious or an order is made annulling it. In either event the effect will be to refuse recognition to the debt evidenced by the transfer. It was the duty of the District Munsif to have directed his attention to this aspect of the case and then only to have pronounced upon the validity or otherwise of the transaction in question. While disagreeing with the District Judge in his view that the insolvency Court had no jurisdiction to deal with the question, I cannot however owing to the irregular and defective trial before the District Munsif, restore the order of the latter. He must be directed to frame proper issues and after giving the parties an opportunity to let in evidence, adjudicate upon the question which has been raised.

Costs will be costs in the cause and will be provided for in the order to be made by the District Munsif.

Case remanded.

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(15) [1920] 11 L.W. 106—55 I.C. 766.

✱ 1923 MADRAS 647

SCHWABE, C. J., OLDFIELD, AND RAMESAM, JJ.

Marakkarutti and others—Defendants—Appellants.

v.

Veeran Kutty and others—Plaintiffs—Respondents.

R. C. No. 17 of 1922, D/- 12th March, 1923.

Civil P. C., S. 151—Record destroyed owing to Moplah rebellion—Remedy.

There is inherent power in every Court to reconstruct its own records where it has been destroyed or lost and it follows that there is inherent power in the appellate Court to reconstruct the records of the Court from which an appeal lies to it. (2 Burrows 722; 42 Am. Dec. 640; 7 W.R. 18 Ref.) It may be that, in reconstructing the record, the Court will have to go very near to re-hearing, but the Court will always have to apply its mind to ascertain not what the rights of the parties were, but what the destroyed record of the suit was and on that record, when reconstructed, it will have to act on the ordinary principles on which it would have acted if the original record had been before it. It will be for the Judge, to whom the application is made, to decide how the reconstruction of the record is to be attempted. In the event of the appellate Judge being unable to reconstruct the record to his satisfaction, it must be borne in mind that the onus is on the appellant to establish his grounds of appeal and on the respondent his cross-objections, if any. [P. 648 C. 1, 2; P. 649 C. 1.]

K. P. Ramakrishna Iyer—for Respondent.

Schwabe, C. J.—This case is referred to us by the District Judge of South Malabar. It is an appeal from the District Munsiff of Parappanangadi. Difficulty has arisen owing to the fact of the District Munsif's Court having been destroyed in the Moplah rebellion and the records in this case at the same time destroyed. We are informed that there are many cases similarly affected, and the learned District Judge asks our direction as to what is the proper course to adopt.

The respondent only has been represented before us, but his vakil, Mr. K. P. Ramakrishna Ayyar, has assisted the Court very much by placing before us fully everything that he could find whether it was for him or against him in the matter. I think that one can safely start with the proposition that there is inherent

power in every Court to reconstruct its own records and I think it follows that there is inherent power in the Appellate Court to reconstruct the records of the Court from which an appeal lies to it. This power has been recognised in England and in America, which follows the English Common Law, and also in this country. The English case that is quoted on the subject is *Douglass* v. *Yallop* (1). The matter was more fully discussed in an American case, *Mc Lendon* v. *Jones* (2), a judgment of the Court of Alabama which quoted and followed *Douglass* v. *Yallop* (1) and a case which had been decided by the Supreme Court of New York; and that case points out, "Cases must frequently have occurred in which, by accident, the records of Courts of Justice have been destroyed or lost, and it would seem strange if the Common Law had provided no adequate means by which the injuries growing out of such accident could be averted or remedied," and then goes on to discuss the methods by which the remedy should be provided. I call attention to it because it states the matter more fully than the other reported cases. In this country the matter came before the Calcutta High Court in 1867 in *Babu Guru Dayal Singh* v. *Durbaree Lal Tewaree* (3), a judgment of Sir Barnes Peacock, C. J. and Jackson, J. In that case records had been lost in transit from the first Court to the second; the second Court acted on some documents purporting to be office copies which the High Court held were not regularly proved or admitted. The Court held that there were two alternative courses open, to direct the lower appellate Court to receive such secondary evidence of the contents of original records as may be forthcoming, or to order an entirely new trial. It decided against the second alternative for very cogent reasons with which we agree. It directed the lower appellate Court to receive secondary evidence of the contents of the whole record, but, if not able thus to replace the record, that the parties should be at liberty to adduce further evidence and, on the record so reconstructed and supplemented, give judgment. While agreeing in the main with this, we think it desirable to state our own view of the matter.

The first thing to observe is that the appellant has, in order to get his appeal heard at all, to satisfy the Court what the record is of the case in which he has failed. He can come to the Court and say that he has tried to get the record which has been destroyed. He can then ask the Court to be allowed to reconstruct that record. It is then for the Court, if so minded—I say that because it is conceivable that the Court may say, on the material at hand before it or on the appellant's application that no amount of reconstructing of the record would assist the appellant in his appeal—to permit the appellant to get the record reconstructed. The Court has not got to have the case reheard. The respondent is entitled to the benefit of having the judgment which he has got in his favour on the original hearing. It may be that, in reconstructing the record, the Court will have to go very near to rehearing, but the Court will always have to apply its mind to ascertain not what the rights of the parties were, but what the destroyed record of the suit was and on that record, when reconstructed, it will have to act on the ordinary principles on which it would have acted if the original record had been before it. It will be for the Judge to whom the application is made to decide how the reconstruction of the record is to be attempted—affidavits, counter-affidavits, the hearing of witnesses and the admission of copies are all methods which he can in a proper case allow. He will, of course, get the best evidence available. It will be open to him in a proper case to call for a finding of the District Munsif on what the record was. It may well be in some cases that it would be more convenient that the Court that heard the matter and made the record should do the reconstructing rather than the appellate Court and, with that in view, the appellate Court may

(1) 2 Burrows 722—97 E. R. 532.
(2) 42 Am. Dec. 640.
(3) [1867] 7 W.R. 18.

well in a proper case send the case to the District Munsif for the recording of evidence and a finding as to what the record consisted of, which finding, when given, it will be open to the appellate Court to accept or reject in the ordinary way. It is worth observing, that in the appellate Court, probably the best evidence of what took place in the Court below will be found in the judgment, if that has been preserved, of the District Munsif or the Subordinate Judge, as the case may be, who heard the case and recorded findings.

In the case at present before us, we have the District Munsif's judgment still existing, and he states on several matters the facts that were proved before him, and it is very clear that his statement as a contemporaneous statement of what took place before him or statement made at any rate a short time after it had taken place will be as good evidence as can be obtained and in all probability better than any other. In the event of the appellate Judge being unable to reconstruct the record to his satisfaction, it must be borne in mind that the *onus* is on the appellant to establish his grounds of appeal and on the respondent his cross-objections, if any.

Therefore, in this case we direct the District Judge of South Malabar to hear the appeal, and, if he thinks it necessary, to reconstruct the record for the purposes of the appeal in the manner suggested above. I do not think we can in anticipation usefully give any further instructions as to what should be done in these matters.

Costs of this reference will be costs in the appeal.

Oldfield, J.—I agree and have nothing to add.

Ramesam, J.—I agree.

Reference answered.

1923 MADRAS 649

SPENCER AND VENKATASUBBA RAO, JJ.

P. Govinda Menon—Appellant.

v.

P. K. Krishna Mannadiar and another—Respondents.

A.A.No. 20 of 1922, D/- 10th January 1923, against the order of the Dt. Court of South Malabar in A.S. No.178 of 1921 D/-20th August, 1921.

Civil P. C., S. 11—Execution proceedings—Objection as to executability of a decree.

If no objection is raised to the executability of the decree with respect to some items contained therein, and the decree is executed, no objection can be raised to its executability with respect to the other items. [P 651 C 1]

C. V. Ananthakrishna Iyer and *C. Unikanda Menon*—for Appellant.

K. P. M. Menon—for Respondents.

Spencer, J.—This second appeal arises out of orders passed in execution of the decree in a suit for redemption of a mortgage of a number of items of property in Malabar. The decree of the original Court was passed on 24th February, 1913, and there was a final decree of that Court on 22nd April, 1913. Meanwhile an appeal was brought against the preliminary decree, and that appeal was decided on 27th December, 1913. The present application is one made by the mortgagor to sell items 11 to 120. There was a previous application to sell items 1 to 10 upon which an order for sale was passed on 23rd July, 1915. The present application was made on 20th January, 1919.

Two questions arise for our decision. The first is whether the present application is barred by limitation as more than 3 years have elapsed from the date of the appellate Court's decree. The second question is whether this application for sale is valid when no final decree has been passed, since the appellate Court's decree varied the 1st Court's preliminary decree by enhancing the amount to be paid to the mortgagee.

On the 1st point I feel no difficulty in holding that the present is an application in execution and it is made within 3 years of previous

applications in execution of the same decree under Art. 182, Cl. 5 of the Limitation Act. It is therefore within time.

The 2nd question is one of some difficulty. The order of the executing Court on 23rd July, 1915 was that items 1 to 10 should be sold as prayed for. At first the decree-holder asked for the sale of all the items 1 to 12. The petitioner's final prayer was to sell items 1 to 10, and they were accordingly sold. No objection was then raised by the mortgagee,-judgment-debtor that the application was not admissible in the absence of a final decree, on the authority of *Govinda Taragan* v. *Veeran* (1). It was open to a mortgagor to apply for the sale of the mortgaged property, and accordingly items 1 to 10 were sold.

It is argued for respondents that at the time when that order was passed the executability of the decree was in question. The appellant's learned Vakil seeks to distinguish the present application from previous one on the ground that that was only an application for selling items 1 to 10 and he contends that the order does not operate as *res judicata* in an application to sell different items. He also points out that the application then made purported to be made under O. 34, R. 8, Civil Procedure Code, 1908, as well as under the execution chapter, so that if an objection had then been taken that there was no final decree, the decree-holder might have asked the Court to treat that application as one for a final decree as he was then in time under Art. 181 applying to the Court to pass a final decree.

In *Ramasami Reddi* v. *Rangamannar Iyengar* (2) a similar objection was raised that an order absolute had not been made before executing a mortgage decree, and it was held that the objection could not prevail when an order for execution had already been made after notice, and that order had not been set aside. An attempt is made to distinguish that case on the ground that there the property was the same in both applications for execution, whereas here the items are different. But here, as in that case, the decree was the same, and the objection to the executability of the decree is an objection, which if raised, would be common to the present application and to the previous one. In *Subba Chariar* v. *Muthuveeran Pillai* (3) it was held that where in the course of a second application for execution of a money decree an objection was raised that the application was barred by limitation not being within 3 years of the date of attachment, the judgment-debtor was estopped from contending that the attachment was not subsisting. The items appear to have been partly the same as in the previous petition and partly fresh items but the attachment was the same. In *Mungul Pershad Dichit* v. *Girja Kant Lahiri* (4) the Privy Council held that if an order for execution had been made by a Court which had jurisdiction to decide whether the decree was barred by time or not, even though such order might be erroneous, if it was not reversed, it would operate as *res judicata* in a subsequent application to execute the same decree. In *Raja of Ramnad* v. *Velusami Tevar* (5) a similar objection as to limitation arose. The appellant was the assignee of a decree and on a previous application to execute the decree a plea of limitation was raised. Their Lordships observed that it was not necessary to decide whether or not the plea would have succeeded if an appeal had been brought against the order for execution As the defendants did not appeal from the order then made, it was not competent for the executing Court in subsequent proceedings

(1) [1911] 36 Mad.,32—21 M.L.J.941—10M.L.T. 322-(1911) 2 M.W.N.323-12 I.C. 432.

(2) [1914] 26M.L.J 255—15 M.L.T.246—(1914) M.W.N. 622—23 I.C 390.

(3) [1913] 36 Mad. 553—24 M.L.J. 545—14 I.C. 264.

(4) [1882] 8 Cal. 51—8 I.A. 123—11 C.L.R. 113—4 Sar. 248 (P.C.)

(5) [1921] 48 I.A. 45—19 A.L.J. 168—40 M.L.J. 197—13 L.W. 290—1921 M.W.N. 51—33 C.L.J. 218—25 C.W.N. 581—23 Bom.L.R. 701—29 M.L.T. 345—59 I.C. 880 (P.C.)

to allow the plea to be raised a second time. Applying the reasoning of those decisions *mutatis mutandis* to the present case we may say that even though the executing Court did not, on a previous occasion, pronounce in so many words that the decree was executable in spite of there being no final decree passed after the appellate Court's decree, yet as that objection should have been taken then and as sale was ordered in execution of the decree as it stood, the effect of that order was to decide in favour of the executability of the decree and it is not open now to the appellant to raise the objection that there is no final decree in respect of the items now involved. No doubt the items are different but the question that should have been raised on the previous occasion and that is sought to be raised in the present case relates to the executability of the decree as a whole and that is a question common to all the items. I am therefore of opinion that the appellant is barred by *res judicata* from raising this objection in the present case and that the appeal must be dismissed with costs.

Both parties agree that before the final execution is made a commissioner should be appointed and there should be a valuation of improvements effected since the last valuation was made.

I consider it unnecessary to express an opinion whether, as was held by two learned Judges in *Nanu Nair v. Kandan Ashtamurthi Nambudripad* (6), there should be only one decree in mortgage suits in Malabar.

Venkatasubba Rao, J.—I entirely agree and have nothing to add.

Appeal dismissed.

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(6) [1918] 8 L.W. 275—1918 M.W. N. 551—47 I C. 914.

1923 MADRAS 651

OLDFIELD AND DEVADOSS, JJ

K. Sankaran Nair—Plaintiff—Appellant.

v.

K. K. Atchuthan and another—Defendants—Respondents.

R. C. No. 24 of 1922, D/-6th March, 1923.

Madras Act (1 of 188 9), Ss. 66, and 67—Civil P.C., S. 39 - Execution of decree—Jurisdiction of District Munsif.

A District Munsif, receiving by transfer a decree of a village Court under S. 66 of the Madras Act I of 1889 or withdrawing execution of a decree to his own file under S. 67 has no jurisdiction to transfer it for execution to another District Munsif's Court under S. 39, Civil P. C. The Act is intended to supply a complete Code of procedure for village Courts ; and there is therefore no reason for importing into that procedure the provisions of another statute, the Civil Procedure Code, the less so as the reference to transmission is in S. 66 against such importation.

Judgment.—The question referred to us is whether a District Munsif, receiving by transfer a decree of a village Court under S. 66 of the Madras Act I of 1889 or withdrawing execution of a decree to his own file under S. 67, has or has not jurisdiction to transfer it for execution to another District Munsif's Court under S. 39, Civil Procedure Code.

The learned District Munsif in referring this question has pointed out the great practical inconvenience of a negative answer to it ; and we fully appreciate the considerations he has referred to. It is however our duty to deal with the matter with reference to the law as it stands. Under S. 48 "the decrees shall be executed by the village Court, which passed it, or by a village Court or District Munsif, to whom it is sent for execution under the provisions hereinafter contained."

Under S. 66 " any decree passed by a village Court may, on the application of the decree-holder, be transmitted for execution to the District Munsif (who is defined earlier in the Act as the District Munsif within whose jurisdiction the Court is situate) who may execute the same, as if it were a decree passed by himself or may transmit it for execution to the Court of any other village, in which

the defendant is represented to have moveable property ;" and S. 67 authorises the District Munsif to take on his own motion the action authorized by S. 66. The result of these sections is not, in our opinion, to authorize the District Munsif to send a decree, which has been withdrawn to his own file for execution, to another District Munsif for that purpose. There is first no explicit reference to such transmission. There is next the explicit reference to a particular kind of transmission as open to the District Munsif, a transmission to the Court of any other village, in which the defendant is represented to have moveable property. In accordance with the ordinary canons of construction reference to this one kind of transmission is against an intention to authorize any other kind of transmission. The Act, as we understand it, is intended to supply a complete Code of procedure for village Courts ; and there is therefore no reason for importing into that procedure the provisions of another statute, the Civil Procedure Code, the less so as the reference to transmission in S. 66 is in our opinion against such importation.

We may add with reference to the applicability of the provisions of the Civil Procedure Code that in the Amending Act II of 1920, when it was desired to make one of those provisions, S. 60, applicable to the execution of village Court's decree, it was so made applicable by a special provision, S. 23.

We must answer the reference in the negative. No one has appeared on either side on this reference. Therefore no order as to costs is necessary.

Reference answered in the negative.

1923 MADRAS 652

SCHWABE, C.J.
[on difference between KRISHNAN and VENKATASUBBA RAO, JJ.]

Secretary of State for India—Appellant.

v.

Chellasani Venkataratnam — Respondent.

A. A. O. No. 26 of 1922, D/-19th January 1923, against the order of the Sub. J , Masulipatam D/-7th Sept. 1921.

Limitation Act, Ss.15 and 29 and Art. 16—Suit for recovery of water cess levied for unauthorised use of water—Madras Revenue Recovery Act (II of 1864) S. 59—Period of limitation—Two months notice to Collector.

A suit for the recovery of water cess levied under S. 1 of the Madras Irrigation Cess Act, 1865, for the unauthorised use by the plaintiff of water belonging to Government and paid by him under protest is governed by Art 16, Limitation Act. S. 59 of the Madras Revenue Recovery Act, 1864, does not apply.

Per Krishnan J. To a suit under S. 59 of the Revenue Recovery Act 1864, Limitation Act does not apply. 15 I. C. 328 Foll. 23 Mad. 571 Diss.

The Government Pleader — for the Appellant.

V. Krishna Mohan—for Respondent.

Krishnan, J.—The question that arises for decision in this case is one of limitation. Plaintiff sues the Secretary of State for India in Council for the refund of excess water cess collected from him for certain lands of his on the ground that he had unauthorisedly used Government water for their irrigation. He contends that he did not take any water unauthorisedly and that he was not liable for the cess so collected from him. The cess was imposed on him under Section 1 of the Irrigation Cess Act, VII of 1865, Section 2 of that Act provides that :

" Water cess payable under this Act shall be realised in the same manner as arrears of land revenue are or may be realised by law."

The reference is to the Revenue Recovery Act II of 1864. The water cess in question here was paid by the plaintiff under protest when a demand notice by the Collector was served on him under the latter Act ; he now seeks by the present suit to get a refund of it with interest. The suit was filed within 8 months from the date of payment but beyond 6 months therefrom.

The District Munsif applied the six months' rule in Sect. 59 of Act II of 1864 and rejecting the argument that plaintiff was entitled to deduct in his favour under S. 15, Cl. (2) of the Limitation Act the two months' period of the notice he had to give under S. 80, Civil Procedure Code, before bringing his suit he dismissed the suit as barred by limitation. The Subordinate Judge on appeal took a different view and held, relying on *Srinivasa Ayyangar* v *Secy. of State* (1), that plaintiff was entitled to the deduction claimed and that the suit was in time. He reversed the decree of the 1st Court and remanded the case for disposal on the merits. The present appeal to us is by the Secretary of State against that order.

Before deciding whether plaintiff is entitled to the deduction claimed or not, it is necessary to consider what rule of limitation applies, for it is argued that the limitation applicable is not the six months' rule under S. 59 but the one year's rule under Art. 16 of Limitation Act. If this argument is correct the suit is well within time. Though the lower Courts have decided this point against the respondent it is no doubt open to him to support the order of the Subordinate Judge on the ground urged. It seems to me, however, that the argument is not sound ; for in my opinion the suit is one falling within the very words of S. 59 and if that view is correct the application of Art. 16 will be excluded even if the suit fell within the words of that article also, for the former is the Special Law and as such it must prevail. S. 29 (b) of the Limitation Act. also expressly enacts so.

The water cess we are concerned with in this case was, as already stated, imposed on the plaintiff under Act VII of 1865. S. 2 of that Act applies the procedure for the collection of land revenue to the collection of water cess. Now it was argued for the respondent that the wording of Section 2 does not apply all the sections of the Revenue Recovery Act to the collection of water cess but only such of the sections that deal with the method of collection or the procedure prescribed for it and it was contended that S. 59 did not fall under that description and was not attracted by S. 2 of the Cess Act. Reliance was placed for this argument on certain rulings under the Abkari and Income-tax Acts where it was held that similar provisions applying the procedure of the Revenue Recovery Act for collection of arrears under those Acts did not make S. 42 of the Act applicable to sales for such arrears. See *Ramachandra* v. *Pitchaikanni* (2) and *Kadir Mohideen Marakayar* v. *Muthukrishna Ayyar* (3). The learned Government Pleader on the other side, pointed out that it has been held that these rulings are not applicable to the case of water cess in *Veeranan Ambalam* v. *Karuppiah Pillai* (4) and *Gunnam Dorayya* v. *Vadappalli Ayyamacharyulu* (5) the reason given being that the Revenue Recovery Act II of 1864 itself by the definition of the term Public Revenue in Sect. 1 made that term include water cess ; so that all the provisions of that Act by their own force would apply to the collection of arrears of water cess. The respondent in answer has drawn our attention to the fact that Section 1 of Act 11 of 1864 deals only with water cess imposed for water supplied by the Government for irrigation and he has contended that it cannot therefore apply to water unauthorisedly taken and so not supplied. Assuming that the respondent's contention is correct and that the view expressed in *Gunnam Dorayya* v *Vadayalli Ayyam Charyylu* (5) that Sect. 2 is a mere surplusage is incorrect, and that we must rely upon that section to make Act II of 1864 applicable to the collection of arrears of water cess charged for water unathorisedly taken I am still of opinion that the words of S. 2 are sufficient to make

(1) [1915] 38 Mad. 92—24 M.L.J. 41—18 I.C. 617.

(2) [1884] 7 Mad. 434.

(3) [1903] 26 Mad 230—12 M.L.J. 368.

(4) [1914] 37 Mad 49—24 M.L.J. 511—19 I. C. 386.

(5) [1914] 27 M.L.J. 295—16 M.L T. 226 - (1914) M.W.N. 648—25 I.C. 797.

S. 59 applicable to this case, whether S. 42 applies or not, S. 59 applies by its own language to all suits brought by parties aggrieved by any proceedings taken under the Revenue Recovery Act, whether such proceedings were taken to collect arrears of water cess or dues authorised to be collected under it. As pointed out by Sadasiva Aiyar, J.,in *Ramaswami Iyer* v. *Secy. of State* (6) the ambit of Sect. 59 is very different from that of S. 42 the period of limitation provided under S. 59 was applied in that case and not Art. 16, to a suit arising under the Kudimarmath Act, I of 1858 which authorised the Collector to recover the value of labour which the plaintiff had to contribute " in accordance with the procedure prescribed under Act II of 1864." The same view was taken by the late Chief Justice Sir Arnold White and Mr. Justice Benson in *Orr* v. *Secy. of State* (7) with reference to fees payable to village servants collectable under S 52 of Act II of 864 itself "in the same manner as arrears as land revenue." It will also be noticed in connection with the next argument that in that case money was paid under protest and no further proceedings were taken. The case in *Sankarappa Naicken* v *Secy. of State* (8) also takes the same view ; following these rulings I hold that Sect. 59 applies.

It was next argued that as money was paid on demand being served on the plaintiff under Act II of 1864, and nothing further was done there were no " proceedings " under the Act about which plaintiff was complaining in this suit but he is only seeking to get a refund of his money under the general law and therefore Section. 59 does not apply. Certain unreported decisions in S. A. Nos. 838 and 845 of 1940, and the rulings of this High Court reported in *Ravula Vengala Reddi* v. *Secy of State* (9) and *Ravvula Nagamma* v. *Secy. of State* (10) were cited in support of this argument. With all respect, I am quite unable to follow these rulings. As against them there are the cases in *Orr* v *Secy. of State* (7), and *Sankarappa Naicker* v. *Secy. of State.* (8) already cited. It seems to me the proceedings begin by the distraining officer producing a demand in writing from the Collector giving the name of the defaulter and the amount of water cess payable by him, and showing it to the defaulter. That is a part of the proceeding under S. 8 of the Act ; in fact it is the first step. I see no reason to hold that the proceedings mentioned in S. 59 refer only to subsequent proceedings after demand and not to the demand itself. There does not seem to be any justification for making such an artificial distinction. The cases referred to by the respondent have never been followed or treated as good law. It is clear to my mind that the plaintiff in this suit is a person who deems himself aggrieved by the proceedings under the Revenue Recovery Act by which he was compelled to pay water-cess for which according to his case he was not liable and that he is seeking redress in this suit by suing for a refund of the money. The case falls in my view exactly within the langugage of S. 59 and the rule of limitation provided in it applies.

The next question is whether the plaintiff is entitled to the deduction he claims. No doubt the ruling in *Srinivasa Ayyangar* v. *Secy. of State* (1) is exactly in point in his fovour but after the ruling in the Full Bench case reported in *Lingayya* v. *Chinna Narayana* (11) that case cannot be considered to be good law, though it was not formally overruled. The principle adopted in that Full Bench case is directly against the reasoning on which *Srinivasa Ayyanga* v. *The Secretary of State for India* (1) is based. It has now been taken as settled that the application of the general

(6) [1915] M.W. N. 154—26 I.C. 863.
(7) [1900] 23 Mad. 571—10 M.L.J. 261.
(8) [1910] M.W.N., 404—8 M.L.T. 201—20 M. L. J. 977—7 I. C. 339
(9) [1912] 15 I. C. 328.
(10) [1913] M.W.N. 75—18 I. C. 699.
(11) [1918] 41 Mad. 169—7 L. W., 443—33 M. L. J. 566—44 I. C. 805 (F.B.)

provisions of the Limitation Act in Ss. 5 to 25 to the limitation prescribed by special or local laws would " affect or alter " the periods so prescribed and is therefore prohibited by S. 29 of the Limitation Act. The distinction sought to be made in *Srinivasa Ayyangar* v. *Secy. of State* (1) between Special Acts which do not contain " a complete body of provisions with regard to limitation of suits coming within their purview" and other Acts which do contain them was rejected in the Full Bench case and I have therefore no hesitation in holding that plaintiff was not entitled to the deduction he claims under S. 15. Cl. (2). The Calcutta High Court has taken the same view in *Secy. of State* v. *Shib Narain Hajra* (12). The point is however of little importance hereafter as the amending Act X of 1922 has made provision for it. But it is not argued that that Act applies to the present case for the suit here was barred before that Act came into force. In the view I take, the plaintiff's suit is barred by limitation. I would therefore reverse the order of the Subordinate Judge and restore the decree of the District Munsif with costs here and in the lower appellate Court.

Venkatasubba Rao, J.—The Government recovered from the plaintiff penal assessment under the Madras Irrigation Cess Act (VII of 1865) for unauthorized use of water and the plaintiff claimed in this suit refund of the amount so recovered from him. The Government pleaded that suit was barred by limitation. The District Munsif accepted the contention and dismissed the suit. On appeal the Subordinate Judge reversed the decision of the District Munsif on the question of limitation and remanded the suit for disposal on the merits. The present appeal is by the Government against the order of remand.

On behalf of the plaintiff it is argued:

1. that the provision of law applicable is Art. 16 of the Limitation Act under which the period of limitation is one year and not S. 59 of the Madras Revenue Recovery Act (II of 1864) under which the period is six months.

2. Where there was a mere demand by the Government and money was paid and no further proceeding was taken that Section 59 of the Revenue Recovery Act is not applicable because there was no proceeding under that Act.

3. Should the period of limitation be held to be six months under S 59 of Act II of 1864, that the plaintiff is entitled to exclude the period of notice prescribed by S. 80, Civil Procedure Code in computing the said period of six months.

In my opinion, the provision of law applicable is Art. 16 of the Limitation Act and not S. 59 of the Revenue Recovery Act. I shall presently state my grounds for this opinion and as I entertain no doubt on the point, I consider it unnecessary to deal with the other two contentions urged before us. As already stated the penal assessment was collected from the plaintiff under the Irrigation Cess Act (VII of 1865). S 1 of the said Act, so far as it is relevant for the present purpose enacts.

(*a*) "Whenever water is supplied or used for purposes of irrigation from any river * * * * belonging to or constructed by Government and also,

(b) " Whenever water by direct or indirect flow or by percolation or drainage from any such river, irrigates any land under cultivation or flows into a reservoir, and is thereafter used for irrigating any land * * * it shall be lawful for the Government * * * to levy * * * a separate cess for such water."

S. 2 provides :

"Arrears of water-cess payable under this Act shall be realised in the same manner, as arrears, of land revenue are, or may be realised by law in the Madras Presidency."

Arrears of land revenue are realised under the Madras Revenue Recovery Act (II of 1864) and the reference in the section above quoted is to the provisions of the said Act.

S. 2 may be rendered thus :—

(12) [1919] 46 Cal., 199—22 C.W.N 802—47 I. C. 502.

"Arrears of water-cess payable under this Act shall be realised in the manner prescribed by the Revenue Recovery Act in regard to arrears of land revenue."

In my opinion, the meaning of S. 2 is, that all the sections of the Revenue Recovery Act, that relate to the manner of realising arrears of land revenue, shall be read as if they form part and parcel of the Irrigation Cess Act.

S. 59 of the Revenue Recovery Act runs as follows :—

"Nothing contained in this Act shall be held to prevent parties deeming themselves aggrieved by any proceedings under this Act .....from applying to the Civil Courts, for redress' provided that Civil Courts, shall not take cognizance of any suit instituted by such parties for any such cause of action unless such suit shall be instituted within six months from the time at which the cause of action arose."

The learned Government Pleader argues that S. 59 is applicable to this case and this argument implies that the said section deals with the manner of realising arrears of revenue. S. 59 does nothing of the kind. It pre-supposes that the revenue has been realised and it prescribes the remedy to an aggrieved person against the Government. It refers to parties aggrieved by any proceedings "under this Act" that is under the Revenue Recovery Act. It refers to a suit instituted by "such parties" and for "such cause of action," "such parties" being, parties deeming themselves aggrieved by any proceedings under the Revenue Recovery Act and "such suit" and "such cause of action" can only refer to what is contemplated by the section.

I fail to see how S. 59 can come within the group of sections which refer to the manner in which land revenue is realised. If the legislature instead of merely saying "arrears shall be realised in the same manner as arrears of land revenue are under the Revenue Recovery Act", had reproduced *enbloc* all the sections of the latter Act which deal with the mode of realising revenue and re-enacted them in the Irrigation Cess Act, could it for a moment be contended that Sect. 59 of the Revenue Recovery Act would be applicable to suits filed for the refund of penal assessment collected under the Irrigation Cess Act ? To my mind, I have no doubt whatever, that Sect. 2 of the Irrigation Cess Act merely incorporates by reference only those sections of the Revenue Recovery Act that deal with the manner of realising land revenue. S. 59 is clearly not one of those sections.

Let me now turn to Art. 16 of the Limitation Act "against Government to recover money paid under protest in satisfaction of a claim made by the revenue authority, on account of arrears of revenue or on account of demand.....recoverable as such arrears-*one year*.....when the payment is made".

This article in terms applies to the present suit. The only argument advanced on behalf of the Government against its applicability, is that a special rule is enacted in S. 59 of the Revenue recovery Act and that an article in a general Act should not be applied when a section of a Special Act is applicable.

It will be noticed that the article of the Limitation Act is quite general in its terms. It refers to arrears of revenue. Land revenue alone is removed from the scope of the said article by reason of the fact that a special provision is enacted in respect of it by S. 59 of the Revenue Recovery Act.

S. 66 of the Madras Forest Act (V of 1882) provides that all money payable to the Government under that Act may be recovered "as if it were an arrear of land revenue." Similarly S. 84 of the Madras Salt Act (IV of 1889) provides that all sums recoverable under that Act, may be recovered "as if they were arrears of land revenue." Again S. 28 of the Madras Abkari Act (1 of 1886) enacts that certain sums due to the Government may be recovered "as if they were arrears of land revenue." It is unnecessary to refer to various other acts in which similar provisions occur. Does it then mean that S. 59 of the

Revenue Recovery Act applies to suits instituted for recovery of money paid to Government on account of alleged arrears of revenue under any of these Acts? If this view should be taken, Art. 16 of the Limitation Act would practically be a dead letter. I fail to see why the plain provisions of Art. 16 of the Limitation Act should not be given effect to and why a forced construction should be placed upon S. 2 of the Irrigation Cess Act for the purpose of enabling the Government to plead a rule of limitation in bar of an admitted right to sue.

Land revenue being the most important item of revenue due to the Government, the legislature has in the Revenue Recovery Act enacted in detail the procedure for realising it. When the legislature came to deal with other sources of revenue like Salt, Abkari, Income-tax, Irrigation cess, the legislature thought it sufficient to enact that all sums payable to the Government in respect of each particular head of revenue could be recovered as if it were an arrear of land revenue. The legislature could not have intended by mere reference to the procedure for realisation of land revenue, that a provision of the Revenue Recovery Act which does not deal with such procedure should be incorporated in the Special Acts.

The District Munsif refers to S. 1 of the Revenue Recovery Act, and by some argument which I am unable to follow, comes to the conclusion that by reason of the wording of that section, S. 59 applies to this case. The material portion of S. 1 is as follows:—

"Public revenue due on land shall for the purposes of this Act be taken to include cesses or other dues payable to Government on account of water supplied for irrigation."

Whether S. 1 of the Revenue Recovery Act and S. 2 of the Irrigation Cess Act overlap each other or not, it is unnecessary for me to discuss. But one thing is certain; in this case water-cess was not levied for water *supplied* for irrigation. On the other hand as the District Munsif remarks at the close of his judgment, it was the unauthorised *use* of water that entailed penal assessment. The Revenue Recovery Act refers not only to water supplied but also to water *used*. In this suit we are concerned only with water used and not with water supplied and the reference by the District Munsif to S. 1 of the Revenue Recovery Act seems altogether irrelevant.

For these reasons I have come to the conclusion that the suit is not barred by limitation and I would therefore dismiss the appeal with costs.

By the Court.—As we have differed on a point of law *viz.*, whether the suit is barred by limitation or not, we refer the point under S. 98, Civil Procedure Code for the decision of a third Judge.

Schwabe, C. J.—In this case claim was made for water cess. The assessee paid under protest, gave notice claiming the amount he paid and commenced this suit seven months after the payment but within eight months of it. It is contended by the Crown that the suit is barred by limitation under S. 59 of the Revenue Recovery Act, II of 1864. That section runs thus:—

"Nothing contained in this Act shall be held to prevent parties deeming themselves aggrieved by any proceedings under this Act from applying to the Civil Courts for redress: provided that Civil Courts shall not take cognizance of any suit instituted by such parties for any such cause of action unless such suit shall be instituted within six months from the time at which the cause of action arose."

I will assume that that section applies to cases arising out of the collection or imposition of cess under the Madras Irrigation Cess Act, VII of 1865. By Art. 16 of the Limitation Act a period of one year is given for suits "against Government to recover money paid under protest in satisfaction of the claim made by the revenue authorities on account of arrears of revenue or on account of demands recoverable as such arrears." That section applies in terms to this case

unless there is something in S. 59 of the Rent Recovery Act which prevents its applying S. 29 (1) (*b*) of the Limitation Act which says :—

"Nothing in this act shall affect or alter any period of limitation specially prescribed for any suit by any special or local law now or hereafter in force in British India"

There is a futher provision in S. 15 (2) of that Act that :—

"in computing the period of limitation prescribed for any suit of which notice has been given in accordance with the requirements of any enactment for the time being, in force, the period of such notice shall be excluded," and under S. 80 of the C. C. P. no suit can be instituted against the Secretary of State in Council unless two months' notice is given. It has therefore to be contended for the Crown that S. 59 of the Revenue Recovery Act, by reason of S. 29 of the Limitation Act, not only excludes Art. 16, but also by reason of the same section, prevents the application of S. 15 of the Limitation Act so that the period of two months is not in this particular instance to be excluded. In my judgment, this is not a case under S. 59 of the Revenue Recovery Act at all, because it is not the case of a party deeming himself aggrieved by any 'proceeding' under that Act. I doubt very much whether a demand of payment is a proceeding under the Act at all as contemplated by that section. I am quite clear that a person, who pays under protest when a demand is made and claims to recover back, is not a person aggrieved by any proceeding under the Act. He has taken a wise course, which prevents his having a grievance.

There is, direct authority in support of this view in *Ravula Vengala* v. *Secy. of State* (9), which followed a series of appeals, S. A. Nos. 838 and 844 of 1910 and 240 to 244 of 1911, the judgments in which, I regret, have not been published, because the point is fully discussed there and decided. The only authority to the contrary is the case of *Orr* v. *Secy. of State* (7). In that case, without giving any reasons the Court expressed a view that, in the cricumstances of that case, S. 59 applied where there had been a payment under protest, to the exclusion of Art. 16 of the Limitation Act. It was unnecessary for that decision (which no doubt explains why no reasons were given) because in that case, the Court held on the merits that there was no case. That case was considered by the Bench in *Ravula Vangala* v. *Secy. of State* (9) and in the cases therein referred to, and distinguished. *Ravula Nagamma* v. *Secy. of State* (10), which was also referred to, does not touch this point.

In this state of authorities, sitting alone, I should have considered myself bound to follow the decision in *Ravula Vengala* v. *Secy. of State* (9) but it is open to me, sitting as I am now, to express my own views, and I agree with the decision in *Ravula Vengala* v. *Secy of. State* (9) for the reason given in that case and in the unreported cases referred to therein, and I disagree with that part of the judgment in *Orr* v. *Secy. of State* (7) which is to the contrary.

That being my view, it is enough to dispose of the case ; but although I have not heard the matter fully argued, I think it right to say that I should find it very difficult to hold that S. 29 of the Limitation Act, even if it has any application in this case operated to exclude the two months' time given by S. 15 of that Act, for there is nothing in S. 59, of the Revenue Recovery Act to suggest that the six months limited there is to include the period which is by the general law excluded.

The appeal will be dismissed with costs, including the costs of this reference.

Appeal dismissed.

1923 MADRAS 659

ODGERS, J.

A. C. Subba Reddi and another—Petitioners.

v.

Vasireddi Jayaramayya and others—Respondents.

Civil Rev. Pet. No. 88 of 1922, D/- 5th February, 1923, to revise the order of the Dt. Judge of Guntur, D/- the 10th Sep. 1921.

(a) *Civil P. C., O. 21 R. 89—Contract of sale creates no interest.*

Persons entitled under a contract for the sale of immoveable property are not persons entitled to apply under O. 21 R. 89. 23 B 181 Foll.

If the conveyance be prior to the attachment the pur-chasers would equally have no *locus standi* as their interests are not effected. 16 M 470. Ref. [P. 660 C. 1]

(b) *Civil P. C., S. 115—Wrongly entertaining application under O. 21 R. 89.*

The High Court can interfere in revision if an application under O. 21 R. 89 has been wrongly admitted on the ground that it was made by a person interested to apply. 44 M 554 F. B. App. [P. 660 C. 2]

Ch. Raghava Rao—for Petitioners.

Judgment.—In this case the petitioners are the auction-purchaser and decree-holder of certain property sold in Court-auction on the 14th September, 1920. It appears that the plaintiff and certain others in O. S. No 319 of 1917 on the file of the Additional District Munsif's Court of Guntur made an "arrangement" (as it is called) on the 26th May, 1915 that they should purchase the entire property of the judgment-debtor and distribute the proceeds rateably among his creditors. On the 10th June, 1917, the petitioners here attached the whole of the properties, the subject of the aforesaid arrangement. On the 2nd September, 1919, it is said that there was a conveyance in favour of the respondents in pursuance of the agreement of 1915. A suit was instituted to estop the petitioners before me from proceeding in execution of their decree in O. S. No. 319 of 1917 and on the 13th September, 1920 a temporary injunction was obtained against them for that purpose. It was dissolved on the next day 14th September, 1920, on which day, also the Court auction was held and the petitioners were declared to be the purchasers. On the 25th September, 1920 an application was made by the respondents here to set aside the sale. This application was made on the ground that one of the respondents to the petition had fraudulently deceived the Court by having the property put up again on the 14th September, 1920, without a fresh proclamation for sale. It was also said that the property which was worth about Rs. 1000 was knocked down for Rs. 600. The interest which it is necessary that he should allege under O. 21, R. 90, Civil Procedure Code, before be can show a *locus standi* to have the sale set aside is the agreement of the 26th May, 1915 and the conveyance of 2nd September, 1919. In the application dealt with by the learned District Munsif he found that no fraud had been proved nor was there any irregularity in the conduct of the sale and that the adjournment of the sale was justified and was authorised by O. 21, R 69 (1). It appears from the Sub-sect. 2 of that order that so long as the adjournment is made for not longer than 7 days no fresh proclamation is necessary. The petitioners examined no witnesses and offered no evidence and their petition was dismissed. On appeal to the District Judge he apparently held that the District Munsif had decided the petition on the preliminary point as to their interest, the learned District Munsif having said "It is not at all clear that petitioners are persons entitled to apply under this provision of law." It is however clear to my mind that the District Munsif went into the merits, and it was only after his decision on the merits that he made this observation as to interest. The District Judge however thought that the interests of the petitioners were affected or might be affected by the sale. The District Munsif having found that the petitioners had no interest could take no other course than to dismiss the petition no opportunity having been given to adduce evidence. It is somewhat remarkable that the petitioners

themselves when the case came up before the District Munsif's Court on the 25th October, 1920, requested an adjournment till the following day when the petition was heard.

As to the question of the respondents' interest, it has been argued before me by Mr. Raghava Rao that the respondents have no interest on three grounds. First that the agreement of the 26th May, 1915, creates no interest as it conveyed no interest in real property within S. 54 of the Transfer of Property Act to the respondents who claim to be trustees under that agreement for the benefit of the creditors, and persons entitled under a contract for the sale of immoveable property are according to the authority of *Mahadeo* v. *Vasudev Kirtikar* (1) not persons entitled to apply under S. 310 (a) of the Civil Procedure Code corresponding to the present. O. 21, R. 89.

The second ground is that the conveyance is subsequent to the petitioner's attachment and therefore cannot operate to pass any property which is the subject of that attachment. It is clear that the attachment was on the 10th June, 1917, and the conveyance on the 2nd September, 1919. S. 64 Civil Procedure Code declares that any such transfer of property attached shall be void as against all claims enforceable under the attachment and the case in *Girijanath Roy Chowdhury* v. *Upendranath Pal* (2) holds that the auction-purchaser stood in this position with regard to S. 276 of the old Code which corresponds to S. 64 of the present Code.

Thirdly if the conveyance had been prior to the attachment the respondents would equally have had no *locus standi* as their interests were not affected. This seems to be established by the cases in *Subbaraydu* v. *Pedda Subbarazu* (3) and *Fotick Chunder Dey Sircar* v. *Foley* (4). The Full Bench case of *Sundaram* v. *Mamsa Mavuthar* (5) is authority for the proposition that the High Court can interfere in revision if an application under O. 21, R. 89 has been dismissed on the ground that it was made by a person not entitled to apply. I assume that the converse holds good. It is perhaps unfortunate in this case that the respondents have not appeared. But I have had the advantage of a full argument on behalf of the petitioners and on a consideration of the points advanced by their learned vakil I think they ought to succeed. I must therefore come to the conclusion that this is a case in which I ought to interfere in revision and set aside the order of the learned District Judge of 10th September, 1921. This I accordingly do.

The Petitioners must have their costs.

Petition allowed.

(1) [1899] 23 Bom., 181,
(2) [1913] 20 I. C. 241.
(3) [1893] 16 Mad. 476.
(4) [1888] 15 Cal. 492.
(5) [1921] 44 Mad 554—40 M.L.J. 497—13 L.W. 498—29 M.L.T. 269—(1921) M.W.N. 272—63 I.C. 937 (F. B.)

✱ 1923 MADRAS 660

OLDFIELD AND RAMESAM, JJ.

Ramanathan Chettiar—Accused—Petitioner.

v.

King Emperor—Opposite Party.

Cr.Rev. No. 115 of 1912 and Cr. Rev Pet. No. 106 of 1922, D/-15th August 1922, to revise the order of the Court of the Sub-Divisional Magistrate of Madura Division, D/- 7th November. 1921.

Criminal P. C, S. 350 (1) (a)—Procedure in warrant case before charge.

Section 350 (1) (a), Cr. P. C. cannot be applied to proceedings in a warrant case, before the charge has been framed. At that stage the proceeding is not a trial, but is merely an enquiry. [P. 661 C. 1]

A. Narasimha Iyer—for the Petitioner.

The Public Prosecutor—for the Crown.

Order.—The question before us is in effect whether S. 350 (1) (a)

Criminal Procedure Code can be applied to proceedings in a warrant case, before the charge has been framed. That is in effect whether at that stage the proceeding is not a trial, but merely an enquiry. The authorities *Narayanasawmy Naidu* v. *Emperor* (1) *Sriramulu* v. *Veerasalingam* (2) and *Venkatachinnayya* v. *King Emperor* (3) are in favour of the view that such a proceeding is merely an enquiry; and we see no reason for departure from this series of considered decisions, two of them given by a Full Bench. There is therefore no legal objection to the Magistrate's order and the Revision Petition must be dismissed.

Petition dismissed.

(1) [1908] 32 Mad. 220—5 M.L.T. 233—19 M.L.J. 157—9 Cr. L.J. 192—1 I.C. 228 (**F.B.**)

(2) [1914] 38 Mad. 585—27 M.L.J 589—16 M.L.T. 303—(1914) M.W. N. 646—15 Cr. L.J. 676—25 I.C. 1001.

(3) [1920] 43 Mad. 511 (**F.B.**)

1923 MADRAS 661

AYLING AND RAMESAM, JJ.

Sundara aja Chariar—Plaintiff—Appellant

v.

Ali Muhammad Ethibar Khan Sahib and others—Defendants.—Respondents.

S. A. No. 150 of 1922, D/- 23rd January, 1923, against the decree of the Sub. J., Trichinopoly in A. S. No. 53 of 1918.

Grant—Inam-Charity Inam—Construction—Deed effected by trustee—Effect.

In a suit for an injuction restraining the defendants from interfering with the plaintiff's, possession of the suit lands, the plaintiff alleged that he had been the Kudivaramdar of the suit lands prior to 1882 on condition of delivering waram to the landlord and that in 1882 the predecessor-in-title of the defendants executed a deed under which the waram was commuted into a fixed money rent and that the defendant claiming to revert to the waram rate, were interfering with the plaintiff harvesting his crops. The defendants contended that as the inam was a charity Inam the deed of 1882 was not binding on them.

Held that the suit lands were inam lands and the deed of 1882 was not binding on the charity nor the defendants who were trustees of the charity. The fact that a third share of the proceeds is being appropriated by the inamdars for their private uses does not make it the less a charity inam as the grant was only one and cannot be split up into two parts—a personal grant of one-third and a charity grant of two-thirds of the inam. 40 M. 116 Ref. [P. 661 C. 2 P.662 C.1]

T. Narasimha Iyengar—for Appellant.

S. Varadachariar and *V. Ganapathi*—for Respondents.

Judgment.-The suit was brought for an injunction restraining the defendants from interfering with the plaintiff's possession of the suit lands. The plaintiff alleged that he had been the Kudiwaramdar of the suit lands prior to 1882 on condition of delivering waram to the landlord and that in 1882 the predecessor-in-title of the defendants executed Ex. A under which the waram was commuted into a fixed money rent and that the defendants claiming to revert to the waram rate, were interfering with the plaintiff harvesting his crops. The defendants originally denied that plaintiff was the kudivaramdar and contended that as the inam was a charity inam, Ex. A was not binding on them. During the course of the trial, the plaintiff's right as kudivaramdar was conceded. The Subordinate Judge decided against the plaintiff and he appeals.

The first question that arises for decision is the nature of the inam. Ex. II is the inam register. In column 8 it was described as Kyrati which means, according to Maclean's Glossory Vol. III, p. 415 a charity inam (Kheiranty) (See also Wilson's Glossory, Khairat). The suit inam was described in Wallace's Register as "to the charity of Ithbar Khan" (*Vide* Column 14, Ex. II). This is the earliest description of it now available. In Column 21 the Deputy Collector describes it as forming "the grant for the support of the charities of Muhammad Ithabar Khan consisting of a chatram, a water pandal and a mosque." He then mentions that a former Collector and the Board of Revenue considered it as falling within the operation of Regulation VII of 1817 (The Madras Endow-

ments and Escheats Regulation, 1817) and concludes by proposing to "fix a Jodi of 2/3rds of the Regular Survery Assessment, which will become the property of the charities to be applied to them by the managers for the time being." But in Column 22, the order of the Commissioner was "confirmed for the support of the mosque, water pandal and chatram on the understanding that the whole village will be resumed unless 2/3rds of the proceeds are appropriated to the support of the above purposes." It is clear that the inam Commissioner did not accept the recommendation of the Deputy Collector. The entry in Column 2 as "personal" and in Column 9 "Free; Jodi now imposed personal" and in Column 9 "Free: Jody now imposed Rs. 310" must be regarded as embodying the Deputy Collector's view and as not being adopted by the Commissioner. The fact that a third share of the proceeds is being appropriated by the inamdars for their private uses does not make it the less a charity inam [See *Ramanathan Chettiar* v. *Vava Levvai Marakayar* (1)] as the grant was only one and cannot be split up in two parts—a personal grant of one-third and a charity grant of two-thirds to the inam. It follows that Ex. A is not binding on the charity.

The next point argued is that the defendants are barred by limitation from repudiating the transaction of 1882. The plaintiff is a tenant and had been a tenant of the suit land prior to 1882. It is impossible for him to prescribe for the estate of a tenant holding on more favourable terms as the character of the tenant's possession continues and there can be no prescription. In this view, no question of limitation arises and it is unnecessary to consider the effect of the decisions in *Vidya Varuthi* v. *Baluswami Iyer* (2), *Damodar Das* v. *Lakhan Das* (3), *Narasayya Upada* v. *Venkataramana Bhatta* (4) and *Gnana Sambanda Pandara Sannadhi* v. *Velu Pandaram* (5).

Nor are the defendants estopped by their conduct from questioning Ex. A. In so doing, they do not act in their personal right but as trustees of the institution which cannot suffer from their conduct [See *Yasim Sahib* v. *Ekambara Aiyar* (6)].

The result is there will be a declaration that the plaintiff is entitled to hold the suit lands as kudivaramdar on condition of paying the waram rate prevailing prior to 1882. The decree will be modified accordingly. As Ex. A provides that, when the landlord wishes to revert to waram, he can do so only on returning the Rs. 3,000 borrowed by him from the plaintiff, our decision will not stand in the way of plaintiff, recovering such portion of the Rs. 3,000 as may be binding on the trust from the properties appertaining to the charity or the whole of the amount from the heirs of the executants of Ex. A, if so advised. As the plaintiff has substantially failed he will pay the defendant's costs.

Decree modified.

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(1) [1917] 40 Mad. 116—44 I.A. 21—32 M.L.J. 101—15 A.L.J. 139—(1917) M.W.N. 180—19 Bom. L.R. 401—5 L.W. 293—25 C.L.J. 224—21 M.L.T. 215—21 C.W.N. 521—1 P.L.W. 394—39 I.C. 235 (P. C.)

(2) 1922 P.C. 123—48 I.A. 302—44 Mad. 831—41 M.L.J. 346—30 M.L.T. 66—15 M. L.W. 78—(1921) M.W.N. 449—26 C.W.N. 537—20 A.L.J. 497—24 Bom. L.R. 629—3 P.L.T. 245—65 I C. 161 (P. C.)

(3) [1910] 37 Cal. 885—37 I A. 147—14 C.W.N. 889—12 C.L.J. 110—7 A.L.J. 791—(1910) M.W.N. 303—8 M.L.T. 145—20 M.L.J. 624—12 Bom. L.R. 632—7 I.C. 240 (P. C.)

(4) [1912] 23 M.L.J. 260—12 M.L.T. 218—(1912) M.W.N. 870—16 I.C. 53.

(5) [1899] 23 Mad. 271—27 I.A. 69—10 M.L.J. 29—2 Bom. L.R. 597—4 C.W.N. 329—7 Sar. 671 (P. C.)

(6) [1919] 37 M.L.J. 698—10 L.W. 672—26 M.L.T. 441—54 I.C. 497.

1923 MADRAS 663

OLDFIELD, J.

Hari Krishnan Pillai—Claimant—Petitioner.

v.

*Arur Panditha*r — Decree-Holder—Respondent.

Civil Rev. Pet. No. 163 of 1922, D/- 21st February, 1923, to revise the order of the Dt. Munsif of Sreerangam in E. A. No. 303 of 1921.

(a) *Civil P.C., S. 115—Material irregularity—Change in judgment after transcription by short-hand writer.*

In a claim proceeding, the Dt. Munsif delivered his judgment orally, dictating it to the short-hand writer. When the short-hand transcription reached the Dt. Munsif he entirely changed the effect of what he had said in open Court.

Held it was a material irregularity.

Held further that though it is the practice of the Madras High Court not to interfere in revision when another remedy is available, it will interfere where the case is exceptional and it is doubtful whether another remedy is open. (Re-trial of the whole case directed.) [P664 C 2]

(b) *Civil P. C., S. 152 and O. 20 R. 3 (Substituted by Madras High Court)—Extent of powers under.*

In a claim proceeding, the Dt. Munsif delivered his judgment orally, dictating it to the short-hand writer; when the short-hand transcription reached the Dt. Munsif he entirely changed the effect of what he had said in open Court.

Held, that the revision contemplated by O. 20 R. 3 and S. 152 cannot be of the effective part of the judgment and must be of the nature referred to in S. 152. *i. e.* relating to clerical or arithmetical mistakes arising from accidental slip or omission. The Court cannot, by revision, substitute a wholly new decision for the one originally pronounced. (Retrial directed.) [P 664 C 1]

T.V. Muthukrishna Iyer- for Petnrs.

S.T. Srinivasa Gopalachari—for Respdts.

Judgment.—The facts of this case are exceptional and fortunately so; and it is fortunate further that there is no dispute about the good faith of the District Munsif concerned whatever opinion may be formed of his conduct.

The facts are that on the 29th September 1921 the District Munsif gave judgment on the present petitioner's claim to draw certain money, the subject of attachment which was alleged to be due to the judgment-debtor from the Trichinopoly District Board. The District Munsif delivered that judgment orally, dictating it to a short-hand writer; and there is no dispute that in substance, whatever the exact words he used may have been, he allowed the petitioner to draw the money in case he got probate or succession certificate or got his rights determined in a separate suit or gave security on unencumbered immoveable property for the amount. This order may be difficult to understand, because it is not of the nature contemplated by O. 21 R. 60, being based on assumption in the alternative, that the judgment-debtor or the claimant was entitled to the property. With the merits of that order however we are not at present concerned. What we are concerned with is that when the short-hand transcript reached the District Munsif for correction, he entirely changed the effect of what he had said in open Court, by leaving out the reference to the withdrawal of the money by the petitioner in case he gave security. There is no dispute that this change was made. In fact the District Munsif, when the petitioner's vakil remonstrated with him on 8th October 1921, dealt with the matter in a lengthy order, in which the judgment was corrected and declined to make any alteration in it, saying that it, and not the judgment as pronounced, expressed his real decision. That order contains a good deal regarding the circumstances, in which the District Munsif found it necessary to make this material correction in his judgment and those in which the petitioner's vakil discovered, owing to his clerk's consulting the Court diary, that a change had been made. It is not necessary to pursue those matters. I turn to the two arguments to be dealt with, first whether the District Munsif acted with material irregularity in the exercise of his jurisdiction and secondly whether I should interfere in revision, when it is said the petitioner has another remedy open to him by a suit under O. 21. R. 63.

On the question of material irregularity and the right of the District Munsif to correct his judgment as he did in fact by substituting a refusal for relief for grant of it, reference has been made to the rule substituted by the Court for O. 20, R. 3. That rule deals with the case of a Judge, who has been empowered to pronounce his judgment by dictation to a short

hand writer in open Court, and says that the transcript of the judgment so pronounced shall, "after such revision as may be deemed necessary", be signed by the Judge, and it is urged that this authorises the Judge to revise the transcript and to substitute fresh words for the words, which fell from his mouth to any extent he may deem necessary. Such a case as this is not likely to have any precedent and accordingly no authority on the interpretation of the rule has been brought to my notice. It seems to me on reference to section 152 and the Rule issued by this Court and from obvious considerations of principle that the revision contemplated cannot be of the effective part of the judgment and must be of the nature referred to in section 152, one relating to clerical or arithmetical mistakes arising from any accidental slip or omission. It is in fact impossible to see how there can be any purpose in the provision in Order 20 Rule (1) that the parties and pleaders shall be present or have notice of the pronouncement of judgment in open Court, if the decision which is to bind them ultimately is to be contradictory of what was then said. Certain judgments dictated must inevitably contain verbal or arithmetical mistakes in respect of which revision will be advisable or even necessary. But that is not to say that by revision the Court can substitute a wholly new decision for the one which was originally pronounced. Taking this view, I hold that what purports to be the District Munsif's judgment in its ultimate form is not really his judgment. It is clear that the terms of his judgment as originally formulated and as it must be taken for the present purpose to have been given were to an entirely different effect; although it must be held that it is not possible to reconstruct them exactly from the materials available.

I turn to the second question whether the District Munsif having been guilty of a material irregularity to the prejudice of the petitioner, the fact that the petitioner can bring a suit under O. 21 R. 63 will disable me from proceeding in revision. It is no doubt the practice of this Court not to interfere in revision, when another remedy is available. The present case however is exceptional and it is not clear that there is in fact another remedy. True the petitioner may sue in the manner contemplated by O. 21 R. 63 to set aside the order as ultimately promulgated by the District Munsif. But that is no reason why he should be called on to forego the advantage he obtained in the order as pronounced. There is moreover the consideration that the procedure under O. 21 R. 63 is for the establishing of the right of the party who has failed in the claim proceedings. If the petitioner were to sue for that purpose it would be difficult to see how he could be allowed to put forward what would certainly be a material part of his case; that he did not fail really in the proceedings, but it was virtually successful. In any case it seems to me that it will be a fair exercise of my discretion to use the power of revision to clear up the position of the parties, and to enable them to obtain an order, which cannot be open to the very grave objection applicable to the one before me and on which they can take further action.

Taking this view I hold that a material irregularity has been committed and that it is a proper exercise of this Court's power in revision to interfere to set it right. The only difficulty is, as I already indicated, that it is impossible to reconstruct exactly the District Munsif's original order and therefore impossible to restore it. There is the further consideration that, if it is restored, the respondent here, owing to a misapprehension for which he is not responsible, will be prejudiced in respect of the period available to him for suing if he has to do so, under O 21 R. 63. The course I take is, therefore, to set aside the whole proceedings in the lower Court on the petition and to direct the present District Munsif to re-admit it and deal with it according to law. Costs in this Court and up-to-date in the Lower Court will be costs in the claim and will be provided for in the order thereon.

Case remanded.

1923 MADRAS 665

SPENCER AND KRISHNAN, JJ.

Secretary of State for India—Defendant—Appellant.

v.

Nagaraja Iyer and another—Plaintiffs—Respondents.

A. A. O. Nos. 257 and 258 of 1922, D/- 16th February, 1923, against the orders of the Sub. J., of Kumbakonam in A. S. Nos. 1 and 11 of 1922.

Limitation Act, Art. 16—Money paid under protest—Madras Revenue Recovery Act, (1864) S. 59.

The period of limitation applicable to a suit to recover amounts alleged to have been illegally collected by the Government from the plaintiffs as water-cess on their lands, is one year from the date of payment under Art. 16 and not six months from the date of the distraint of the plaintiffs paddy crop under section 59 of the Madras Revenue Recovery Act (II of 1864), where the relief claimed is the refund of the amount illegally collected and paid under protest together with interest. [P 666 C 1]

The Government Pleader (C. Madhavan Nair)—for Appellant.

C. S. Venkatachariar and R. Subramania Iyer—for Respondents.

Judgment.—The question for our determination is whether the period of limitation applicable to these suits, which have been brought to recover amounts alleged to have been illegally collected by the Government from the plaintffs as water-cess on their lands, is one year from the date of payment under Art. 16 of the Frist Schedule of the Limitation Act, or six months from the date of the distraint of the plaintiffs' paddy crop under S. 59 of the Madras Revenue Recovery Act (II of 1864).

It is conceded on either side that if the former period applies, the suits are in time, after giving the plaintiffs credit for the time required under S. 80, Civil Procedure Code, to give notice of suit to the Government, as allowed by S. 15 (2) of the Limitation Act, but that if the latter period of limitation is applicable, the suits are out of time, under S. 2 of the Madras Irrigation Cess Act (VII of 1865), arrears of water-cess are made recoverable in the same manner as arrears of land revenue. S. 59 of Act II of 1864, gives a right to persons deeming themselves aggrieved by any proceedings under that Act to apply to the Civil Courts for redress within 6 months of the cause of action arising.

In the plaints it is stated that the imposition and collection of penal water rate was unauthorized and illegal, and the relief claimed is the refund of the amount thus illegally collected and paid under protest together with interest, the cause of action being given as the communication on 24th, June 1920, (five days before the institution of this suit) of the Collector's order of 28th, May 1920, in the village of Visalur, where the amount was collected on 30th, April 1919. The nature of the suit thus falls exactly under the description in Column 1 of the 1st Schedule of the Limitation Act, Art. 16 (suit) "against Government to recover money paid under protest in satisfaction of a claim made by the revenue authorities on account of arrears of revenue or on account of demands recoverable as such arrears". The only doubt is whether the fact that the plaintiffs' crops were distrained in order to enforce payment of the Pemand (alleged to be unjustifiable) operates to introduce S. 59 of Act II of 1864 by reason of S. 29 (b) of the Limitation Act and go to shorten the period of limitation. The fact that the plaintiffs do not even mention in their plaints the attachment of their crops clearly shows that they do not deem themselves, aggrieved by that. It is not their case that the collection of water cess from them was *intra vires* but irregular. They maintain that it was altogether *ultra vires* as they were not at all liable to pay the cess because they have an immemorial vested right to the water.

The distinction between proceedings for the collection of revenue which are taken professedly under the Act but amount to an illegal or irregular exercise of jurisdiction, by which a party is aggrieved and proceedings which are wholly without jurisdiction owing to the party against whom they are taken not being a defaulter was first made by a Full Bench in *Venkata*

v. *Chengadu* (1) and the distinction has been since observed in *Iswara Patter* v. *Karuppan* (2), in *Raman Naidu* v. *Bhassoori Sanyasi* (3), in *Vadlur Chinna Nagi Reddy* v. *Devineni Venkataramiah* (4), in *Bhanireddi Venkan Doragaru* v *Secretary of State* (5) and in *Secretary of State* v. *Simhadri Jaghapathiraju Bahadur* (6) quoted by the Subordinate Judge; and in *Suryaprakasa Row* v. *Secretary of State for India* (7) this particular point was not raised and discussed.

In *Ravula Vengala Reddi* v. *Secretary of State* (8), in *Rawala Nagamma* v. *Secretary of State for India* (9) and in *The Secretary of State* v. *Ranganayakamma* (10), where the suits were for the recovery of cess alleged to have been illegally levied, the one year's period of limitation under Art. 16 was held to govern them, S. 59 of Act of 1864 being confined in operation to the particular class of cases to which that section is directly applicable, namely, to the cases of persons being aggrieved by illegal or irregular proceedings taken for the collection of revenue under the provisions of Act II of 1864, according to the principles laid down in *Srinivasa Ayyangar* v. *Secretary of State* (11). The learned Subordinate Judge was therefore right in his view that the Art. 16, Limitation Act, which gives one year from the date of payment, governs these suits, and Civil Miscellaneous Appeals are dismissed with costs.

Appeals dismissed.

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(1) [1889] 12 Mad. 168 (**F.B**)
(2) [1893] 3 M.L.J. 255.
(3) [1903] 26 Mad. 638.
(4) [1918] 7 L.W. 468—23 M.L.T. 231—(1918) M.W.N. 224—45 I.C. 653.
(5) [1918] 48 I.C. 844.
(6) [1915] 39 Mad. 67—28 M.L.J. 51—17 M.L.T. 29—2 L.W. 31—26 I.C. 692.
(7) [1903] 13 M.L.J. 380.
(8) [1912] 15 I.C. 328.
(9) [1913] M.W.N. 75—18 I.C. 699.
(10) [1920] 12 L.W. 334—59 I.C. 98.
(11) [1915] 38 Mad. 92—24 M.L.J. 41—18 I.C. 617.

1923 MADRAS 666

SPENCER, J.

M. R. Krishnamurthi Iyar—Complainant—Petitioner.

v.

C. V. Parasurama Iyar—Accused-Respondent.

Cr. R. C. No. 594 of 1922, D/- 26th January, 1923, to revise the order of the Third Presidency Mag., Egmore, Madras in No. 8333 of 1922, D/- 27th June 1922.

Criminal P. C., Ss. 179, 182—Publication, place of.

If the defamatory letter is posted in Madras with a view to be read in Tinnevelly the offence of defamation is triable either in Madras or in Tinnevelly. [P. 666 C. 2.]

K. S. Ramabhadra Iyer and *C. Sankarama Sastri*—for Petitioner.

L. S. Veeraragava Iyer—for Respondent.

Order.—If the complainant can prove that the letter was posted in Madras with a view to be read in Tinnevelly the offence of defamation is triable either in Madras or in Tinnevelly under Ss. 179 and 182 of the Code of Criminal Procedure, seeing that the accused has done all in his power towards publication and has lost control of the letter when he has committed it to the post (see Mayne on Criminal Law, 4th Edition, p. 872).

The English cases of *Rex* v. *Burdett* (1) *Rex* v. *Williams* (2) and *Queen* v. *Ameer Khan* (3) support this view.

The third Presidency Magistrate is directed to take the complaint on his file and dispose of it according to law.

Petition granted.

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(1) [1820] 4 B. & Ald. 95.
(2) [1810] 2 Camp. 505.
(3) [1871] 17 W. R. Cr. 15-9 B.L.R. 36.

1923 MADRAS 667

SCHWABE, C. J. AND WALLACE, J.

Secretary of State for India—Defendant—Appellant.

v.

Pandit Radhika Prasad Bapuli—Plaintiff—Respondent.

O.S. No. 89 of 1921, D/—5th October, 1922.

Limitation Act, Art. 10—Notes issued by East India Company—Liability of Government of India to pay principal and interest—Limitation.

The plaintiff sued to recover money due on a bond dated 28th July 1845 under which the Governor in Council promised on behalf of the East India Company to pay certain principal and interest to one M. and his successors-in-title. The said M. represented a creditor of the deposed Raja of Tanjore whose debts so far as they had been proved to the satisfaction of the Company under a commission appointed for the purpose, the Company took over, and for the due payment of which they made themselves responsible.

Held, that the obligation to pay was in the nature of trust, that an assignee from the heir of M. was entitled to get principal and interest from the Government up to the date of payment, and that article 10 of the Limitation Act applied. [P. 670 C. 2]

The Advocate General—for Appellant.

K. Rajah Aiyar and R. Ganapathi Aiyar—for Respondent

Schwabe, C. J.—The history of this matter is so clearly stated in the judgment of Coutts Trotter, J , that it is unnecessary for me to repeat it and I have nothing to add to his statement of the facts except as to the plaintiff's title and I will deal with that first.

The plaintiff is the assignee of one Mukund Lal who is the direct lineal descendant of Madhu Sahai who in the year 1845 had issued to him a document called a Promissory Note of the Tanjore debt No. 307. The plaintiff has also obtained from the District Court of Benares a succession certificate under the Succession Certificate Act of 1889 in the matter of the estate of Madhu Sahai declaring him entitled to collect money and the interest due on the said promissory note (Ex. M). The effect of that certificate is that the plaintiff is declared to have whatever rights Madhu Sahai would have had in that Promissory Note if he had been alive, and payment to him will be a good discharge to the Government. The assignment to the plaintiff, Ex. J., was made in 1909 and in my judgment it assigns all the rights that the assignor had as representing Madhu Sahai. It is true that it recites that the assignor is entitled to the Promissory Note and to a specified amount of interest Rs. 2,833-15-0. That is the amount of interest accrued due from the date of the last payment, referred to hereafter, up to the time when by Ex. F. published in the Fort St. George Gazette, it was announced that, as Madhu Sahai had declared that he had not received the Promissory Note No. 307, it would be paid on September 30th, 1854 and that the notice would be held equivalent to a tender of payment on that date, from which date all interest on the said Note would cease. It has not been contended before us that the notice had any effect on the rights of Madhu Sahai but apparently the parties to the assignment thought that it had the effect of stopping the interest as from that date, and that is apparently the meaning of this recital. However the operative part of the document assigns all the interest in the Promissory Note which the assignor had. In the translation before us the words are "right and authority." But we have had before us the Court interpreters of Hindi and Guzarati and they agree that the words mean literally "the rights and powers," and convey what we understand by such words as "all the right, title and interest" and include particularly all powers of recovering by action or otherwise the amount due on the Promissory Note. This in my judgment is wide enough to cover both principal and all interest due and to become due. It follows that the plaintiff had both by the assignment and by virtue of the succession certificate all the rights of the estate of Madhu Sahai.

I propose now to consider the right of the plaintiff apart from the Limitation Act and then whether that Act applies. The history of the matter, as far as we can ascertain it, is that in 1847 one Har Kissen Doss received through his agent one Pattam Narayanaswami Chetti the arrears of interest up to 30th October 1846 from

the date of the agreement of 1824 referred to hereafter *i. e.* Rs. 8,411-5-1 (Ex. 1 A.) The Promissory Note itself has a column on the back for acknowledgment of the receipt of interest. That column contains what purports to be an order by Madhu Sahai to pay to Hur Kissen Doss, and it also contains what purports to be a further order signed by Madhu Sahai to pay to one Shri Girdharji Maharaj. This is the best that can be made out of the endorsement on the original somewhat dilapidated Promissory Note, and of a copy of this endorsement made by the plaintiff when it first came into his possession some 13 years ago. It is suggested that these endorsements are forgeries, and there is some support for that theory in that in 1853 Madhu Sahai's statement that he had never received the Promissory Note is officially accepted as is shown by Ex F. But the East India Company paid this interest to Hur Kissen Doss in 1844 on what purports to be the direction of Madhu Sahai and, in the absence of evidence that it was not done by his direction, in my judgment the plaintiff has failed to establish that this amount of interest was not properly paid; and therefore in my judgment his claim to that amount fails.

At later dates other persons made claims under the Promissory Note, but they were all rejected,—one by the High Court made by V. Munuswami Chetty, as appears from Ex. G. at some date before 1864. In 1892 one Shri Jivan Lalji put in a claim which was rejected—See Ex. H. It would appear that Shri Jivan Lalji was the grandson of Shri Girdharji Maharaj, who, in Ex. E. is stated to have died in 1842, and Jiwan Lalji left surviving him, a widow and two sons, one also called Girdharji Maharaj (See Ex. K.) If Ex. E., which does not seem to have been proved by any one, is accurate, that Girdharji whose name appears endorsed on the Promissory Note was dead before the Promissory Note was issued in 1845 it is not surprising that doubts were thrown in Ex. H. on the honesty of any claim made through him. At any rate no payment was made of principal or interest to Girdharji Maharaj or any one claiming under him, and the plaintiff has by Ex. K. taken the precaution of obtaining a release deed from the present representatives of Girdharji Maharaj, and in my judgment the supposed endorsement to him can be disregarded. It is not relied upon by the Secretary of State. Where the Promissory Note was until between 1901 and 1906 when it is stated that it came into the hands of the heirs of Madhu Sahai, we do not know. But it was originally issued to Madhu Sahai and was throughout his and his legal representatives' property, and I find no assignment of his rights thereunder, except for the interest dealt with above, until the assignment to the plaintiff. I therefore hold that the plaintiff has the full rights that Madhu Sahai would have had if he were alive now.

Those rights, apart from limitation, are to be paid, the principal, the requisite notice having been given in 1853 and apparently again in 1858 (See Ex. G.), and interest at 4 per cent from October, 1846 until the decree herein.

It is contended that all rights to the principal and consequently also the interests are barred. It is argued that, under Art. 120 of the Schedule to the Limitation Act of 1908, if under no other Article, the right to recover is barred 6 years after the principal debt became payable, *i. e.*, from the date of the expiry of the 15 months' notice given in 1853 or 1858. There are two answers made to this. First that time can only begin to run from the date of demand for payment made at Madras which was not until October, 1916; and secondly that the Government, who it is admitted have succeeded to the rights and liabilities of the United Company were and are in the position of trustees and that, under S. 10 of the Limitation Act, no period of limitation can apply. The learned Judge has found the first point against the plaintiff and the second in his favour. In my judgment the plaintiff is right on both points.

The first point turns on the terms of the Promissory Note itself. By it the Company agrees to pay to Madhu Sahai, on the expiration of 15 months' notice of payment, on

demand at the General Treasury at Fort St. George the principal sum, and to pay interest half yearly as along as the Company was in possession of the revenues of Tanjore. The interest was to be paid at the Treasury in cash to proprietors if resident in India and in cash or by bills at 12 months at the option of the proprietors, if resident in Europe.

According to the law of England when money is payable on demand and nothing further is said, it is payable at once and without demand and time under the Statute of Limitations begins to run at once. The most common instances of the application of that principle are of money lent repayable on demand or at request, and promissory notes payable on demand. *Norton* v. *Ellam* (1). It is worth noticing that this principle of the English Common Law has been held not to apply to cases in the mofussil. *Tarinee Parshad Ghose* v. *Pran Kishen Banerji* (2). However the principle is in terms applied by Arts. 59 and 73 of the Limitation Act to cases of money lent and bills of exchange and promissory notes payable on demand. But it is not extended to any other case. Art. 73 does not apply to this case as the so called Promissory Note is not a promissory note within the definition of the Limitation Act. Further in England the question in such cases is stated clearly by Scrutton, L. J. in *Bradford Old Bank, Ltd* v. *Sutcliffe* (3), and by Bankes and Atkin, L. JJ. in *Joachinson* v. *Swiss Bank Corporation* (4), where, it was established that the principle did not apply to cases between customers and bankers. The question to be considered is whether the words, 'on demand' are mere words, or whether, looking at the whole document, it is really intended that the demand should be made before the liability to pay arises Now in this connection, I attach very great importance to the fact that the payment is to be made at a named place by the person liable which place is the address of the debtor and not of the creditor. In the case of *Rowe* v. *Young* (5) it was held that the presentment for payment of a Bill of Exchange payable at a named place was a condition precedent to the right to sue on the bill. It is true as pointed out by Coutts Trotter, J. that that particular rule has since been altered by Statute, but the principle of the decision is, in my judgment, in no way thereby affected, and I consider it directly in point. Further it is worth observing that there has been no similar statutory alteration of the law in India. Looking at the whole document in my judgment, it was the intention of the Company to insist on a demand at the place named for I cannot think that it was intended that the Company should be under a duty to seek out the creditors and pay them, especially as the payment under the promissory note was to be to the payees or their order and the Company would not know who they would be at the expiration of 15 months' notice to be given at some future date. Further as to the interest the Company would require to know if the proprietor for the time being was in India, in which case it was to be paid in cash at the General Treasury, or in Europe, in which case he had an option, the exercise of which he would have to communicate. In my judgment the Company came under no liability to pay either the principal or interest until the demand was made for payment at a particular place and in some cases in a particular manner; and if the Company had been sued without a demand it would in my judgment have been a good defence to the action that no demand has been made. It follows in my judgment that the rights under the promissory note looked upon as a simple contract debt are not barred.

Secondly, are the Government trustees within the meaning of S. 10? Following the words of that section—

(1) 2 M. & W. 461—1 M. & H. 69—6 L.J., Ex. 121—1 Jur. 433.
(2) 6 B.L.R. 160—14 W.R. 224.
(3) [1918] 2 K.B. 833—88 L.J., K. B. 85—119 L.T. 727—24 Com. Cas. 27—62 S.J. 753 - 34 T.L.R. 619.
(4) [1921] 3 K.B. 110.
(5) [1820] 2 Bligh. N.S. 391—129 E.R. 921—22 R R. 662—2 Brod. & Bing. 165.

Is the Government a person in whom property has been vested in trust for any specific purpose and is the action for the purpose of following the trust property? A specific purpose is a purpose that is either actually and specifically defined in the terms in which the trust is created, or a purpose which from the specified terms can be certainly affirmed *Khaw Sim Tek* v. *Chuah Hooi Gnoh Nech* (6). In this case the terms are to be found in the articles of agreement of 1824 (Ex. C of which, I think, if this case goes further, Arts. 15 and 16 should be printed). It was an agreement between the Company and amongst others, Madhu Sahai's predecessor-in-title. In my judgment, by that agreement the United Company undertook to set aside a sufficient part of the Tanjore Revenue to be received by it, to provide for the payment to the creditors of Amar Sing, who had signed the agreement, of their debts. Those creditors were to receive transferable bonds or certificates, and sufficient revenue was to be set aside and applied to paying the interest on those bonds, and also to creating and accumulating a sinking fund for the redemption in due course of the principal. In pursuance of this agreement a transferable bond, called a promissory note, was issued as the Note states, in conformity with and in pursuance of the articles of agreement of 1824, and is now held by the plaintiff. It is true that by the terms of the document the Company agrees to pay in the events that have happened, the interest and principal due on the bond to Madhu Sahai or his order. He or his assignees could have sued on the promissory note itself and the Company undertook a liability to pay interest so long as they received the Tanjore Revenue and principal after 15 months' notice given by them, and it would have been no defence that the Company had not received sufficient revenue or that, after giving the notice had not got sufficient sinking fund in its hand; but, this does not in my judgment prevent the Company from being trustees of the fund that did get into its hands, that is, of that part of the Revenue required for the purpose of meeting the principal and interest on these bonds. I agree with the Judgment of Coutts Trotter, J., that a trust was created by the articles of agreement and in my judgment, the Company and the Government and its successors are trustees of the funds in their hands for the purpose specifically defined in the articles of agreement, namely, the payment of interest and of principal of the transferable bonds to be issued under that agreement, of which the bond in suit is one. I therefore hold that S. 10 of the Indian Limitation Act applies.

The judgment must be reduced by Rs 8,411-5-1 referred to above. That is however a minor part of the case, but the appellant's case partially succeeded and I think that the justice of the case will be met by awarding to the plaintiff three-fourths of the taxed costs of this appeal.

Time for payment three months from to day.

Wallace, J.—The plaintiff is suing to recover money due on a bond Ex. A dated the 28th July, 1845 under which the Governor in Council promised on behalf of the East India Company to pay certain principal and interest to one Madhu Sahai and his successors-in-title The said Madhu Sahai represented a creditor of the deposed Raja of Tanjore Amarsingh, whose debts so far as they had been proved to the satisfaction of the Company under a commission appointed for the purpose, the Company took over, and for the due payment of which they made themselves responsible. The manner in which this was done is set out in Ex. C dated the 11th February, 1824, articles of agreement between the Company and those claiming to be the creditors of Amar Singh.

A great deal of discussion has centred round this document. On the best consideration that I can give it, the important provisions in it appear to me to mean this. The creditor who put their hands to it agreed to abide by the decision of the Commission appointed to determine the

(6) 1922 P.C. 212—49 I.A. 37—25 B.L.R. 121—26 C.W.N. 495—30 M.L.T. 160 (P.C.)

extent of their debts. The Company who were then in possession of the revenues of Tanjore formerly in the possession of Amar Singh, on their part agreed to take over these debts so determined with simple interest on the balance found due at 4 p. c. from the date of the debt to the 30th April, 1823 to consolidate that sum as the principal of bonds to be issued by them to the creditors in full satisfaction of such debts due by Amar Singh, the bonds to carry simple interest at 4 per cent. per annum to be paid half yearly from the 30th April, 1823; such interest was payable only so long as the Company retained the Tanjore revenues, while the payment of principal was not so conditioned. Such payment to be made only after 15 months' notice by the Company. In order to provide means for the redemption of these bonds, the total principal of which amounted, we are told, to nearly nine lakhs of rupees, a reserve fund sufficient to pay the interest was to be set apart by the Company out of the Tanjore revenues *plus* a sum equal to 5 per cent. of the principal annually out of the same revenues, as a sinking fund to meet the principal; and on this sinking fund, the Company would pay four per cent. per annum to be paid from general revenues This latter stipulation is important as showing that the Company regarded the sinking fund as a separate fund with them belonging to and for the benefit of others. The sinking fund was to remain in existence and be a charge on the Tanjore revenues until all the bonds were discharged. Art. 15 of the deed further stipulates that the deed shall not operate to make the Company's property apart from the Tanjore revenues, liable for these debts or any other debts owing to these creditors of Amar Singh, or to make even the Tanjore revenues liable unless these are received by the Company at Madras. The effect of this agreement clearly is, I think, that the Company, who had come into possession of the Tanjore revenues and recognised the justness of the claims of Amar Singh's creditors on these revenues, took on themselves the obligation to pay these debts and constituted themselves trustees, so far as they were and remained in possession of the Tanjore revenues, for the payment of these bonds so isued, and undertook to set apart a sufficient portion of these revenues as a trust fund to be used for the payment of interest on, and the ultimate redemption of, these bonds until all of them were discharged.

In pursuance of this agreement, bonds, as contemplated, were issued, and Ex. A the bond under which the plaintiff sues, is one of them. It is not denied that it is undischarged as regards the principal and most of the interest.

The plantiff's contention is twofold: firstly he sues on Ex. A on the ground that he is entitled to be paid on it from the trust fund maintained *ad hoc* by the Government and therefore his claim cannot be barred, since the Government plead limitation against a trust obligation, and secondly, that, apart from any question of trust, and even if there is no trust fund, the payment is not barred by limitation. The Goverment claims that the trust, if created, (and its creation is not strenuously disputed) came to an end when Ex. A was issued, and that Ex. A is only an ordinary contractual bond between debtor and creditor, whereon payment is barred by limitation. Ex. A itself states that it was issued in pursuance of the agreement Ex C-detailed above, and the whole tenor of it shows that this was so. The Advocate-General's chief contention is that, in Ex. C, it was laid down that the amount of principal and interest found by the Commission to be due to any particular creditor of Amar Singh was to be *satisfied* by the bond to be issued and that implied that on the issue of the bond, the trust ultimately ceased. That view I cannot accept. The debt of Amar Singh was indeed to be satisfied once and for all by the bond, but the agreement went on to make distinct provision for the ultimate satisfaction of the bond itself, by announcing a promise of a sinking fund to be maintained until the bonds were fully discharged It is not denied that the sinking fund was maintained and the Government

Notifications of the 24th June, 1853 Ex. F. and the 18th December, 1858 (filed in this Court) indicate that it was so being maintained, and of course Government was bound under Ex. C. so to maintain it until all the bonds were discharged. Government has been, since, the date of Ex. C, in possession of the Tanjore revenues, and I must presume that it has carried out the promise contained in that document.

So then we have the position that *pari passu* with the issue of and running of the bonds, the sinking fund to pay them off was being accumulated, until, by 1858, all except four bonds, of which Ex. A was one, had been paid off, and that in 1858, Government had sufficient sinking fund to clear these also. It is plain then that Government had been all along holding in trust for the bond holders the amounts necessary to pay off each bond. The trust had in fact not ceased by the issue of the bonds, but continued and was to continue according to the agreement, so long as any obligation to pay remained on any bond, and the trust fund could be dissolved only when every bond was discharged. Ex. A has not been discharged. The trustee must therefore meet it from the trust fund so far as that fund is sufficient to meet it, and he cannot be heard to plead that he is not bound to do so or that the payment is barred by time, and thus in effect appropriate to himself the trust fund. To this part of the case no defence can be put forward against payment other than one of two pleas (1) that such a loss in the Tanjore revenues has taken place that the trust fund was exhausted so that the bonds cannot be redeemed from it, or (2) that all the bonds have been discharged. Neither plea has been here advanced.

Another argument to show that the trust came to an end with the issue of the bonds is based on the wording of Ex. A itself. Ex. A no doubt does not mention any sinking fund or reproduce Art. 15 of Ex. C, which makes only the Tanjore revenues liable for the debt. So far as its wording goes, the Governor in Council is prepared to meet the obligation to pay the principal and interest from general revenues. Interest no doubt would not be payable if the company had wholly lost the Tanjore revenues, but apparently the obligation to pay from general revenues would continue even if the Tanjore revenues while not wholly lost, nevertheless proved insufficient to meet the bond. Incidentally, this shows that Ex. A was something more than a mere warrant or declaration of intention to carry out Ex. C, or a mere label to indicate to the holder of the Ex. A what his share in the trust fund was.

But apart from that, the present question is: was the original trust obligation charged on Tanjore revenues thus converted when Ex. A was issued, into an ordinary contractual obligation to pay from general revenues so that the trust obligation had come to an end ? I can find no ground for such a conclusion. The wording of Ex. A so far from indicating any novation of the agreement Ex. C, directly purports to be in pursuance of Ex. C. The probable explanation of the use of language of Ex. A loose enough to make the Company's general revenues liable for the bond, is that the risk of the company losing the Tanjore revenues, which was a real risk in 1824, had by 1845 become negligble, and it became a matter of indifference to the company whether the bond was redeemed from the trust fund fed by Tanjore revenues, or from general revenues, while beyond that Government always had the safeguard that interest was not payable, if the Tanjore revenues are lost, while principal was not payable until Government chose to give notice. Had there been any risk at the time of the issue of the bond in 1845, it is obvious that the full terms of the agreement in Ex. C would have been strictly set out in Ex A, and that a bond professedly issued in pursuance of that agreement would have, if it had been at all necessary, limited the liability of the Company to a charge on the Tanjore revenues as set out in Ex. C. There is nothing in the wording of Ex. A, then, to indicate that Ex. C was not being carried out, that the trust fund was not in being, or that there was any fresh agreement at the

time of Ex. A which put an end to the trust. In fact its wording implies that the trust set out in Ex. C had been accepted and was being carried out thereby.

My conclusion on this part of the case then is this : there is and ought to be a trust fund in existence for the payment of the amount due under this bond. Government cannot be heard to say, nor is it in fact pleaded, that they have broken that trust or have not maintained the fund. The plaintiff, assuming that he is the real beneficiary under the bond, is entitled to enforce his claim under Ex. A as if he were, as he is, one of the beneficiaries under this trust, and if there is sufficient money in the fund to discharge what is due on this bond, the money due under it must be paid, and payment of it cannot be barred by limitation, since a trustee cannot be allowed to vouch a statute of limitation against a breach of trust, and the present suit is clearly one for the purpose of following *i. e.* for recovering for the *cestique* trust, in the hands of Government trust property vested in it for a purpose specified in this case by the author of the trust. So far then as the trust fund will discharge Ex. A it must do so, but if and in so far as, the trust fund is insufficient to discharge Ex. A and therefore the obligation to discharge it falls on the ordinary revenues, Ex. A is enforceable against these general revenues only as an ordinary contract between a debtor and a creditor. It might in certain circumstances therefore have been necessary to enquire how far the trust fund will suffice to meet Ex. A but, fortunately, in the present case it is not necessary, for two reasons: first, Government has not pleaded that the trust fund is insufficient to meet Ex. A; and secondly, I hold, in agreement with the learned Chief Justice that even as an ordinary contract, Ex. A is enforceable in plaintiff's favour.

Turning to the second part of the case, *viz.*, whether, apart from any trust, payment under the bond is barred by limitation, I agree with and have very little to add to, what the learned Chief Justice has said. As to the question of the meaning of the phrase 'on demand' at a particular place, I would note the significance of the general notification of 1858 filed in this Court, which, after giving the necessary 15 months' notice announced that "on presentation of the notes to the Accountant General at Fort St. George," a certificate for payment both of principal and interest would be issued. It is clear then that before Government became liable to pay on the notes, whether principal or interest, that is, before any of the debt became due, there was to be a specific demand accompanied by presentation of the note at the Accountant General's office at Fort St. George.

I have nothing to add to what the learned Chief Justice has said regarding what plaintiff has acquired under the assignment deed, Ex. J., except that I do not think it necessary to consider the scope of Ex. M or to decide whether it is co-extensive with Ex. J., or not. Personally I think it is limited to the sums named in it, but it is not a point of importance at present

As to the disallowance of Rs. 8,411-5-1 the plaintiff clearly has no right to that sum. The assignor believing no doubt that under the Notification of 1853 Ex. F, interest ceased from 30th September 1854, calculated the interest due to him up to that date from 30th October 1846, the date up to which, according to the endorsement of the note Ex. A interest had been paid by Government to Harikishendoss described on Dx. A as the general attorney of Madhu Sahai, the original holder, and Rs. 2,833-15-0 represents that sum. The plaintiff has shown no reason for us to suppose that that sum was not paid to the holder's attorney and the Government books Ex. 1 (a) show that it was so paid. The plaintiff's assignor is claiming from Madhu Sahai and therefore the plaintiff himself could have no right to have this sum paid over again ; and the plaintiff's assignor evidently was quite aware of this, and therefore refrained from assigning that sum over to the plaintiff.

I therefore agree with the order proposed by the learned Chief Justice.

Appeal allowed in part.

✱ 1923 MADRAS 674

PHILLIPS AND DEVADOSS,, JJ.

Hota Veerabhadrayya—Appellant.

v.

K. K. Ramchandra Venkatakrishna Rao (dead) and others—Respondents.

Appeal Nos. 283, 304, 334 and 350, of 1918, D/- 14th December, 1922, against the decree of Government Agent, Godavari, in Original Suit Nos. 2 of 1915 and 1 of 1917.

(a) Evidence Act, S. 90—Document undated—No presumption—Usual proof needed.

Where a document is undated, no presumption can be drawn under S. 90, as it cannot be said that it is thirty years old. It must then be proved in the ordinary way. [P 675 C 2]

(b) Easements Act, S. 30—Easement passing to one of two joint owners—Special proof necessary.

When a dominant heritage is divided between two or more persons the easement becomes annexed to each of the shares provided that such annexation is consistent which the terms of the instrument under which the division was made. But there is no presumption that it passed to one of such persons unless there is a specific agreement to that effect. [P 677 C 1]

T. R. Venkatrama Sastry and *B. Satyanarayana*—for Appellant.

L. A. Govindraghava Aiyar, *S. Srinivasa Aiyangar* and *A. Krishnaswami Aiyar*—for Respondents.

Judgment. — These four appeals relate to a triangular dispute between the Zamindars of Polavaram, Gutala and Gangole who will hereafter be styled by their territorial name. In 1824 before the creation of the Gangole estate, the proprietors of Polavaram and Gutala entered into a compromise with regard to the use of the water of the natural streams passing through their two estates, and in 1829 an agreement is said to have been entered into by the two proprietors. In order to understand the case it is necessary briefly to state the respective positions of the lands, and the streams passing through them. Stream, Kovvada Kalva, with which we are chiefly concerned, runs from west to east through, first of all, the Gutala estate, subsequently through Polavaram and again through Gutala and Polavaram. A feeder channel, Nakkalagayya Kalva joins the Kovvada Kalva at a point in the Polavaram estate, and another channel, Pedralla Kalva also does the same but further to the east. Apparently water was taken by the lands of both the estates from all these streams, but the Polavaram proprietor wished to utilise the water of the Pedralla Kalva exclusively for his own lands and he built a masonry dam which effectively diverted its waters from the Kovvada Kalva. In return for this compromise was entered into between the proprietors of Gutala and Polavaram permitting the former to dam up the Kovvada Kalva at a point above its junction with the Nakkalagayya Kalva, so as to prevent water coming down below the point of damming. Apparently the Gutala proprietor did erect such a dam across the Kovvaga Kalva in the year 1850, but it was almost immediately washed away and for some years no further dam was constructed. In 1843 the Gutala Proprietor sold certain villages of his estate to Hota Gengayya by Exhibit A. It is argued for Gutala that this transfer did not amount to a sale. It is perfectly clear as found by the lower Court, and from the language of Exhibits A, A1 and A2 that the transfer did amount to a sale. The land that was transferred is now what is called Gangole mittah. In 1849 the Gangole mittah was separately registered as an estate by the collector, and from that date we have the three estates with which we are here concerned. In 1848 Hota Gengayya started the erection of a dam, across the Kovvada Kalva, and when objection was raised by Polavaram, Gutala supported his vendee. Apparently the dam was not fully constructed, although the Sub-Collector had approved of Gangayya's action ; for it appears from Exhibit D. 30 that the masonry dam had not been constructed in 1852. Again in 1860 a further attempt to build the dam was made and also in 1869, 1876, and 1880 but these attempts all failed owing to opposition of Gutala and Polavaram. Nothing apparently happened after 1880 until 1898 when the then proprietor of Gangole, plaintiff in O. S. No. 2 of 1916, assumed charge. In 1905 a dam was put up, but the District Magistrate, on the complaint of

Gutala ordered the blocking up of the Sagupadi channel which was fed by the water retained by that dam and it was not till 1911 that a complete masonry structure was put up. This structure consists of two parts, firstly what is called the *Valanka*, which apparently means a sort of training bund running from one bank up the middle of the stream, and secondly a cross dam from the end of that bund to the opposite bank. The cross bund was ordered to be removed in 1911, but the Valanka was allowed to remain. Gangole has therefore brought this suit. O. S. No. 2 of 1916 for a declaration of his right to construct a cross bund of any material he pleases and for an injunction restraining the defendants, namely the Zamindars of Polavaram and Gutala from interfering with his enjoyment. Gutala has filed a cross suit, O. S. No. 1 of 1917, against Gangole only, in which he asks for the removal of the Velanka built in 1911, and he also asks for a declaration of the parties' respective rights in the water of the Kovvada channel. The Government Agent in trying these suits has held that Gangole has no right to erect a permanent cross bund in the channel, but he has not dismissed the suit but has declared that he is entitled to use such portion of the water of the Kovvada stream as is reasonable to the enjoyment of his estate as an upper riparain owner. He has left the exact extent of that right and the manner in which it is to be enjoyed to be determined in execution. In the cross suit, he has dismissed the suit entirely, although in the first suit he has held that Gangole was not entitled to put up a permanent cross bund.

Appeals are now filed against both decrees by Gangole (Appeal Nos. 283 and 304) and by Gutala (Appeal No, 334 and 350).

I have talked of this compromise in 1829 as an admitted fact. It is however admitted only by Gutala, and, while Polavaram does not entirely deny the existence of some compromise, he contends that the compromise evidenced by Exhibits E, E1 and E2 is not in accordance with the compromise actually effected. So far as Gutala is concerned, the compromise in terms of Exhibit E is admitted, and that document itself is produced by them. It is contended for Polavaram that Exhibit E has not been proved and that there is no other evidence of the terms of the compromise.

Exhibit E is a copy of the original document purporting to have been executed by the Polavaram Zamindar in favour of the Zamindar of Gutala. It is only a private copy and it is neither signed nor dated. The learned Government Agent, in considering its admissibility, has apparently relied on circumstantial evidence in proof of its genuineness. In one part of his judgment he seems to rely on section 90 of the Evidence Act on the ground that section 90 has been held to be applicable not only to original documents but also to copies. But he has gone considerably further than the presumption warranted by section 90 without really considering the exact effect of that section, and sums up his finding as follows. "The copy produced appears to be genuine and ancient. It gives Polavaram what on the face of it is a reasonable *quid pro quo*. The original is lost. The custody is proper. All that is not proved is the signature and the handwriting but the collateral evidence and the circumstances point to its genuineness. For these reasons I accept Exhibit E". There is no doubt a considerable body of evidence which goes to show that there was some sort of compromise and that its terms were somewhat similar to, if not exactly the same as, the terms of Exhibit E but there is absolutely no proof of the document. The writer is unknown and it does not even purport to be written by any particular person. The date of its making is also unknown and therefore it cannot be said with any certainty that it is thirty years old nor does it purport to be thirty years old. If therefore the document is to be admitted in evidence it must be proved in some way or other. It has not been proved by any witnesses and the presumption in section 90 cannot apply, for that only relates to documents which purport or are proved to be thirty years old and are produced from proper custody. This is not one of such documents

and therefore the limited presumption of section 90 cannot apply. One of the cases relied on by the Government Agent for admitting Exhibit E is *Ponnambalatu Parapravar Bairtee Haji* v. *Sarotu Sankaran Nair* (1) but, from the brief judgment in that case, it does not appear, that the copy was not proved, but on the contrary it would appear that there was some evidence adduced in regard to the copy. Here we have no evidence at all as to the making of the copy. The document not being proved to be 30 years old and being only a private copy proof would be necessary that it was compared with the original before it could be admitted in evidence. As there is no evidence that Exhibit A conforms to any of the provisions of the Evidence Act (S. 63) in regard to secondary evidence it is not admissible in evidence and must be rejected.

Exhibit E 2 is a copy of the petition submitted by the Zamindar of Polavaram and it contains the terms of the compromise though not in exactly the same language as Exhibit E. The same observations apply to this document as to Exhibit E, although we have got the evidence of one witness that the writing of it resembles the writing of one Vedlamani Seshayya, who was a clerk in the estate office. Here again the document is not proved, and does not purport to be thirty years old. Section 90 is therefore inapplicable.

There is also another objection to Exhibit E2 in that it is apparently a copy of a copy. We find that the words 'compared by Parti Rayappa' appear on the document and that the signature 'Patri Rayappa' is only a copy. It would therefore appear that Exhibit E 2 was a copy prepared by some private person unknown of the copy granted by the Collector's Office.

Exhibit E 1 is a copy of a petition purporting to have been submitted by the Zamindars of Gutala and Polavaram. But here again the same objections apply. So far as Polavaram is concerned, therefore the terms of the compromise have not been proved by Exhibit E series.

(1) [1911] 21 M.L.J. 981—12 I.C. 453.

It is then suggested that there is a good deal of other documentary evidence which goes to prove these terms, but unfortunately, section 91 of the Evidence Act prohibits any such evidence being given, for the only evidence of this contract which is allowable under that section is the document itself or secondary evidence of its contents: and none of the evidence which is now adduced comes within the category of secondary evidence contained in section 63.

Inasmuch as the Gangole Zamindar relies upon the terms of this contract or grant of 1829 for his right to construct a masonry dam, his case must fail as against Polavaram.

An attempt has been made to show that he has acquired such a right by user and prescription, but it has been found in the lower Court and admitted in arguments, that until 1911 no masonry dam had ever been constructed. His prayer therefore for a declaration that he is entitled to put up a dam made of any substance he pleases must fail and his suit must be dismissed so far as Polavaram, the first defendant, is concerned.

As Gutala has admitted Exhibit E and in fact relies upon it, it will be necessary to consider, so far as the proprietors of Gutala are concerned, what rights the plaintiff has. The Gangole mittah was sold to the plaintiff in 1838 and another deed was executed in 1849 at the time when the transfer of registry was effected by the Collector. The contention now is that all the rights conferred by Polavaram upon Gutala in 1829 passed by that sale to Gangole. Neither of the sale deeds contains any recital as to rights of water or any reference to the compromise, but it is urged that the right was appertaining to the land which was sold to Gangole. The right to dam the stream and prevent the flow of water to the Polavaram estate which is given by Exhibit E is claimed to be an easement right, the dominant heritage being the Gutala estate, which at that time comprised also the Gangole mittah, and the servient heritage being the Polavaram estate. It is contended that, as no right has been reserved in the sale deed, the whole

of this easement right must be deemed to have been transferred. It must, however, be observed that the right when created was a right pertaining to the whole of the Gutala estate, and must be deemed to have been for the benefit of the whole estate. In fact we have evidence that in 1830 a bund was constructed and the Sagupadi channel which takes off from that bund was extended so as to water not only the villages of Gangole mittah, but also the Gutala villages lower down the stream. It is therefore difficult to understand how this right which included a benefit to the estate retained by the vendor, Gutala, can be said to have passed wholly to Gangole, who bacame the owner of only a portion of the dominant heritage. Under S. 30 of the Easements Act, when a dominant heritage is divided between two or more persons the easement becomes annexed to each of the shares, provided that such annexation is consistent with the terms of the instrument under which the division was made. Here the annexation of the right to Gangole alone would be to create an easement in Gangole as against the remainder of the Gutala estate for the effect of damming up the waters in the Gangole mittah would not only deprive Polavaram of water but also the lower parts of Gutala. No doubt an arrangement might have been made for watering these lower villages by means of a continuation of the channel which waters the Gangole estate. But in order to enjoy such a right it would be necessary for Gutala to have a right to water upon the land of Gangole in order to reap such a benefit or alternatively an easement right to take water through Gangole would be conferred on Gutala. In the absence of a definite agreement to that effect no such right can be presumed in Gutala, and therefore it appears to me that the terms of the sale are quite inconsistent with the idea that the easement right was wholly tranferred to Gangole. Whether Gangole and Gutala still possess a joint right against Polavaram it is not necessary here to discuss, because so far as Polavaram is concerned. this suit must be dismissed, and no attempt has been made by Gutala in their litigation to assert such a right.

One fact relied on by Mr. Venkatarama Sastri for Gangole is that, in 1848, when Hota Gengayya commenced the erection of dam, he was supported by the proprietor of Gutala: but it must be remembered that at that date Gangole had not been separately registered, and consequently would not be recognised by the Revenue authorities. The registered proprietor of Gangole mittah was at that time the Gutala Zamindar and therefore there was nothing extraordinary in the Zamindar of Gutala conducting the proceedings with reference to the dam in opposition to the Polavaram estate on behalf of his vendee. This one circumstance certainly cannot be deemed to prove that Gutala intended to part with all his rights under Exhibit E by the sale deed in 1843. It is possible that Gutala did not at that date care very much whether the right was exercised by Gangole or by himself, but is anxious to assert his rights against Polavaram. We see that in 1867 when further disputes arose Gutala difinitely opposed Gangole's attempts to raise a dam and from that time forwards there have been continuous disputes between the parties. I must hold therefore that the Gangole proprietor has failed to establish the right claimed in his plaint.

I think also for another reason that his suit must fail. Under S. 47 of the Easements Act,a continuous easement is extinguished when it totally ceases to be enjoyed as such for an unbroken period of twenty years. Such period should be reckoned in the case of a continuous easement from the day on which its enjoyment was obstructed by the servient owner, and in the case of a discontinuous easement from the day on which it was last enjoyed by any person as dominant owner. Assuming that this is a continuous easement as contended for by Gangole, obstruction was begun in 1867, or certainly in 1876, and has continued up till the time of filing this suit. Admittedly the permanent dam was never constructed until 1911 and therefore it is clear that the right had not been enjoyed for an unbroken

period of at least twenty years prior to 1911. On that ground also Gangole's suit must fail.

These findings might be sufficient also to dispose of the connected suit in which Gutala sues for the removal of the masonry Valanka, but a great deal of evidence has been adduced to show that the Gangole proprietor has from time to time been putting up Valankas and cross dams of a non-permanent character and thereby diverting the water of the Kovvada kalva into his Sagupadi channel, and the Government Agent has ordered in his decrees that the extent of this right, which he terms the right of the riparian owner, should be determined in execution. No doubt as the Government Agent is responsible for the due administration of the scheduled district and for the peace and order therein his decree may be said to be equitable as giving an opportunity to the parties to come to terms as to their respective rights to the user of the water—a question which can only be accurately settled with great difficulty. Treating the question as one of law, it seems to me clear that the Government Agent's decree cannot stand. When he found that Gangole had no right to build a permanent cross dam, he ought to have dismissed O. S. No. 2 of 1916. Similarly as regards the Valanka, which apparently is now a solid structure extending some 200 yards into the stream, an order for its removal or at least diminution should have been passed. It is suggested that in the case of the valanka, which only diverts the water of the stream and does not dam it up, it is really immaterial whether it is constructed of sand or tatties or loose stones, or whether it is made of stones and mortar. It is however quite clear that the temporary flimsy structures which had been put up before were constantly washed away and therefore for long periods constituted no obstruction at all to the flow of water to Polavaram and lower Gutala, whereas the existence or a permanent masonry valanka must always divert a certain quantity of water, which in times of low water might be of considerable importance to the lower proprietor. Gangole has in no way established his right to put up such a permanent structure, for I have held that the right under Exhibit E has not passed to him, and therefore I think that an order must be made for the removal of the valanka It is perhaps unfortunate that Gangole should be driven to building temporary structures, which naturally entail considerable additional expense, as they are repeatedly washed away and have to be rebulit but as a question of right it must be held that nothing further has been established by him. The right he has obtained can only be a right by user or prescription and it is incumbent on him, if he claims any particular right to prove that he is entitled to it. In this Court, in Second Appeal No. 111 of 1904 the creation of a permanent masonry dam was restrained, when it was found that a right to a temporary dam only had been made out. No permanent dam having been constructed prior to 1911, no right to such a dam can have been acquired by prescription. The user proved is only the erection of the flimsy structures. As pointed out in *Bakthovathsola* v. *Secretary of State* (2) the question in each case must be what is the exact nature of the right which is shown by the evidence to have been acquired by the party? In this case Gangole has failed to show that he is entitled to a permanent valanka as now existing and therefore his defence in O. S. No. 1 of 1917 must fail.

As a result O. S. No. 2 of 1916 must be dismissed with costs, two sets, and in O. S. No. 1 of 1917 there will be a decree, directing the removal of the valanka within 4 months with costs and that in default plaintiffs be at liberty to remove it and recover costs thereof to be determined by the lower Court from defendant. Gangole will pay costs in Appeal 283 (2 sets) and in Appeal 350 (one set). In the other appeals the parties will bear their own costs.

Devadoss, J.—I agree.

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(2) [1911] 9 M. L. T. 375—9 I. C. 636.

1923 MADRAS 679

SCHWABE, C. J. AND RAMESAM, J.

M. Kuppuswami Chetty and another—Plaintiffs-Appellants.

v.

M. Singaravelu Chetty and others—Defendants-Respondents.

O. S. A. No. 54 of 1920, D/- 21st March 1923, from the judgment and decree of Phillips, J. in C. S. No. 603 of 1918.

(a) Words and Phrases—Good debts leaving off bad debts—Mortgages and such other things.

The terms of the muchilika were :—

The immoveable and moveable properties, silver, and precious stone ornaments which are partly the self acquisition of the father and which were partly acquired by the plaintiff by having traded for about 18 years along with him and separately and the good debts leaving off the bad debts as per ledger account kept in the business carried on at present only in the name of the plaintiff and the mortgages, simple loans, shares and all such other things, which are in the possession of all the members of our family shall be valued on the whole by you the two arbitrators,

Held that "such other things" must be read *ejusdem generis* with the words going before, and they mean assets unconnected with the business and things like mortgages, loans and shares, which might perhaps be compendiously described as choses in action.

[P. 680 C. 2]

Held. further that the proper interpretation of "good debts.....business" is that if there is a balance of good debts over bad debts, then it is to be divided; if there is no balance, there will be nothing to be divided. That expression does not mean that the whole business was included and that, if that business ultimately turned out as a burden instead of a benefit, the net loss was to be brought in and shared between the brothers. [P. 680 C. 2]

(b) Limitation Act, Art. 120—Business wound up—Suit for recovery of profits if any.

Where the business was wound in 1895 and at least by 1897, the plaintiff knew perfectly well exactly how he stood in the matter.

Held: that Art. 120 applied and the time for suit for the recovery of the balance became barred at the latest after six years from 1897.

[P. 681 C. 2]

(c) Civil P. C., O. 22 R. 4—Application to be made by the plaintiff or representatives of deceased.

R. 4 does not mean that the application under it should be made by the plaintiff and that the deceased defendant's representative cannot apply. [P. 682 C. 1]

K. Rajah Iyer and *V. Ramaswami Aiyar*—for Appellants.

T. Narasimha Aiyangar, T. Ethiraja Mudaliar, S. Rangaswami Aiyangar, S. Venugopal Chetti and *S. Bhupati Chetty*—for Respondents.

Schwabe, C. J.—In this case the plaintiff sues for partition of certain property which he describes as joint family property. In 1895 the father of the plaintiff and of the 1st defendant, who had been carrying on business for many years past with the plaintiff, became more or less insane. The two brothers of the plaintiff, namely the 1st defendant and one Ratnavelu, who subsequently became an insolvent, claimed that the property including the business was joint family property and should be divided as such. The plaintiff denied that the property was joint family property but ultimately entered into an agreement, Ex. A in the documents in O. S. A. No. 2 of 1917, referred to in this case as the muchilika, under which it was agreed that he should take half and his two brothers a quarter each in certain properties. They agreed to refer to arbitration how those properties should be apportioned. An arbitration took place. The arbitrators valued the moveable property in the possession of each member of the family and divided the immoveable property among the members in the proportions agreed upon. Nothing further was done. In 1900 Ratnavelu brought a suit for partition. He alleged that the property was joint family property and that the completion of the arbitration had been stopped by the action of the plaintiff, and he asked the Court to decree partition of everything. The plaintiff set up as a defence that there was no joint family property undivided, that the property, in fact was the self- acquired property of himself and his father and except in so far as it has been agreed by the muchilika, there was no right to partition at all and that the arbitrators had properly divided all the properties included in the muchilika. With that defence the 1st defendant agreed and that suit was discontinued. In 1901 a fresh suit was brought with the same objections and with the same result. Nothing further of any importance occurred until 1908 when a dispute arose in the course of which

the letter Ex. Q was written in which the 1st defendant complained that he had been ousted from certain of the immoveable properties which was his by the plaintiff and stated that he was willing to settle any accounts that might be outstanding. I should have mentioned before, that in 1905 an account had been settled between the plaintiff and the 1st defendant (Ex. P) which showed that, on balance, the defendant was indebted in a sum of Rs. 3,275 to the estate of the father, or as it might be put, to the joint family. No payment was made, no demand was made and nothing seems to have been done in any way until 1915 when a suit was filed by a purchaser of certain of the immoveable properties claiming to have them put into his name. I do not think that anything that happened in that suit has any real bearing on the matter before us. In 1918 the plaintiff brings this suit.

The first question to be decided is whether there is any joint family property, or any property of which the parties are co-owners, to be divided. The plaintiff only asks that an account should be taken for the purpose of a partition in which the business which had been carried on by him and his father was to be treated as a business of which he, the 1st defendant and Ratnavelu were or became co-owners, so that they would be liable for any loss that there was in that business. Apart from that, he requires no partition, because there is nothing which he alleges that has got to be divided. His whole case depends on the question of whether or not that business, which he alleges resulted in a net loss, is to be brought into the account as between him and his brothers: so that, if he is right in contending that there has been a loss which he has borne, he would be entitled to be indemnified for that loss in the division of the property and for this purpose, if necessary, to reopen the partition which took place under the arbitrators' award. The terms of the muchilika are:—

" The immoveable and moveable properties, gold, silver and precious stone ornaments which are partly the self acquisition of the father and which were partly acquired by the plaintiff by having traded for about 18 years along with him and separately and the good debts, leaving off the bad debts as per ledger account kept in the business carried on at present only in the name of the plaintiff and the mortgages, simple loans, shares, and all such other things, which are in the possession of all the members of our family shall be valued on the whole by you the two arbitrators. "

That clause contains a statement that the business had been the business of the father and the plaintiff. It contains first of all an agreement under which certain property was to be treated, for the purpose of this arbitration and division, as though it was joint. That was " immoveable and moveable ". The business is not included in those words. It is secondly, " the good debts leaving off the bad debts as per ledger kept in the business" and it is thirdly, " mortgages, simple loans, shares and all such other things ". In this third category " all such other things" must according to the strict construction of those words, be read *ejusdem generis* with the words going before, and I think that means assets unconnected with the business and things like mortgages, loans and shares, which might perhaps be compendiously described as choses in action. As regards the business specifically, what is to be divided is the balance of good debts over bad. The good will of the business is not brought in. The liabilities of the business are not brought in. In my judgment the proper interpretation of those words is this, that if there is a balance of good debts over bad debts, then it is to be divided; if there is no balance, there will be nothing to be divided. You cannot read into those words the provision contended for by the appellant, namely that the whole business was included and that, if that business ultimately turned out as a burden instead of a benefit, the net loss was to be brought in and shared between the brothers. That being so, there is nothing to divide which the plaintiff wishes to divide and his suit must

accordingly fail. No question of limitation arises in the matter at all, because he fails *in limine* to establish a right to what he claims, namely, a right to saddle the defendants with the share of the alleged losses in the business.

As the question of limitation has been raised, I desire to say a word or two about it, although in the view I have just expressed, it is not necessary for the decision. But, assuming that the business was included as a whole, the question would arise whether the plaintiff's cause of action has become barred by limitation. The converse case was fully discussed by a Full Bench in *Yerukola* v. *Yerukala* (1). But the cause of action here is different. The plaintiff says that he wants an account because, on the taking of that account, it will be found that he, as one of the co-owners has, spent on behalf of the co-owners more than he has received as his share and he wants them to contribute towards that expenditure. It seems to me that the claim that he makes must either come under Art. 61 or Art. 120 of the Limitation Act. Art. 61 is for money payable to the plaintiff for money paid for the defendant and time begins to run from the date when the money is paid, I see great difficulty in applying that article, because I do not think it can be intended in such a case that the cause of action should arise from the moment of every payment made by a co-owner in possession, it being impossible to say, whether, in fact, there is anything due or not, until he has not only paid off what has to be paid but received what has to be received and I express no view about it except that I am extremely doubtful whether Art. 61 can possibly apply to such a case. The result would be that we should have to fall back on Art. 120 which is for suits for which no period of limitation is provided elsewhere in the schedule, and the time there is six years and begins to run when the right to sue accrues, The question is when the plaintiff's right to sue accrued, and I should say that it accrued at the latest when the business was wound up definitely, when the amount paid by the plaintiff could be definitely ascertained and must no longer be a question of conjecture depending on other uncertain events. In this case the business was wound up in 1895 and I am quite satisfied that at least by 1897, the plaintiff knew perfectly well exactly how he stood in the matter. The fact that he himself having ascertained the debts took time for payment of those debts is an irrelevant consideration. I am satisfied that, even if this business was included the time for his suit for the recovery of the balance which he says he is out of pocket, by reason of payment of debts of this firm, became barred at the latest after six years from 1897 He also claims that he was entitled to recover from the 1st defendant the sum of Rs. 3,275 referred to above. I can see no ground for that contention at all. Accounts were settled between them, and if the settlement meant that the 1st defendant was liable to the plaintiff for that amount, there was nothing to prevent the plaintiff from suing for it, as a simple money debt which has long since become barred. It may be that, in the event of the 1st defendant's suing the plaintiff in respect of his property alleged by him to be in the hands of the plaintiff the plaintiff may be able to set up against that claim this claim for Rs. 3, 275, but with that we are not concerned in this suit.

For the above reasons, in my judgment, this appeal fails and must be dismissed with costs of the 2nd respondent.

The question is raised as to the liability for costs to the 8th defendant. His position is this. He is the legal personal representative of the 7th defendant who had been brought into the suit by the plaintiff. He defended the suit up to the third or fourth day of hearing and then died. After his death, the plaintiff announced his intention of withdrawing his suit against the deceased person and then

(1) 1922 Mad. 150—45 Mad 648—42 M.L.J. 507—15 M.L.W. 595—(1922) M.W.N. 215—30 M.L.T. 279—71 I.C. 177 (F.B.)

claimed that the legal personal representative of that deceased person had no right to be brought upon the record and when brought upon the record, had no right to receive his costs. The first statement rather startled me, and on looking into the matter, I do not think there is anything in it at all. Under O. 22, R. 1 the death of a defendant does not cause the suit to abate if the right to sue survives; and under R. 4 when a defendant dies, the Court, "on an application made in that behalf," shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit. It is argued that that means that the application should be made by the plaintiff and that the deceased defendant's representative could not apply. I see no reason at all for confining that section to an application made by the plaintiff; for, to do so would be gross injustice to the estate of the defendant who has been wrongly brought before the Court and who, having incurred by reason of his having been brought before the Court a heavy expenditure, dies. It is holding that his estate is to be deprived of the indemnity of his expenditure, which would be given to him by law if he survived, because the plaintiff does not choose to add his legal representative, as a defendant to the suit. That would be gross injustice and I see no reason at all for implying any such provision into R. 4 which says definitely "on an application made in that behalf" without confining it to an application by one or other of the parties. The 8th defendant, having been properly joined as a defendant, has quite properly, in my judgment, asked the Court, for his costs and the Court was perfectly right in giving him costs. He must also have his costs in this appeal estimated on the pleader's fee.

Ramesam, J.—I agree.

Appeal dismissed.

✱✱ 1923 MADRAS 682

AYLING, COUTTS TROTTER AND RAMESAM, JJ.

Secretary to the Chief Commissioner of Income-tax, Madras — Referring Officer.

v.

M. Doraiswami Ayyangar and Brothers—Assessees.

Referred Case No. 14 of 1921, D/- 28th March 1923.

Income Tax Act (VII of 1918), S. 51 and S. 2 (12)—Super Tax Act, 1920—Hindu Law—Partnership carried on by some members—Not necessarily joint family trade.

The registration of the brothers as a firm as defined under S. 2 (12) of Act VII of 1918 precludes the assessment of the family as an undivided family to super-tax on the income derived from the business of this firm unless the firm so registered has been shown to carry on its business on behalf of and for the benefit of the joint family.

The mere constitution of partnership between some members of the family will not preclude the assessment in cases where the partnership is conduced on behalf of and for the benefit of the joint family. [P. 683 C. 2]

C. Madhavan Nair—for Referring Officer.

A. Krisnaswami Ayyar—for Assessees.

Coutts Trotter J.—This is a case stated by the Chief Commissioner of Income tax to the High Court under S. 51 of the Income tax Act, VII of 1918 read with S. 6 of the Super tax Act of 1920. The question for decision is whether the assessees who are the registered firm of M. Doraiswami Iyengar and Brothers are assessable to super tax as an undivided Hindu family and the specific questions put to us are as follows:—

(1) Does the registration of the brothers as a firm as defined under S. 2 (12) of Act VII of 1918 preclude the assessment of the family as an undivided family to super tax on the income derived from this business of this firm.

(2) If not, does the mere constitution of a partnership between some members of the family by a formal document preclude the assessment of the income of the partnership to super tax as part of the income of the undivided family?

When this case first came before us we thought it necessary to have more

information than was afforded to us by the original case stated and therefore referred the case back for a finding of fact as to whether the original capital of the firm was wholly or in part derived from joint family funds. The answer to that is to be found in the Commissioner's letter dated the 5th of August 1922, the concluding paragraph of which runs as follows:—

"On the whole no adequate evidence has been adduced which would enable one to record a finding as a fact whether the original capital of the firm was wholly or in part derived from joint family funds."

To that is appended the following statement:

"It can only be inferred from the conduct of the assessees and all the circumstances of the case that appellants intended to trade as a joint family and did trade as such."

We desire to say with regard to this last statement that it is in no way relevant to anything that we referred back to the Commissioner that we decline to treat it as a finding of fact, by which we are bound in framing our answer to the questions referred to us. It appears to us to be a deduction of law from unknown circumstances rather than a finding of fact, but in any event, we disregard it as being in no way called for in connection with the matter that has been referred. In any event it is vitiated by the laxity of reasoning which led up to it and is evidenced by, the language in paragraph (3) of the same document in which it is said that the four brothers "practically" form the joint family. A joint family consists of certain definite persons and any given individual must either be a member of it or not. The general legal position appears to us to be beyond doubt, members of a joint family may engage in trade in such a way as to embark on the adventure funds of the joint family and pledge its credit to their undertaking. On the other hand the members of a joint family may embark on a trade without involving the funds of the joint family in it, and in that event, their profits as traders would be self-acquisitions and the losses would not be recoverable from the joint family property. The members who actually take part in the trade may enter into a deed of partnership between themselves and a stranger partner which of course would regulate their dealings *inter se* and with the stranger partner but need not necessarily affect the question as to whether and how for the property of the joint family is to be regarded as involved in the adventure. It is not conclusive to show that some funds of the joint family were invested in the trade; because they might have been borrowed by the trading members as a loan of a definite sum to be paid by the trading firm just as if it was a loan from strangers. In the present case the accounts appear to show that such a course has been pursued here and that the amount advanced by Mr. M. Ananthachariar, the father of the assesees and apparently the manager of the joint family of which they are all admittedly members were treated as a mere loan for the purpose of the business to be repaid with interest in the ordinary way and not as an indication that the business was conducted as a joint family business. But that is a question of fact and inference which is primarily at least for the determination of the Commissioner and not of this Court. We therefore answer the questions put to us in the only way we can answer them on the materials before us.

(1) Yes, unless the firm so registered has been shown to carry on its business on behalf of and for the benefit of the joint family.

(2) The answer is in accordance with the preceding answer. The mere constitution of a partnership between some members of the family will not preclude the assessment in cases where the partnership is conducted on behalf of and for the benefit of the joint family.

As we have been unable on the materials before us to give a final determination of the rights of the parties we make no order as to costs.

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✱ 1923 MADRAS 684

AYLING, COUTTS TROTTER AND RAMESAM, JJ.

The Secretary, Board of Revenue, Income-tax, Madras—Referring Officer.

v.

The Mylapore Hidu Permanent Fund, Ltd., Mylapore, Madras—Assessees.

Ref. Case No. 17 of 1921 D/- 29th March 1923.

Income Tax Act (VII of 1918) *S.* 51—*Interest paid by share-holders on loans from the Company not liable to tax.*

Interest from share-holders either on loans or on overdue subscription is not liable to income-tax because income to be taxable, must come in from outside and not from within. 14 A. C. 351 Foll. [P. 685 C. 2]

The Government Pleader — for Referring Officer.

A. R. Krishnaswamy Aiyar, N. Rama Rao, and *T. S. Srinivasa Rao*—for Assessees.

Ramesam, J.—This reference under S. 51 of Act VII of 1918 relates to the assessing of the Mylapore Hindu Permanent Fund for purposes of Income-tax.

The Fund was established in 1872, being registered under the Indian Companies Act of 1866. It then started with 11,904 shares and gradually increased the shares up to 1,19,047 shares. A share holder subscribes one rupee per share per mensem and at the end of seven years draws 102½ rupees and then he ceases to be share-holder (*qua* that share) The rate of interest works out at slightly less than that of 6¼% @ (simple interest). The amount of Rs. 18½ thus earned on each share is described as the guaranteed rate of interest. Other rules reduce the rate earned in case of withdrawal within 7 years. A share-holder has to pay interest on the subscription if not paid within the time prescribed by the rules. The Fund gives loans to the share-holders, divided into ordinary loans and special loans. Occasionally when there are large amounts not borrowed by the share-holders they may be invested on Fixed or Current deposits in outside institutions such as the Public Banks of Madras. The excess of interest earned by the Fund over the expenses of the institutions and the interest earned by the share-holders is regarded as the profits of the Fund. One eighth of this goes to the Reserve Fund, three-eighths (subject to a maximum of Rs. 5,000) is divided among the Directors and the rest is partly added to the Reserve Fund and partly distributed among the share-holders with reference to the number of the shares and the number of months during which they have held them (rule 85).

It is clear, from the above summary of the rules of the Fund that the number of the so-called share-holders is fluctuating from time to time the figure 1,19,047, representing only the maximum limit and that its earnings consist of (1) chiefly interest from share-holders either on loans or an overdue subscriptions and (2) occasionally interest from outside investments. So far as the second of these items is concerned it is conceded on both sides that the amount earned is liable to income-tax and the whole controversy centres on the first item. As to this item it seems to me that the case is governed by *New York Life Insurance Co* v. *Styles* (1). The principle of that case is that income, to be taxable, must come in from outside and not from within. The fact that the Fund is a legal entity (for certain purposes) does not matter for, in the language of Lord Watson (p. 393—4) it 'represents the aggregate of its members' and the members are the participators of its profits and 'I do not think that their complete identity can be destroyed or even impaired by their incorporation.' Last's case, *Last* v. *London Assurance Corporation* (2) was distinguished by Lord Bramwell (p. 396) on the ground that the profits were made and meant to be made not from its own members but from those it dealt with. There were in that case two bodies the share holders and the assured. In Style's case and in the case before us the persons dealt with and the participators are identical. To

(1) 14 A.C. 381—15 L.J., Q.B. 291—61 L.T. 201.

(2) 10 A.C. 438—55 L.J., Q.B. 92—53 L.T. 634—34 W.R. 233—50 J. P. 116.

the same effect are Lord Herschel's observations at p. 409 and Lord Macnaughten's at p 412 where he describes Style's case as one where the business is a mutual undertaking pure and simple. In *Equitable Life Assurance Society of the British States* v. *Bishop* (3) the share-holders of the company were entirely different people from the members of the mutual insurance body(Vaughan Williams L.J.at p 190.)

The case of *Leeds Permanent Benefit Building Society* v. *Mallandaine* (4) was strongly relied on by the learned Government Pleader. The judgment of the Divisional Court is reported in 76 T. L. R. 650. The learned Judges Wills and Grantham JJ. observed, "The case of *New York Life Assurance Co.*, v. *Styles* (1) is not in point, as the society is not a mutual society, whereas that Insurance Co. was (at p, 652). On Appeal the whole argument turned on the application of *Clerical Medical and General Life Assurance Society* v. *Carter* (5) and no reference was made to Style's case either in the judgments of the Court of Appeal or the arguments before it and the decision of the Court of Appeal is no authority on the point now discussed. In that case a benefit building society consisted of two classes of members (1) Investors each of whom invested one or more sums of £100 and (2) borrowers who do not invest but borrow from the society on shares or fifth parts of shares and pay 2 s—6 d per share or 6d. per fifth part of a share per week to the fund after the borrowing this sum being intended to be a discharge of (1) the interest on the loan and (2) the principal. The resemblance between that case and the present one is in the fact that both investors and the borrowers participate in the surplus and that the investors are like the share-holders in the present case but the difference consists in the fact that the borrowers are not like the share-holders and an investor can never be a borrower. It is obvious that the fact, that, while the investors only were the capitalists, the final participators consisted of the investors and borrowers, prevented its being a mutual company. If the real company in that case is regarded as consisting of the investors only, the income was earned from outsiders only and Style's case cannot apply. This must have been the view of the Divisional Court—the borrowers being regarded as outsiders. It is clear that their payments of 2s. 6d. per share or 6d. per fifth part of a share per week can bear no analogy to the sums of £100 contributed by the investors and the final participation of the borrowers in the profits was considered as a bait to them and as a reduction of the interest they pay and not to alter their position as outsiders. The cases in 2 Tax cases 131 and 6 Tax cases 85 relate to the supply of water by the Glasgow Corporation and the District Council of Mallingar and cannot help us in the present case. In *Carlisle and Silloth Golf Club* v. *Smith* (6). Buckley L.J., says "A man cannot make a loss or profit out of himself, and that was the ground of the decision in *New York Life Insurance Co.* v. *Styles* (1),

I am therefore of opinion that all earnings found from within are governed by Style's case and are not liable to be taxed.

The Government must pay the costs of the reference to the other side. Fee Rs. 250.

Appeal dismissed.

(3) [1900] 1 Q.B. 177—69 L.J. Q.B. 252—81 L.T. 693—48 W. R. 341—4 Tax. Cas. 147—16 T.L.R. 174.

(4) [1897] 2 Q.B. 402—66 L.J, Q.B. 813—77 L.T. 122—61 J.P. 675.

(5) 22 Q.B.D. 444—58 L.J. Q.B. 224—37 W.R. 346—53 J.P. 276.

(6) [1913] 3 K.B. 75—82 L.J., K.B. 837—108 L.T. 785—11 L G.R. 710—6 Tax. Cas. 198—57 S.J. 532—29 T.L.R. 508.

1923 MADRAS 685

SCHWABE, C. J. OLDFIELD AND COUTTS TROTTER, JJ.

Chockalinga Chettiar—Plaintiff—Appellant.

v.

S. Palani Ambalam — Defendant — Respondent.

L. P. A. No. 25 of 1921, D/- 13th March 1923 against the judgment of Krishnan, J., in S. A. No. 999 of 1920.

Madras Estates Land Act (I of 1908), Ss. 13 (3) and 187 (1)—Contract before the Act—Improvement after the Act—Contract not enforceable.

Where the plaintiff claims that he is entitled to get rates on the strength of a contract entered into before the Estates Land Act (1 of 1908) was passed and the improvement was made after it was passed.

Held, that the plaintiff is not entitled to rely on his contract in view of S. 13 (3) of the Act read with S. 187 (1). [P. 686 C. 2]

C. V. Ananthakrishna Aiyar — for Appellant.

S. T. Srinivasagopalachari — for Respondent.

Judgment.—The question is whether the plaintiff, land-holder, is entitled to recover rent at wet rates from his tenant, the defendant, for land which the latter has been able to cultivate wet in consequence of improvements made at his own expense. The plaintiff claims that he is entitled to wet rates on the strength of a contract contained in Exhibit D of the year 1885, *i e.* before the Estate Land Act was passed. The improvement was made after it was passed. Krishnan J. has held that, in these circumstances, the plaintiff is not entitled to rely on his contract with reference to S. 13 (3) of the Estates Land Act.

It is no doubt true that, as the plaintiff contends, such a contract would have been enforceable under the previous law, S. 11 of Act VIII 1865. The only authority relied on by the plaintiff is a dictum of Kumaraswami Sastri J. in *Venkataperumal Raja* v. *Ramudu* (1) a case in which both the contracts and the improvements were made before the passing of the present Act. That dictum was, therefore, unnecessary for the learned Judge's decision. The considerations which weigh with us are (1) that the wording of S. 13 (3) exempts the ryot from liability to pay a higher rate of rent in consequence of improvements made at his sole expense, notwithstanding any usage or contract to the contrary and that wording is absolutely general; (2) that as Krishnan J. has observed the connected reference to usage renders it unlikely in the extreme that the legislature intended to except contracts made before that Act, but not enforceable before it from this provision; (3) the ryot is referred to in S. 13 (3) as becoming liable to pay a higher rate of rent, inconsistently with the view that he had already become iable under a previous contract. Lastly S, 187 (1) must be read with S 13 and in the former the reference is to "contracts made before or after the passing of this Act." This indicates clearly that the intention of the legislature was to refuse to contracts made before equally with contracts made after the passing of the Act any effect on the relation between the ryot and the landholder.

Taking this view, we dismiss the appeal with costs.

Appeal dismissed.

(1) [1915] 39 Mad. 84—28 M.L.J. 81—(1915) M.W.N. 132—17 M.L.T. 129—27 I.C. 688.

1923 MADRAS 686

OLDFIELD, J.

Parthasarathi Chetti (dead) *and another* —Plaintiffs—Petitioners.

v.

Abdul Rahiman Sahib — Defendant—Respondent.

Civil Rev. Pet. No. 130 of 1921, D/- 31st January 1923, against the order of the District Munsif, Tirupattur, in R. E. P. No. 300 (a) of 1920 D/- 22nd September 1920.

Limitation Act, Art. 182 — No step-in-aid—Order for 'fresh steps if any'.

A warrant of arrest. issued at the instance of the decree-holder had been returned, the judgment-debtor not having been found. Thereupon the Court passed an order in the following terms :—"Fresh steps, if any, by 10th May 1917."

Held, that neither this order nor the application, which must have been made in connection with it, is a step-in-aid of execution; it could not be said that limitation began to run from the 10th May, when the application for execution was finally dismissed. 31 M. 71 and 8 C. 420 Dist. [P. 687 C. 1]

C. Narasimhachariar — for Petitioners.

The Respondent was unrepresented.

Judgment.—The question is whether this execution application is in time; that is when the last step-in-aid of execution was taken by the petitioner.

The facts are that on 3rd May, 1917, a warrant of arrest, issued at his instance, had been returned the judgment-debtor not having been found. What is relied on by the petitioner as a step-in-aid of execution is that the Court passed an order in the following terms :—" Fresh steps, if any, by 10th May, 1917." This order or the application, which, I am asked to presume, must have been made in connection with it, is relied on as a step-in-aid of execution. I agree with the lower Court that neither can be relied on in that way. The order itself is clearly not a step taken by the petitioner (decree-holder). It is impossible to say whether it was based on any application made or what the nature of that application was. On the assumption that there was an application for further time that would not be a step-in-aid.

The petition is then argued on the ground that time really ran from 10th May, 1917, on which date the execution petition then pending was dismissed. This is not in accordance with the wording of Art. 182 of Schedule I of the Limitation Act ; and the only authority shown me for it is *Chalavadi Kotaih* v. *Poloori Alimelammah* (1) and *Kedarnath Dutt* v. *Harra Chand Dutt* (2) followed therein. In *Chalavadi Kotiah* v. *Poloori Alimelammah* (1) the question was of an execution, which had been suspended owing to a bar to its proceeding and in which a strike off order of the well known type was passed. The reasoning of the learned Judges is not fully stated. In fact they give two alternative grounds for their conclusion and it is not clear to me that they meant to lay down a general principle, which would involve a wide departure from the language of the Act. *Kedarnath Dutt* v. *Harra Chand Dutt* (2), is a decision of a single Judge. His reason for holding that the right to apply was still subsisting apparently was that the application was one in a pending suit. If so, that reason is not available to the petitioner in the present case, for the present application is not made in any pending suit or other pending proceedings.

The result is that the revision petition fails and is dismissed.

Petition dismissed.

(1) [1908] 31 Mad. 71—18 M.L.J. 46—3 M L.T. 329.
(2) [1882] 8 Cal. 420.

1923 MADRAS 687

KRISHNAN, J.

In re: *Garapati Kotayya and another*

Cr. R. C. No. 755 of 1922, D/- 2nd March, 1923 to revise the order of the Sub-Div. Mag., Ellore in Cr. App. No. 33 of 1922.

(a) Penal Code, S. 353—Execution of Warrant within time—Assault.

Where the time fixed by the Munsif for the return of the warrant had not expired but only the time given by the Nazir for the earlier return of the warrant as a matter of office routine had expired.

Held, The warrant had not become time barred and the accused assaulting the Amin while executing it was guilty under S. 353. 40 C. 849 Foll. [P. 687 C, 2]

(b) Penal Code, S. 35—Making preparation.

The facts that the accused left the place where the disturbance was and came back with a stick in his hand and the persons alleged to be assaulted dismissed him, apprehending that he would attack them are sufficient to lead to the inference that the accused was making preparations to use criminal force. [P. 688 C. 1]

Peri Narayanamurthi and *K. Kamanna*—for Petitioners.

V. L. Ethiraj—for Crown.

Order.—The first point taken is that the warrant had become time expired when it was sought to be executed by the Amin and therefore he could not be treated as having acted in the proper discharge of his duty. The time fixed by the Munsif for the return of the warrant had however not expired. Only the time given by the Nazir had expired. The Amin derives his authority to execute the warrant in virtue of his office from the Court, that is the Munsif. The Nazir could not and did not take away that power. He only directed an earlier return as a matter of office routine, and that did not affect the Amin's authority. The same view is taken in *Subed Ali* v.

Emperor (1). Following that ruling I must overrule the 1st objection.

It is next argued that there is no evidence of any assault under S. 353 I. P. C. against the 1st accused. The prosecution witnesses prove that the 1st accused left the place where the disturbance was and came back with a stick in his hand, and as they apprehended that he would attack them they disarmed him. I think the evidence is enough to justify the inference of both the lower Courts that 1st accused in coming back to the scene armed with a stick was making preparations to use criminal force to Amin and the constables. That they apprehended such a result is clear from the evidence and from their action in disarming him. The second ground also fails. As against second accused there is clear evidence that he pushed the Amin and thus committed assault.

The convictions under S. 353 I. P. C. are correct and are confirmed.

As regards the sentences I am inclined to think that in the circumstances of this case considering that no serious violence was used, it is not necessary to give the accused rigorous imprisonment. I set aside the sentences of 2 months rigorous imprisonment passed on the accused and substitute for it a fine of Rs. 50 against each of the accused, in default one month's rigorous imprisonment.

Sentence modified.

(1) [1913] 40 Cal. 849—14 Cr. L.J.274—17 C.W N. 941—19 I. C. 706.

✱ 1923 MADRAS 688

AYLING, J.

K. Krishna Rao—Petitioner.

v.

P. S. Seshasubramania Iyar—Respondent.

Cr. Rev. No. 328 of 1922, and Cr. Rev. Pet. No. 285 of 1922, D/- 21st December, 1922, to revise the order D/-20th March 1922 of the Add. Dt. Mag. of Tanjore in Criminal Misc. P. No. 8 of 1922.

Criminal P. C., S. 17—Power of Dt. Mag. to direct a stay.

There is no provision in the Cr. P. Code which would give the District Magistrate the power to stay proceedings in a Criminal Court subordinate to him and it would appear that the High Court's power to pass such an order can only be exercised under its general powers of superintendence. 23 Cal. 610; 30 M. 216 Ref.

T. Richmond—for Petitioner.

K. S. Jayarama Iyer and *P. N. Appusamy Iyar*—for Respondent.

J. C. Adam—for the Crown.

Order.—This is a revision petition against an order of the Additional District Magistrate of Tanjore directing stay of proceedings in a criminal case before the Stationary Sub-Magistrate of Tanjore, who had previously on application made to him declined to stay the trial of the case.

The Additional District Magistrate says that his jurisdiction to pass the stay order was not questioned in argument before him. But Mr. Richmond now definitely raises the question, and I think it must not only be determined, but decided in his favour. Neither the learned Public Prosecutor, nor the learned vakil for the respondent accused in the case can point out to any provision in the Code of Criminal Procedure Code which would give the District Magistrate the power to stay proceedings in a Criminal Court subordinate to him and it would appear that this Court's power to pass such an order can only be exercised under its general powers of superintendence *vide Raj Kumari Debi* v *Bama Sundari Debi* (1) and *Anna Ayyar* v. *Emperor* (2). I must hold that the order of the District Magistrate is *ultra vires* and it is hereby set aside.

Order set aside.

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(1) [1900] 23 Cal. 610.
(2) [1907] 30 Mad. 226-6 Cr. L. J. 131.

✱ 1923 MADRAS 689

SCHWABE, C. J. AND ODGERS, J.

President of the District Board, South Kanara—Defendant-Appellant.

v.

K. Gopalakrishna Bhatta—Plaintiff-Respondent.

S. A. No. 1 of 1921 and Civ. Rev. Pet. No. 2 of 1921, D/-15th March 1923, against the decree of the Dt. Court, South Kanara in A. S. No. 50 of 1920.

Provincial Small Cause Courts Act, Sch. II Arts. 1 and 3--President of District Board not an officer of Government—Tolls Act (21 of 1901), S. 7 does not bar suit for damages.

Plaintiff had bought the right to collect tolls on certain roads from the District Board. He had to comply according to this contract with the orders given by the President of the District Board. He received an order from the appellant, President of the District Board, forbidding him to collect tolls in the District from certain carts carrying fodder for army purposes. The respondent complied with the order which the appellant had issued and in due course brought a suit for damages claiming that this order forbidding him to collect these tolls was illegal and allaging that he had suffered the damages by reason of that order.

Held: that the President of the District Board is not an officer of Government within the meaning of Arts 1 and 3 and therefore the suit is triable by Small Cause Court. [P. 689 C. 2]

Held, further that the loss had not been sustained by the present respondent by reason of S. 6 of the Tolls Act (21 of 1901) but even if it were so that section does not exclude the jurisdiction of the Small Cause Court to hear cases such as this. [P. 690 C. 1]

C. Malhavan Nair—for Appellant.

B. Sitarama Rao, R Kesava Aiyangar and K. P. Sarvothama Rao—for Respondent.

Judgment, [S. A. No. 1 of 1921].—A preliminary point in taken in this second appeal under S. 102 of the the Civil Procedure Code, on the ground that this was a suit which could be brought in the Provincial Small Causes Court being for an amount under Rs. 500. The suit was rather a curious one. It was an action by a person who had bought the right to collect tolls on certain roads from the District Board. He had to comply according to this contract with the orders given, by the President of the District Board. A large quantity of fodder being required for army purposes in this District, the Forest Officers hired carts and sent them along the road on which the toll bar in question was. The respondent tried to collect tolls on these carts and he received an order from the appellant, President of the District Board, forbidding him to collect tolls, he basing his prohibition on his interpretation of the Army Act, under which he decided 'that no toll was payable in respect of carts carrying supplies for the army. The respondent complied with the order that the appellant had issued and in due course brought a suit for damages claiming that this order forbidding him to collect these tolls was illegal and alleging that he had suffered the damages by reason of that order.

The District Munsif and on appeal the Subordinate Judge so found, and awarded him damages for Rs. 214. No. second appeal lies against that decision, the amount being under Rs. 500 unless this is one of the suits set out in the second schedule to the Provincial Small Causes Court Act, IX of 1887. The article of that schedule relied upon is Art. 19 "A suit for a declaratory decree not being a suit instituted under S. 283 of the Code of Civil Procedure". I agree that if the case is really a case for a declaration the Court would be entitled to hold that the Small Cause Court's jurisdiction was excluded. If the case is really a case for damages, as in our judgment this was, the Small Cause Court would have jurisdiction, though in arriving at its decision, it would have to come to a conclusion, as to whether this prohibition was rightly or wrongly imposed. The other articles relied upon are Arts. 1 and 3, which exempt from the cognisance of a Small Cause Court suits concerning acts or orders purporting to be done by the Governor-General in-Council, or by a Local Government, or by a member of the Council and suits concerning acts or orders purporting to be done by any other officer of the Government in his official capacity. If the President of the District Board is an officer of the Government within the meaning of these articles, this suit would be excepted. But in our judgment he is not. Local Boards and Corporations are what may be called

quasi governing bodies; but by the very scheme of the Acts under which they are created, they are not servants of the Government. Their representatives in some cases are nominated but generally elected by the people and they have their official capacity as such and not as officials of the Government. It is true that they are under Government, in the sense that under the statute they have to account to the Government and are under certain disciplinary powers of the Government. The Government has a duty cast upon it, to see that these ministerial bodies carry out their functions lawfully. But in our judgment none of the officials of these Municipalities and District Boards are officers of the Government, coming within Arts. 1 and 3.

It follows that this preliminary point succeeds and that this Second Appeal does not lie and must be dismissed with costs.

Schwabe, C. J.—[C. R. P. No. 2 of 1921.] This Civil Revision Petition is on the same matter just disposed of (S. A. No. 1 of 1921). It is suggested that the Court that had heard the case had no jurisdiction by reason of S. 6 of the Tolls Act, XXI of 1901. By that section, provisions are made for compensation to certain persons, who sustain loss, by reason of that Act. It is argued that loss had been sustained by the present respondent by reason of that Act. It is not at all so. Even if it were so, that section does not in my judgment exclude the jurisdiction of the Small Cause Court to hear cases such as this.

It is further suggested that this action did not lie; because it was against the President and not against the District Board itself. That is not a question, as I understand it, going to the jurisdiction; and I see no ground for interfering in this case in revision.

The Civil Revision Petition will be dismissed. There will be no costs.

Odgers, J.—I agree.

Appeal and Petition dismissed.

✱ 1923 MADRAS 690

ODGERS, J.

Ratnachalam Iyer—Petitioner.

v.

Sivachidambaram Pillai and others—Counter-Petitioners.

Civ. Rev. Pet. Nos. 414 and 415 of 1921, D/- 19th February 1923 to revise the orders of Dt. Munsif Court, Kulitalai D/- 25th September, 1920.

(a) *Civil P. C. O. 1 R. 10 —Striking out unnecessary parties—No appeal lies.*

Where some of the defendants, who are joined for the sake of convenience are struck out, there is no substantive right decided nor the striking out has any effect of putting an end to the litigation and therefore no appeal lies. 1922 Mad. 332=45 M. 194 Foll. 42 M. 219 and 1920 M. W. N, 467 Not. foll. [P. 691 C. 1]

(b) *Civil P. C. S. 115—Interference with interlocutory orders exceptional.*

Though the Court will interfere in revision with an interlocutory order, such interference should be exercised with extreme diligence, the general rule being against such interference; it will interfere only in such cases as for example where the Court below has acted perversely or in a manner as to cause irreparable loss to plaintiffs. [P. 692 C. 2]

Vaidyanatha Aiyer and N. Swaminatha Aiyar—for Petitioner.

S. T. Srinivasagopalachari and C. V. Ananthakrishna Aiyar — for Counter Petitioner.

Judgment.—These are revision petitions against the orders of the District Munsif of Kulitalai. The first is against an order of his striking out defendants 43 to 99 in Original Suit No. 596 of 1920 on his file and the second against his dismissal of an application by plaintiffs to join these same defendants on the ground that some of them are setting up permanent rights of occupancy on the lands in their possession and which are in question in the suit.

A preliminary objection is taken that no revision petition is competent as an appeal lies and this objection must be disposed of first of all. It will be necessary to examine the plaint in some detail and to see exactly what is claimed in the suit. The plaintiff alleges that the lands in question are samudayam lands in K. T. Viganallur village consisting of 104¼ pangus. These

lands are the property of the defendants (1 to 42) in their respective shares. The five heads of chethis (including 2nd plaintiff) are enjoying the said lands on their own behalf and that of the other owners. Two previous partition suits were filed namely O. S. No. 202 of 1910 by 1st defendant and O. S. No. 74 of 1891 by second defendant by which 1st plaintiff has acquired 5/15/16 pangus and second plaintiff 6 pangus. 1st defendant is entitled to 43/16 pangus and second defendant 163/16 pangus, the remainder (71 & 15/16) are the property of defendants 3 to 42. As joint enjoyment is impossible owing to disputes, the plaintiffs asked for partition of the 11 & 15/16 pangus belonging to themselves. Defendants 43 to 99 who are tenants at will with the consent of the heads of the chethis are joined as parties in order that possession may be given to plaintiffs. The material prayers are that the 11 & 15/16 pangus be partitioned out to plaintiffs and given possession of and that future profits from date of plaint to date of actual partition at the rate of Rs. 350 a year be given by the defendants. Mr. Vaidynatha Ayyar who takes that preliminary objection urges that the District Munsif by his order has refused to plaintiffs the relief of possession and to have their title to the reversion investigated. The rights of the plaintiffs to bring the suit as against the tenants is determined. He relies on the rulings in *Rama Rao* v. *Rajah of Pittapur* (1) and *Ayya Mudali Velan* v. *Veerayee* (2), as governing the questions. In the former case it was held that the substance of the order striking out 1st defendant was to determine the right of the plaintiff to bring a suit of that nature; it was for a declaration that 1st defendant be not entitled to claim that he was a reversioner to the Rajah of Pittapur and secondly for setting aside the adoption of the 2nd defendant by the 4th defendant and that therefore the order was a decree as a substantial right had been adjudicated upon and a substantial relief had been deleted. The test suggested was 'Does the removal of parties leave the suit in tact? In *Ayya Mudali Velan* v. *Veerayee* (2) a refusal to implead a person as legal representative of deceased plaintiff on the ground that the cause of action did not survive is a decree as it finally deprives the person refused of all his rights in the suit and has the effect of putting an end to the litigation altogether. The only material allusion to tenants in the plaint is in para 10 where it says the defendants (43 to 99) are tenants at will and are joined for the purpose of completing plaintiff's possession of their shares when partitioned. No relief is claimed against them. Prayer (c) future profits is not an appropriate relief against tenants but only against the co-shares (defendants 1 to 42) with the plaintiffs. The first prayer for partition makes no specific mention of the tenants and I am unable to find that any relief is claimed as against them. They are only sought to be impleaded for convenience. These facts seem to me to distinguish the present case from both the cases quoted above. No substantial right has been adjudicated upon here and the effect of deleting the tenant defendants has certainly not the effect of putting an end to the litigation altogether. Moreover the case of *Shanmuka Nadan* v. *Arunachalam Chetty* (3) seems to me a direct authority in support of this view. The refusal to join the holders of disputed decrees in a family partition suit was held not to be the subject of appeal, even though reliefs were alleged to be claimed against those defendants, on the ground that the lower Court's order was not a conclusive determination on any of the matters in controversy. I therefore hold that as no appeal is expressly provided by the

(1) [1918] 42 Mad. 219—36 M.L.J. 169—25 M.L.T. 184—9 L.W. 329—49 I.C. 835.

(2) [1920] M.W.N. 467—39 M.L.J. 218—12 L.W. 188—58 I.C. 498.

(3) 1922 Mad. 332—45 Mad. 194—42 M.L.J. 97—30 M.L.T. 172—69 I.C. 961.

Code and as the matter does not fall within the principles of the cases cited by Mr. Vydyanatha Iyer there is no appeal. This disposes of the preliminary point. The further question arises as to whether assuming that revision petitions lie, I should interfere. For the plaintiff's several authorities are relied on. *Shanmukanadan* v *Arunachalam Chetty* (3) is authority for interference where the lower Court has entirely misunderstood the nature of the judicial discretion it was called upon to exercise. *Arunachalam Chettiar* v. *Arunachalam Chettiar* (4) is authority for interference where lower Court has wrongly held that a suit was bad for misjoinder of causes of action and has directed plaintiff to elect which he would proceed with. In *Rama Krishna Iyer* v. *Krishna Iyer* (5) it was held that a suit was bad for misjoinder which raised questions in a partition suit as to the rights of the melvaramdars against the kudivaramdars; as it was not absolutely necessary for the purpose of effecting the partition this appears to me to be practically on all fours with the present case. In *Saminada Pillai* v *Subba Reddiar* (6) there was a suit for partition of joint inam lands and ejectment against a number of cultivating ryots. It was held that the suit was bad for multifariousness and the proper remedy of the plaintiffs was to proceed against each ryot separately. In *Ramanuja* v *Virappa* (7) the suit as originally framed was one between co-mirasdars as indeed the present one is also. The lower Court however wandered into the intricate issue of determining the extent of subordinate existing interests and the lower appellate Court held the suit unsustainable. The High Court held the suit could be maintained and the plaintiff must implead all ryots whose rights he questioned in order that their interest may be ascertained. This was the case of an inam village. The judgment of the High Court is extremely brief and no reasons are given. The Court in 18 M. L. J 85 considered 6. Mad. 90 and came to the conclusion that the decree there was not inconsistent with the view taken in the former case. As pointed out at page 87 "The practical objection to such a course (i. e. joining the kudivaramdars as defendants), appears from the evidence in the present case before us which it would not be safe to act on generally while it would be very difficult to apply it to the case of every individual ryot. This seems to lend support to Mr. Vaidyanatha Iyer's objection that if defendants 43 to 99 are joined here there must be an investigation into every square foot of the land in this suit. The question of occupancy rights was never raised in the original plaint. It only occurs in the disallowed amendment thereof, even then it is indefinite as it alleges, that some of them (defendants 43 to 99) contend that they have kudivaram rights. It is curious that if it is of such importance to the plaintiffs to have this question decided it was not raised before; it does not even appear that it was raised in the former partition suits of 1891 and 1910. In *Ramakrishna Pillai* v. *Krishnaswami Pillai* (8) a I examined many of these cases and came to the conclusion that though the Court will interfere in revision with an interlocutory order, such interference should be exercised with extreme diligence, the general rule being against such interference. Can I say here that the Court below acted perversely or in a manner to cause irreparable loss to plaintiffs. It appears to me that the Court below exercised its discretion correctly and further that the loss or inconveniences to the plaintiffs may be that instead of being able to insist on a separate investigation into the rights of the tenants in this

(4) 1922 Mad 436—16 M.L.W. 175—(1922) M.W.N. 453—43 M.L.J. 218—69 I.C.966.
(5) [1908] 18 M.L.J. 85.
(6) [1876-78] 1 Mad. 333.
(7) [1883] 6 Mad. 90.
(8) 1922 Mad. 321—15 M.L.W. 667—(1922) M.W.N. 521—68 I.C. 167

suit, they may have to bring separate suits against such tenants as they may find interfering with their rights of possession which was exactly the state of things in 18 M. L. J 85.

On a careful consideration of the facts and authorities I have come to the conclusion that these cases are in which I ought not to interfere in revision. I accordingly dismiss both revision petitions with costs of defendants 1 and 30.

Petition dismissed.

1923 MADRAS 693

SCHWABE, C. J. AND RAMESAM, J.

Majet Subbiah & Co.—Plaintiffs-Appellants.

x.

Messrs. Tetley and Whitley—Defendants—Respondents.

O. S. S., A No. 51 of 1922 D/-23rd March 1923, from the judgment of Kumarswami Sastri, J. in C. S. No. 1150 of 1921, D/-20th February 1922.

Contract—Construction—Dispute about carrying out includes breach of contract.

A contract contained an arbitration clause in the following terms: "Should any dispute arise as to the interpretation of this contract or any matter in connection therewith or with the carrying out thereof, the same shall be submitted to arbitration. [P. 693 C. 2]

Held: that it included claims for breach of the contract.

P. Venkatramana Rao—for Appellants.

Messrs. Short Bewes and Co.—for Respondents.

Schwabe, C. J.—In this case the dispute arises under a contract as to whether the vendors had broken the contract by failing to deliver at the proper time and whether the purchasers were entitled to sue in respect of the alleged breach and, if so, whether they are entitled to any and what damages. From the correspondence it would appear that there might be a counter-claim also on the ground that the vendors allege that the purchasers failed to take and pay for the goods as they were bound to do under the contract. The contract contains an arbitration clause. Art 12 in the following terms "Should any dispute arise as to the interpretation of this contract or any matter in connection therewith or with the carrying out thereof, the same shall be submitted to arbitration" and it gives the merchants an option as to the form of arbitration An application was made to stay the suitpending reference to arbitration under Art. 12 of the contract. The learned Judge stayed the action and this is an appeal from that order.

It is argued before us that the learned Judge had no power to stay the action, because the claim made, as appears from the plaint, was for damages for breach of the contract; and it was argued that, under such an arbitration clause, claims for damages for breach of the contract are excluded. I asked in the course of the argument, if such claims were excluded, what claims would be included, and I received no answer. Authority for the proposition there is none. Reference to arbitration under similar clauses in respect of breaches of contract is of daily occurrence in England. As far as my knowledge goes, no one ever ventured to suggest to the Court there that there was no power to refer in matters of breach of contract, the real reason being that it is only in respect of breaches of contract that references arise. There may be questions of interpretation of contract not involving a breach which would also be covered, but these must be very rare. The ordinary scope of such a clause is that the ordinary commercial disputes which almost always involve an alleged breach of one side or the other should be referred to a tribunal chosen by the parties, namely, arbitration instead of going to Court. The learned Judge puts the test in this way: "The test is whether the claim is made in respect of a contract which parties declare binding on them or in respect of a matter arising *dehors* the contract in a cause of action based on its invalidity." I do not know where those words come from, but I think they are quoted from some leading authority and at any rate in my judgment, correctly state the position in law. If the case is on a matter arising out of the contract, the most usual

instance of that being a case of breach of contract like the present, there is no doubt whatever that there is power in the Court to refer to arbitration. It is true that in certain cases the Court will not exercise that power. Those are cases where, either by reason of the fact that there are charges of fraud, or by reason of the Court coming to the conclusion that in arbitration complete justice cannot be obtained between the parties, or for some other proper cause that the matter should be kept in Court rather than be referred to arbitration, the Court can decline to stay the action. There is nothing of that sort in this case and, in my judgment, the learned Judge was perfectly correct in staying this action.

This appeal must be dismissed with costs.

Ramesam, J.:—I agree. *Wallis* v. *Hirsch* (1) is a case in which a question of fraud was raised and the learned Judges refused to exercise their discretion in referring the case to arbitration and staying all proceedings. *Nobel Brothers Petroleum Production Company* v. *P Stewart & Company* (2) does not help the appellant as the facts are rather peculiar. But apart from this, the case seems to be one of doubtful authority and very near the line. The decision in *Piercy* v. *Young* (3) states the principle correctly and it is clear that the appellant has no case.

Appeal dismissed.

(1) 1 C.B. (n.s.) 316-26 L.J., C.P. 72.
(2) 6 T.L R. 378.
(3) 14 Ch. D. 200.

✱ 1923 MADRAS 694

AYLING AND ODGERS, JJ.

Thachroth Hydross and others, (Prisoners) In re.

Referred Trial No. 175 of 1922, D/-6th March 1923, by the Sp. J. Court, Malabar, Calicut.

(a) *Criminal Trial—Local inspection for testing the witnesses—Legal.*

It is open to a Magistrate to use the evidence of his own eyes *i.e.*, the local inspection to test the truth of what the witnesses have deposed to 2 Weir Cr. 728 Foll. [P. 696 C. 1]

(b) *Crimininal P. C., S. 342—Re-examining the accused after recall of prosecution witnesses not obligatory.*

S. 342 does not make it legally incumbent on the Magistrate to further question the accused with reference to the evidence elicited from the prosecution witnesses, after the framing of the charge, when they are re-called by the Magistrate under S. 256, Criminal Procedure Code. It may be highly desirable that he should so question the accused, if the evidence contains a new matter of importance. [P. 696 Cs. 1, 2]

(c) *Evidence Act, S. 157—Deputy Superintendent of Police competent to investigate.*

A statement, made to the Deputy Superintendent of Police, in which the informant gave an account of what occurred is admissible in evidence as the Deputy Superintendent of Police is an officer legally competent to investigate the facts of a murder and dacoity, within the meaning of S. 157. [P. 696 C. 1]

(d) *Criminal P. C., S. 556—Result of local inspection may be stated in judgment.*

The judgment of a Magistrate is not vitiated by the fact that he inspected the *locus in quo* and stated in his judgment what he saw there.

V. L. Ethiraj for R. N. Aingar and P. Govinda Menon—for Prisoners.

The Public Prosecutor—for Crown.

Ayling, J.—The three accused in this case have been convicted of dacoity in the house of Krishnan Nair of Olavattoor and murdering him by beating him to death. The offence was committed on the night of 24th October, 1921, in the course of the Mopla rebellion. The prosecution evidence tends to show that about nightfall, a band of some 25 armed rebels attacked a small hamlet consisting of about 5 houses of which Krishnan Nair's was one. All were looted, the inmates of these houses escaped; but Krishnan Nair was caught and beaten twice, the second time with fatal results and his body thrown into a well. The well is said to have subsequently been filled up and the body has not been found; but in the light of the evidence in this case, we see no reason whatever to doubt that Krishnan Nair was killed that night, in the course of the dacoity. We have the evidence of four of the inhabitants of the hamlet who depose to this occurrence and to having seen the three appellants, who were well-known to them, beat Krishnan Nair and throw his body in the morning into the well.

Before discussing the merits of the case, I shall deal with two preliminary objections taken to the procedure of the Special Judge. It appears that when the 1st accused was examined under S. 342, Criminal Procedure Code, he asked that a plan should be prepared of the scene of the offence. This was not done but the Special Judge personally visited the scene of offence, 18 miles from his headquarters, with the prosecution witnesses, and observed for himself the relative positions of the huts and the places from which the witnesses claim to have seen the acts deposed to by them. After this, acting under the powers vested in him by S. 540, Criminal Procedure Code, he recalled these prosecution witnesses, or rather three of them, and examined them in such a way as to put on record the most important points which he had observed at his personal inspection. The witnesses were then cross-examined by the defence. It is argued that the Special Judge's procedure has been illegal in two particulars and that on that ground the conviction should be set aside. It is contended, first that he was not entitled to use the results of his personal inspection to test the truth of the prosecution witnesses' story, and next, it is contended that it was his duty to again question the accused under S. 342, Criminal Procedure Code, with reference to the evidence which the prosecution witnesses gave, when recalled as stated above. As regards the first point we have been referred to several rulings by the learned counsel for the 1st accused, the most important of which is *Queen-Empress* v. *Manikem* (1). In that case, as I understand it, two learned Judges of this Court laid it down that the accused are entitled to have nothing stated against them in the judgment, which was not stated on oath in their presence and which they have had no opportunity of testing by cross-examination and of rebutting. At the same time they say that a Magistrate may make a local inspection, for the purpose of enabling him to understand better the evidence which is laid before him; but for no other purpose. The distinction seems to be between enabling a Magistrate to understand such matters as the description of the locality, which may be confusing or obscure, and enabling him to test the truth of the witnesses' statement of a physical fact by the Magistrates' own occular observation. I think this distinction is also brought out in a Calcutta case *Babbon Sheik* v. *Emperor* (2), but two of the learned Judges who dealt with that case, Woodroffe and Chatterjee, JJ., seem to have held that it was open to the Court to use its local inspection also to test the sworn testimony on record, by the light of its own observation. This is also the effect of the judgment of Sir John Edge C. J., in *In the matter of the petition of Lalji* (3), a very high authority. The learned Public Prosecutor has referred us to a case reported in 2 Weir's Criminal Rulings 728 in which Sir Arnold White, C. J. of this Court declined to follow the ruling in *Queen Empress* v. *Manikem* (1) on the ground that it was no longer applicable, after the amendment of the Code effected in 1898. Speaking for myself, I should be inclined to agree with the judgment above quoted and to hold that it is open to a Magistrate to use the evidence of his own eyes to test the truth of what the witnesses have deposed to and that in the present case the Special Judge has made no improper use of his local inspection.

But it is objected that he has failed to observe two precautions, which two of the learned Judges in *Babbon Sheik* v. *Emperor* (2) have held to be necessary. One is that the result of the inspection must at once be put on record and laid open to the scrutiny of the parties. Chatterjee, J., says:

"To spring such opinions or inference upon the accused at the time of pronouncing judgment is an error of procedure that may have materially prejudiced the accused, and they are quite justified in complaining that they have not had a proper trial."

(1) [1896] 19 Mad. 263—6 M.L.J. 143.

(2) [1910] 37 Cal. 340—14 C.W.N. 422—11 C.L.J. 335—11 Cr. L.J. 121—5 I.C. 365.

(3) [1897] 19 All. 302—(1897) A.W.N. 52.

It was further stated by the judgment in *Queen Empress* v. *Manikem* (1) that when any inspection is made, the Magistrate should invariably be accompanied by both parties or their representatives. It is stated that this was not done and that the accused were not represented at the inspection in the present case. Sir John Edge in *In the matter of the petition of Lalji* (3), on the other hand, is at pains to point out that it is not necessary that the accused or their representatives should invariably be present at a local inspection and he says nothing whatever about the necessity of making a note or record at once of what the Magistrate has seen.

In the present case, as I have already stated, the special Judge has really embodied the results of his inspection in the examination of the prosecution witnesses on re-call and the accused have had a full opportunity of cross-examiming them, with reference to the facts then elicited.

We felt more pressed by the argument that the accused persons were not afforded an opportunity of being represented at the local inspection and before deciding as to the effect of such an omission we deemed it best to call for a special report from the Special Judge as to his procedure. From this it appears that the argument is based on no foundation. Previous intimation of the inspection had been given to both the defence vakils; and one of them Mr. T. M. Kunhunni Nedungadi was actually present on behalf of all the three appellants. On the whole, I do not think that the Special Judge in this case has used his local inspection illegally, or in such a way as to prejudice the accused.

As regards the point based on S. 342, it has been held in a recent case, R. T. No. 160 of 1922, in which I was one of the Judges that S. 342 does not make it legally incumbent on the Magistrate to further question the accused with reference to the evidence elicited from the prosecution witnesses, after the framing of the charges, when they are re-called by the Magistrate under S. 256, Criminal Procedure Code. It may be highly desirable that he should so question the accused, if the evidence contains a new matter of importance but after carefully scrutinizing the evidence in this case elicited on re-call, I do not think it can be classed in that category. The learned counsel for the appellant has referred us to three passages in the recall evidence of the most important witness P. W. 1. One is:

"As there were thicker jungles on Krishnan Nair's side of the paddy field, I went there. The jungles on Krishnan Nair's side of the paddy field are thicker than those on my side."

The second is :

"The place where P. W. 5 hid was only 10–15 feet from where I was ; but I never saw him at the time."

The third is :

"I say that the well of the deceased's house is visible from my house. I could also see persons drawing water from that well from my yard."

None of these passages appear to me to contain such new and important matter that it could be said that the accused were prejudiced because they were not asked what they had to say with respect to them, especially if it is remembered that they were defended in the Lower Court. As regards the latter two points, the Special Judge in paragraphs 17 and 18 of his judgment has recorded that he thinks that P. Ws. 1 and 5 must have seen each other, although they say they did not, and he feels very doubtful whether P. W. 1 could have witnessed from his house next morning the dragging of the deceased to the well. As regards the thickness of the jungle all he says is:

"There is a thick jungle to the South and West of the house. At night time it would be safe enough to hide where the witnesses say they did, and to watch what was happening."

I do not think that any of these points are points on which it was imperatively necessary to further question the accused. I would dismiss both these legal objections to the trial as untenable.

Passing to the merits of the case, I may observe that the important question is whether the statements of prosecution witnesses 1, 3, 5, and 7

that they observed the three appellants either among the dacoits, or taking part in the actual murder of Krishnan Nair and disposing of his body can be accepted. One of the witnesses P. W. 1 is said to have made a statement to the Deputy Superintendent of Police at Calicut, five days after the offence, in which he gave an account of what occurred and named six persons including the three appellants as among the Moplas who looted the house and murdered Krishnan Nair. It has been objected that this statement, Ex. A., is not admissible in evidence. The Deputy Superintendent of Police is an Officer legally competent to investigate the facts of the murder and dacoity, within the meaning of S. 157 of the Indian Evidence Act, *vide* S. 551, Criminal Procedure Code. The requirements of S 157 are therefore complied with, and I cannot accept the contention that Ex A which records the statement taken down by that officer is inadmissible, because it was not recorded as required by S, 154 Criminal Procedure Code. At the time when it was made, the rebellion was in full progress and it was impossible to fulfill the requirements of S. 154. The statement in question was undoubtedly the first information given to Police of the commission of this crime and it is not affected by any such provision of law, as is contained in S. 162. Criminal Procedure Code, which renders statements of witnesses to a Police Officer in the course of an investigation inadmissible in evidence It is admitted that it would have been open to the Deputy Superintendent to give oral evidence of what P W. 1 told him and even to refresh his memory by a reference to Ex. A, and in the absence of a specific legal prohibition, I am prepared to hold that it was open to the Court to take in evidence his written record of what P.W. 1 actually said to him. The inclusion of these appellants in a statement made so early after the crime (having regard to the conditions of the country) seems to be an important piece of corroboration of the identification of the appellants by witnesses in the Special Court.

I feel however considerable doubt as to whether we can accept the evidence of P.Ws. 5 and 7, as to the second beating of Krishanan Nair by the appellant which is said to have caused his death. The Special Judge himself seems to entertain some doubts as to whether the witnesses have not to some extent added to what they saw, and it is curious that all the four witnesses with one accord ascribe to these three appellants before us all the actions leading up to, or connected with the death of Krishnan Nair. It is these three men and one other absent man named Aidruman who are said to have beaten him, when they first came to his house, to have dragged him out at midnight and beaten him again and caused his death and lastly to have dragged his body to the well in the morning. It would seem as if none of the other 22 rebels took any part in any of this. I doubt very much whether the midnight beating was watched by any of the neighbours and I cannot agreee with the Special Judge that it is likely that P. W. 7 would have ventured to come down out of the jungle and penetrate into the compound of Krishnan Nair to see the final act of the murder. The preliminary beating clearly did not cause the man's death, and it cannot be said that because the appellants draggad the body to the well in the morning, it must be taken that it was they who beat him to death at midnight, especially in view of the number of the gang. Nor do I think it can be said that the murder of Krishnan Nair is shown to be part of the common intention of the dacoits, so that all the members of the dacoit gang could be convicted of the murder.

I think that the conviction for murder must be set aside. As regards the conviction for dacoity, I see no reason whatever for doubting that these appellants took part in the dacoity and were recognised by the witnesses. The allegations of enmity and the *alibi* evidence adduced for the defence have been dealt with by the Special Judge. I would set aside the convictions for murder confirming those for dacoity and, in place of the sentence

of death, sentence each of the three appellants to transportation for life.

Odgers, J.—In this case two preliminary points have been taken on behalf of the accused, either of which, it is said, amounts to an illegality and would, therefore vitiate the trial. The first is that the Special Judge made an inspection of the locality, where the crime is said to have been committed and, further, that he tested the statements of certain of the prosecution witnesses by his personal observation of the spot. The second point is that he failed to examine the accused under Sect. 342, Criminal Procedure Code.

To deal with the first point : The trial of the case began on the 9th of September, 1922. The inspection by the Special Judge is said to have taken place during the trial. S. 556, Criminal Procedure Code, Explanation, lays down that a Judge or Magistrate shall not be deemed to be a party, or personally interested, within the meaning of the section "by reason only that he has viewed the place in which an offence is said to have been committed.....and made an enquiry in connection with the case." There are certain authorities which have been cited to us, in support of the contention taken for the accused. The most important from our point of view is that contained in *Queen Empress* v, *Manikhem* (1), where it was held that a Magistrate's view of the *locus in quo* was what influenced him in finding that the complaint of actual damages being caused was true and that the defence that no damage was caused was false. The learned Juiges there say ;

"We are satisfied that such inspection should only be made for the purpose of enabling the Magistrate to understand better the evidence which is laid before him and it must be strictly confined to that."

To this we would add that where any inspection is made with the object stated, the Magistrate should invariably be accompanied by both parties or their representatives. This view finds support in *Sudhema Upadhya* v. *Queen Empress* (4) where the investigations of the Police preliminary to a trial had been directed to a considerable degree by a Magistrate. That was held to disqualify the Magistrate from trying the case. *Bobbon Sheik* v, *Emperor* (2) where the two learned Judges, who originally heard the petition differed: Stephen J,, was of opinion that a Magistrate may visit the scene of an alleged offence. in order to test the evidence he has heard on a question of fact, Woodroffe, J., on the other hand held that as it was a matter of speculation how far the Magistrate was influenced by what he saw, as distinguished from what was deposed to, the trial was vitiated. The third Judge Chatterjee, J,, agreed with Woodroffe, J,, on the ground that the Magistrate had done more than merely view the place, for the purpose of following or understanding the evidence and testing it. The Magistrate had imported into his judgment matters of opinion and that was an error of procedure. that might have prejudicially affected the accused. In *Atior Rai* v. *Emperor* (5) where the question was somewhat different, namely, the effect of the failure of the Judge to place on record the results of a local investigation, the learned Judges held that a Magistrate may view the place of occurrence, in order to follow or understand the evidence. On the contrary, there is the opinion of an Ex-Chief Justice of this Court, Sir Arnold White, in 2 Weir's Criminal Rulings 728, where he was of opinion that the amendment to the Explanation of S. 556, Criminal Procedure Code, was apparently to meet the decision in *Queen Empress* v. *Manikem* (1) and that the judgment of a Magistrate is not vitiated by the fact that he inspected the *locus in quo* and stated in his judgment what he saw there.

Sitting as a single Judge, Sir John Edge, C. J., in *In the matter of the petition of Lalji* (3), said:

"It is highly convenient that a Magistrate should go and see the

(4) [1896] 23 Cal. 328.

(5) [1912] 39 Cal. 476—16 C.W.N. 426—15 C L.J. 403—13 Cr.L.J. 156—13 I.C. 844

locality for himself, if the evidence is conflicting, or if the guilt or innocence of the party depends upon local peculiarities of situation, which cannot be understood except by the Magistrate seeing the place himself".

The judgment is illustrated with special reference to a dacoity, which is also the subject of the present case before us. There seem to me strong grounds for the opinion that the amendment of the Explanation to S. 556, Criminal Procedure Code was devised mainly to overcome the rulings referred to above, in *Queen-Empress* v. *Manikem* (1) and *Suthama Upadhya* v. *Queen-Empress* (4), and that, if this is so, the authority of *Queen-Empress* v. *Manikem* (1), must be taken to have been shaken. Holding then, as I do, that the learned Judge did not disqualify himself from trying the case by reason of his having held an inspection of the spot, the question arises whether any material prejudice has arisen sufficient to say that a failure of justice has occurred. Again, we have called for a report from the Special Judge as to whether or not the vakils for the defence were present at his local enquiry. The answer is in the affirmative and the Special Judge also reports that he gave previous notice to the vakils for the defence of his intention to inspect the *locus in quo* The learned Judge did not "spring any opinion of his own" nor any facts observed by him in his local investigation upon the accused, who as stated were defended, for the first time in his judgment, for he recalled as Court witnesses the prosecution witnesses, who had previously described the hiding places they took up and from which they alleged they witnessed the stages of the crime. These witnesses on re-call by the Court were further cross examined by the defence, so that any opinion that the Judge had formed from the local inspection came through the prosecution witnesses as Court witnesses. From these considerations, I am unable to say either that the Judge acted illegally, or that any material irregularity resulted to the prejudice of the accused.

The second point under S. 342, Criminal Procedure Code, can be very shortly dealt with. In my opinion, this case does not fall within the Full Bench judgment recently delivered by this Court in Criminal Revision Case No. 384 of 922 [*Varisai Rowther, in re* (6)] There the learned Chief Justice says: "in my judgment, the words 'after the prosecution witnesses have been examined' (citing the words of S. 342) "mean after the prosecution has finished calling evidence". If fresh evidence is called by the prosecution after the charge has been framed, then on the termination of that evidence the accused must be examined under the section". The short answer to the objection really is that the prosecution here called no fresh evidence, the prosecution witnesses as stated above having been recalled by the Court and re-cross-examined by the defence. On the question of prejudice to the accused, it is pointed that there are three important points on which the Court should have questioned the accused. They are all contained in the re-examination of P.W. 1 by the Court. They are as follows:—

(1) As there were thicker jungles on Krishnan Nair's side of the paddy field I went there. (2) When the Court inspected the place, P.W. 5 showed the Court where he hid. That place was only 10 to 15 feet from where I was but I never saw him at the time. (3) I say that the well of the deceased's house is visible from my house.

As before stated, the witnesses were re-cross-examined by the vakil for the defence and it cannot, in my opinion be said that the interests of the accused in any way suffered by the accused not being re-examined under S. 342, Criminal Procedure Code. This disposes of the preliminary objections.

With regard to the merits, I do not propose to say more than that I have had the advantage of reading the judgment of my learned brother and I agree with him as to the view he

(6) 1923 Mad. 609—46 Mad. 449—44 M.L.J. 567—17 M.L.W. 722—32 M.L.T. 385—(1923) M.W.N. 477—73 I.C. 163 (**F.B.**)

takes of Exhibit A and of the rest of the evidence adduced in this case. On the whole, I think it would be unsafe to act on the testimony of the prosecution witnesses as to the identification of the actual murderers of the deceased. I agree with the conviction and sentence proposed.

Conviction altered.

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PHILLIPS AND DEVADOSS, JJ.

Koppassa Menon, Kenath Achan—Plaintiff—Appellant.

v.

Karumathil Kalliani Amma and others—Defendants—Respondents.

F. A. No. 213 of 1920 D/-28th February 1923 against the decree of the Sub. J. South Malabar, in O. S No. 42 of 1917.

Malabar Law—Tarwad—Powers of Karnavan Renewal of Kanom before expiry of period valid only for necessity — Renewal before--time but to take immediate effect valid—Avoiding litigation a necessity.

A renewal of a kanom by a karnavan before the expiry of its period, when such renewal is to take effect from the date of expiry, is not valid, unless it is shown to be for necessity A karnavan s position is somewhat higher than that of a Hindu widow and in fact, he has, in some respects, greater powers than a manager of a joint Hindu family. 3 M. 169 Ref. He has full powers of management of the family property and is even allowed to give kanoms of the tarward property without necessity although the kanom amounts to an alienation of immoveable property. The chief reason for holding that necessity must be proved in order to validate a renewal executed before the expiry of the subsisting kanom is that it is impossible to predicate some years in advance what the state of affairs will be when the original kanom *expires*, and what incidents should be imposed in order to make the demise beneficial. But where a particular demise is to take effect at once the above consideration does not come in to play. If therefore a karnavan can obtain the consent of kanomdar to a premature renewal to take effect from that date, it does not necessarily follow that it is an act of bad management, even if necessity be not proved. Where the litigation was avoided by the compromise, the transaction must be entered into *bona fide* and for the benefit of the estate. It is not necessary for a contracting party to prove that the estate did, in fact actually benefit.

[P 700 C 2; P 701 C 2; P 702C 2]

T. R. Ramachandra Aiyar, A. S. Venku Aiyar and P. Govinda Menon—for Appellant.

C. Madhavan Nair and P.S. Narayana swami Aiyar—for Respondents.

Phillips, J.—The facts of this case are as follows: A previous Karnavan of the plaintiff's tarwad granted a Kanom of Rs. 12,000 and odd to one Thappan Nayar on the 11th of May, 1896, and subsequently on the 30th of June, 1902, executed a puramkanda deed for Rs. 1,350 under which the original term of 12 years granted in 1896 was extended for another 12 years, from 1908. Thappan Nayar was, accordingly, entitled to hold the property until 1920 Subsequently, Thappan Nayar transferred Rs. 6,000 of the kanom to defendants 1 to 3, the 1st defendant being the wife of Raman Nayar and the daughter of Thappan Nayar. The remainder of the kanom passed to Raman Nayar, the husband of the 1st defendant. In 1914, the 10th defendant, who had then become the karnavan, executed two demises one in favour of Raman Nayar and one in favour of defendants 1 to 3. These demises renewed the existing tenure for a period of 12 years from their date, namely, until 1926. The plaintiff the senior anandravan of the tarwad, has now brought suits to set aside these demises as not being binding on the tarwad. The case against Raman Nayar has already been disposed of and we are now only concerned with the demise in favour of defendants 1 to 3. In the Lower Court the plaintiff's suit has been dismissed and he appeals.

It has been consistently held in this Court that a renewal of a kanom by a karnavan before the expiry of its period, when such renewal is to take effect from the date of expiry, is not valid, unless it is shown to be for necessity ; and it is the appellant's contention that the plaint demise, is, in effect, a renewal of the puramkadan deed granted in 1914 for a period of 6 years from 1920, and that, therefore, unless the necessity for the transaction is proved, it is not valid and binding on the tarwad. The case is not, however, quite so clear as that; for, in all cases of renewal a fee is payable by tenant to the tarwad, varying in amount according to cir-

cumstances. Ordinarily therefore, the renewal fee is payable every 12 years and in this case the tarwad would not have been entitled to a renewal fee until 1920; whereas, a fee of Rs. 500 for this document was received by the karnavan in 1914, although the prior demise for which also a fee had been paid did not expire until 1920. The practical effect of the demise, therefore, is that the tenant has the right to hold the property for an additional 6 years but has, in fact, paid a renewal fee for 12 years. The tarwad lost the right to redeem for a period of 6 years but gains what is, in effect, the renewal fee payable for 6 years.

The demise has been justified by the defendants on three grounds: (1) that it was executed for necessity; (2) that, as the puramkadam deed was an invalid deed and it was a renewal before the date of the expiry of the kanom, the kanom was the only valid demise in existence in 1914, and (3) that the demise was executed in settlement of a *bona fide* dispute between the parties. I do not think it necessary to discuss the first two grounds in this judgment; for, I am satisfied that on the third ground the defendants must succeed. Defendants 1 to 3 were holding the property under the puramkadan demise of 1902. but the succeeding karnavan, the present 10th defendant, sent a notice in 1914, demanding surrender on the payment of the kanom amount and value of improvements. A reply was sent by the 1st defendant's husband, a High Court Vakil of some standing, to the effect that the kanom of 1696 had been renewed by the puramkadan deed of 1902 and that the 10th defendant had no right to evict until the expiry of term under the latter. In the first place, it is contended for the appellant that there was no real dispute between the parties and that, therefore, this demise cannot be treated as in the nature of a compromise and, consequently, that, if there was a dispute, the compromise, not being entered into for the benefit of the tarwad, is invalid. A large number of cases have been cited as to the circumstances in which a compromise entered into by a qualified owner should be recognised as binding on the estate; but most of these refer to the case of compromises entered into by widows. A karnavan's position is, however, somewhat higher than that of a Hindu widow and, in fact, a karnavan of Malabar tarwad has, in some respects, greater powers than a manager of a joint Hindu family, as pointed out in *Kunhamod Hajee* v. *Kuttiath Hajee* (1). He has full powers of management of the family property and is even allowed to give kanoms of the tarwad property without necessity, although the kanom amounts to an alienation of immoveable property. This power is therefore, one which is not possessed either by a widow or by a manager of a Hindu family, except in cases of necessity. The chief reason for holding that necessity must be proved in order to validate a renewal executed before the expiry of the subsisting kanom is that it is impossible to predicate some years in advance what the state of affairs will be when the original kanom expires, and what incidents should be imposed in order to make the demise beneficial. In this case, however, the plaint demise is to take effect at once and therefore the above consideration does not come into play. If therefore a karnavan can obtain the consent of a kanomdar to a premature renewal to take effect from that date, in my opinion, it does not necessarily follow that it is an act of bad management, and even if necessity be not proved, for the karnavan has full powers of management, and is in a position to decide whether the transaction is a prudent one or not. A somewhat different view has been taken in *Vata Vatta Nair* v. *Kenath Puthen Vittil Kuppassan Menon* (2); but in the present case I think the validity of the demise can be supported on other grounds, without deciding this question here. I think that, even if we take it that the karnavan's powers in this instance are no higher than those of a Hindu widow, the transaction can be justified on the ground that it was entered into *bona fide* for the benefit of the tarward vide *Ramsumran Prasad* v. *Shyam*

(1) [1881] 3 Mad., 169.
(2) [1919] 36 M.L.J., 630—51 I.C. 740.

Kumari (3). The puramkadan demise of 1902, was outstanding and, as it had been granted before the expiry of the prior demise, it would be invalid, unless, it were granted for necessity. It was, of course, alleged that it was granted for necessity, but that was a fact which the defendants would have to prove; on the other hand, if they did prove it, the defendants would be entitled to hold without payment of any further renewal fee till 1920. By compromising the claim, therefore, the 10th defendant allowed the defendants to remain in possession for a further period of 12 years on payment of a renewal fee which would not become due until 6 years later. There is evidence that there were other disputes also. The 1st defendant's husband who, as I said before, is a High Court Vakil of some standing, says, " The 2nd defendant repudiated the demise under Ex. XXI. and threatened to recover the property on the strength of Ex. XX. Therefore, I consented to give up the unexpired period secured by Ex. XXI and to accept a fresh demise from him" ..... " I was induced by my friends Mr. P. Kunnan Nayar and Mr. M. Narayana Menon to give up my term and take a renewal." These two friends are a High Court Vakil and a First Grade Pleader respectively, the former being the vakil for Raman Nayar, the 1st defendant's husband, and the latter the 10th defendant's vakil. They were both examined and they both said that there was a dispute about this demise and also disputes with regard to other property and that in settlement of these disputes, the plaint demise, as well as the demise in favour of Raman Nayar, was executed.

The next question is whether that compromise was entered into, for the benefit of the estate, the allegation being that the karnavan entered into the compromise, in order to secure the renewal fee for his own purposes, and that as there was no present necessity for the money, it was an improvident act, in that it alienated the property for an additional 6 years. No doubt, it is technically an alienation; but, if the circumstances of the case are thoroughly examined, it is only an alienation in the technical sense. The property was outstanding on the mortgage for nearly Rs. 14,000, which apparently the karnavan was not in a position to pay; and the only effect of the renewal was to put it out of the power of the tarwad to redeem the property for a further period of 6 years ; and it was very unlikely that they would be in a position to redeem at an earlier date , nor is it apparent that an early redemption would be beneficial to the tarwad. No additional money was borrowed and consequently, no fresh burden imposed on the tarwad ; but, on the contrary, a sum of money was received for the benefit of the tarwad. Taking this circumstance into consideration and the fact that litigation was avoided by the compromise, it appears to me that the transaction was certainly entered into *bona fide* and for the benefit of the estate. I am not prepared to accept the contention that it is necessary for a contracting party to prove that the estate did, in fact, actually benefit ; and therefore, the suggestion that the money paid to the karnavan was appropriated by him for his own purposes and that the estate did not benefit at all need not be taken into consideration. If the contracting party is satisfied that the compromise is a *bona fide* one and that, in the ordinary course, a benefit will accrue to the estate, it is not necessary for him to prove that it actually did so, as against the allegation that the benefit which should have accrued was fraudulently misappropriated by the karnavan. A contracting party cannot presume that there will be a fraudulent misappropriation; and, unless he is a party to that fraud and acts in collusion with the karnavan, he is entitled to protection. Whether therefore, the 10th defendant did or did not spend the money received by him for the benefit of his tarwad is in this case immaterial, as it is not alleged that there was any

(3) 1922 P. C. 356—1 Pat. 741—49 I. A. 342—25 Bom. L. R. 634—21 A. L. J. 18—27 C. W. N. 269—44 M. L. J. 751—16 M.L.W. 956—31 M.L.T. 200—3 Pat. L.T. 749—69 I. C. 71 (P. C.)

collusion between defendants 1 to 3 and the 10th defendant in this respect. The money was paid to the Karnavan for the benefit of the tarwad, and consequently the transaction was one beneficial to the tarwad, although subsequently that benefit was misappropriated by the Karnawan.

On these grounds I think that the Subordinate Judge's decision is correct and dismiss this appeal with costs.

Devadoss, J.—I agree.

As regards the memorandum of objections we do not think that a successful party should be made to bear the loser's costs, save in exceptional cases, such as when his false contentions have been the cause of unduly swelling his opponents' costs. That is not the case here. We accordingly direct in modification of the Subordinate Judge's order that each party do bear his own costs in the Lower Court and also of the memorandum of objections.

Appeal dismissed.

✱ 1923 MADRAS 703

OLDFIELD AND DEVADOSS, JJ.

Venkiteswarayyan and another — Appellants.

v.

Aswatha Narayanan and others — Respondents.

S. A. Nos. 2127 and 2128 of 1920, D/- 23rd March 1923 against the decrees of the District Court, South Malabar, in A. S. Nos. 17 and 5 of 1920.

(a) *Civil P. C., O. 21 R. 57—Does not apply where the Court and the party both think that there is no attachment.*

The default of the decree-holder referred to in Order 21, Rule 57, cannot be constituted either by his absence from the sale or his failure to bid at the sale, but must be a default in the discharge of some obligation laid on him by the Code or the rules framed under it. The section as a whole is applicable only to cases, in which the stage of attachment has been passed and in which the Court is conscious that the next stage is intended and is not applicable where no one concerned, neither the party nor the Court was conscious of the true facts and where, if there was in fact an attachment, the party and the Court were not aware of it and were proceeding as though there were none.

[P. 703 C 1, P. 704 C. 2; P. 705 C 1.]

(b) *Waiver—None where right not known.*

There can be no waiver in ignorance of the existence of the rights alleged to have been waived. [P. 705 C 2.]

C. V. Ananthakrishna Aiyar and *C. S. Swaminadhan*—for Appellants.

The Advocate-General and *K. R. Narayana Aiyar*—for Respondents.

Judgment.—2nd and 3rd plaintiff appellants, are here to contend that the lower appellate Court erred in holding that Exhibit C was executed during the pendency of an attachment, effected by a decree-holder, now represented by the 6th Defendant. The lower appellate Court no doubt was right in holding that the attachment under Exhibit I was not terminated by the dismissal, with which the proceedings closed. It is only necessary to say with regard to that conclusion that it might have been reached more shortly because the default of the decree-holder referred to in Order 21, Rule 57, cannot, in our opinion, be constituted either by his absence from the sale or his failure to bid at the sale, but must be a default in the discharge of some obligation laid on him by the Code or the rules framed under it.

Having reached that conclusion, however, the lower appellate Court did not go on to consider the result of the subsequent proceedings in Exhibit II. Exhibit II was another application for attachment, which was dismissed on 20-7-1914, because the decree-holder failed to produce the schedules called for. A day before that dismissal Exhibit C had been executed, it is urged, during the pendency of an attachment. The plaintiffs' contention is that the attachment under Exhibit I was terminated by the order of dismissal of 20-7-1914 and that Exhibit C executed the day before that dismissal would become effective, when the attachment came to an end. In this connection reliance has been placed on the reference in S. 64 C. P. C., to a transfer made pending an attachment, as void, as against all claims enforceable under the attachment, the argument being that, when the attachment ceases and there are no longer any claims enforceable under it, there is no reason why the transfer should not be regarded as

valid. On the question raised in connection with the proceedings evidenced by Exhibit II the lower appellate Court has expressed no opinion.

We must accordingly call on it for a revised finding on the question whether Exhibit C is void because of the order of dismissal included in Exhibit II. The lower appellate Court's finding must be returned within six weeks; and seven days for objection. It will, on the return of the finding, be open to the respondents to argue the question raised by issue 7 at the trial.

S. A. No. 2128 of 1920 will stand adjourned pending return of the finding in S. A. No. 2127 of 1920.

[These second appeals coming on for final hearing on Thursday the 22nd day of March 1923, after the return of the finding from the lower appellate Court upon the issue referred by this Court for trial in S. A. No. 2127 of 1920, and the cases having stood over for consideration till this day the Court delivered the following:—]

Judgment.— The appellants, 2nd and 3rd plaintiffs, sued for redemption on two documents Exhibits C and D. The defence at present material was that Exhibits C and D were taken during the currency of an attachment of the property by the 5th defendant, contesting respondent here, who has since become the owner of that property by purchase from the purchaser at the Court sale, which subsequently took place. Before the remand we decided that the 5th defendant's attachment was subsisting notwithstanding the dismissal of the 5th defendant's execution-petition on 22-4-1914. We have now to deal with the lower appellate Court's finding on remand, that the attachment was not terminated by the order of dismissal on a subsequent execution-petition passed on 20-7-1914. The importance of that is that, if there was such a termination of the attachment, Exhibits C and D (it is not disputed) would, so soon as there was no attachment and no obstacle to their doing so, become binding on the property.

We agree with the lower appellate Court's conclusion but not for the reasons it has given. For it held that there was no default by the decree-holder, 5th defendant, such as Order 21, Rule 57 contemplates, on the assumption that the failure to produce schedules, on account of which the execution-petition was dismissed, was a failure to produce schedules for the purpose of framing the sale proclamation and that therefore it was not a failure to comply with any order, which the executing Court was entitled or bound to make. That assumption was untenable. For it is clear from the record that everyone, the decree-holder and the Court, mistakenly thought that the previous attachment had been raised and that the stage, at which schedules were necessary for framing the proclamation had not been reached. That is clear from the order on execution-petition, Exhibit II. There is the first order after its receipt, being that of 11-7-1914, "Pay batta for attachment;" and next that of 14-7-1914. "Batta paid, produce schedules." There is no reference to any return of the warrant of attachment; and there is no doubt that attachment was thought necessary and so process had been filed and that no attachment had been completed. There was so far no question of the further stage of framing proclamation. Whether, if that stage had been reached, non-compliance with the Court's order to produce schedule would have been a default within the meaning of Rule 57 need not be decided. It is clear that the lower appellate Court has neglected the material evidence on this matter and that we must proceed on the footing that the schedules were required for the making of an attachment, such schedules being required for the affixture in various places and for the making of the proclamation by beat of tom-tom under Rule 54 (2). An attempt has been made on behalf of the 5th defendant to contend that failure to produce them was not a default within the meaning of Rule 57 and that the order of dismissal was therefore not passed under that rule. As we are deciding the case on another and wider ground, we need not pursue that. For we cannot accept the contention, because we think that either under the Code or in the exercise of its inherent power to make orders

necessary for the prosecution of the petition before it the Court had power to require such schedules to be produced.

The wider ground, on which we decide the petition, is that even so the order cannot in the circumstances be regarded as having been made under Rule 57. It is true that the conditions specified in Rule 57 are at first sight satisfied. The Court was unable to proceed further with the application for execution. There was default by the decree-holder. The property had been attached in execution of a decree. But that does not entail that the section has in substance been complied with. No doubt the first six words of the section. "Where any property has been attached" are literally satisfied in the present case. But, we are not prepared to hold that such literal satisfaction is sufficient. It seems to us that the section as a whole is applicable only to cases, in which the stage of attachment has been passed and in which the Court is conscious that the next stage is intended and is not applicable to an abnormal case, such as that before us, where no one concerned, neither the party nor the Court was conscious of the true facts and where, if there was in fact an attachment, the party and the Court were not aware of it and were proceeding as though there were none. That is clear from the nature of the procedure enjoined on the Court. Two courses are open to it, either to dismiss the application with the implication that the attachment ceased exist, in which case what may be described as a quasi penal consequence shall be assumed or, for any sufficient reason, to adjourn the proceeding to a future date. It would be contrary to all principles that the Court should be supposed to be making its choice between the two alternatives, one of which results in the imposition of a penalty when it is not aware of the true facts. The order in respect of which default is contemplated, must clearly be one, which could be made after attachment, not one, as here, appropriate only before it. Taking this view, we hold that Order 21, Rule 57 was not applicable to the present case or to the order of dismissal now under consideration at all.

Reliance is then placed on behalf of the plaintiffs on the fact that the order of dismissal was never set aside on appeal or in the alternative that the decree-holder by applying again for attachment must be taken to have abandoned or waived the attachment already made and still subsisting. As regards the absence of appeal we observe that the question whether an order was really passed under Rule 57 and whether it has the implication referred to in the last sentence of that rule is in our experience always a difficult one, and it is perhaps to be desired that the rule should impose an obligation on the Court to express that implication clearly, so as to include in its disposal a clear expression of that implication, when it intends it. The difficulty is that the character of the order, which is made in many cases in the absence of the judgment debtor, is not in controversy until after time has elapsed and it is necessary in some future proceedings to determine its effect. The argument before us however can be dealt with shortly. For after our conclusion that the order of dismissal was not passed under Rule 57 at all it is immaterial that there war no appeal; for an appeal could have secured no purpose, when the order in question had no effect on the previous attachment, which it was necessary to displace. As regards waiver, the answer is equally simple. For it is a general principle that there can be no waiver in ignorance of the existence of the rights alleged to have been waived.

Taking this view, we accept the finding and hold that the first attachment was never determined and that therefore Exhibits C and D, made during the attachment which never ceased, have never become effective.

This failing the appeal has been argued on another ground that Exhibit O, the order on a claim petition by these plaintiffs, sustained Exhibit D to the extent of Rs. 630 actually secured by it and that therefore the plaintiffs should have had a decree to obtain pessession on payment of R . 6 0. This argument was taken very obscurely if at all, in the grounds of appeal in this Court. It can be dealt with very shortly. First the right to obtain

possession was conferred by the melkanom, Exhibit C and not by the panayam deed, Exhibit D, which entitled the plaintiffs only to retain possession of the property as security for their money, after possession had been obtained under Exhibit O. Next Exhibit O did not sustain Exhibit D, as a mortgage with possession, which could be redeemed, but only directed the plaintiffs that the property should be sold subject to a charge under that document for Rs. 630. The plaintiffs cannot claim any different or further relief on Exhibit D, than Exhibit O allowed them.

The result is that S. A. No. 2127 of 1920 fails and is dismissed with costs of 5th respondent (6th defendant). S. A. No. 2128 of 1920 must be decided on the same grounds and it is also dismissed with costs of 1st respondent, plaintiff.

Appeal dismissed.

1923 MADRAS 706

AYLING AND ODGERS, JJ.

(*Kannathayaparkum Puthulath Amina Umma*—Defendant—Appellant.

v.

Anandravan Cheriya Rayarappan Nambiar and others—Plaintiffs and Defendants—Respondents.

S. A. No. 26 of 1921 D/-20th March 1923 against the decree of the Sub. J. Tellichery in A. S. No. 74 of 1920.

Malabar Law—Improper kanom by karnavan—Collusion inferred—Tarwad entitled to redeem.

Where the karnavan executed a later *othi* to 4th defendant for consideration, no part of which was binding on the tarwad and the fourth defendant later on succeeded to the interest of the kanomdar under the earlier binding kanom.

Held: that these facts would be sufficient to justify an inference of collusion between defendants 1 to 4, and to justify the grant of redemption decree in favour of plaintiff tarwad. [P. 706 C. 2]

K. P. M. Menon—for Appellant.

K. Govinda Marar—for Respondents.

Judgment.—The contest in both the lower courts was practically confined to the question of whether the *othi* document, Exhibit 1, executed by the karnavan, 1st defendant, in favour of 4th defendant (appellant) was valid and binding on the plaintiff's tarwad. This has been found in plaintiff's favour; and Mr. Menon who appeared for appellant has been unable to suggest any ground on which the finding could be questioned.

He has devoted his argument to a ground of appeal newly raised—that whatever view may be taken of Exhibit 1, plaintiffs being only anandravans should not be allowed to redeem, the earlier valid and binding kanom effected by Exhibit A in opposition to the karnavan. He relies on the judgment in *O. T. Soopi* v. *C. P. Mariyoma.* (1) in which it is stated that only under any special circumstances could the anandravans of a tarwad maintain a suit for redemption of a kanom granted by their karnavan, as such a suit would amount to an act of interference in the karnavan's management of tarwad affairs."

The judgment does not define what would constitute "Very special circumstances," nor does that in the unreported case, *Kathukutti Haji* v. *Kundan Menon* which is referred to and followed. But from the discussion of the evidence in the reported case it may perhaps be inferred that collusion between the karnavan and the kanomdar or prejudice to the tarwad interest by the continuance of the kanom would be sufficient. Both these circumstances were alleged in that case and found not to be proved.

In the present case, it is found that the karnavan executed a later *othi* to 4th defendant, for consideration, no part of which was binding on the tarwad and we are given to understand that the fourth defendant has succeeded to the interests of the kanomdar under the earlier binding kanom, Exhibit A. These facts would be sufficient to justify an inference of collusion between defendants 1 to 4 and it is clear that 1st defendant, having executed this improper *othi*, Exhibit 1, was in no position to maintain a suit on behalf of the tarwad for redemption of Exhibit A.

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(1) [1920] 43 Mad. 393—38 M.L.J. 207—11 L.W. 200—27 M.L.T. 169—(1920) M.W.N. 279—550 I.C. 760.

We think these circumstances are sufficient to justify the grant of a redemption decree in favour of plaintiff.

This appears to be in accordance with the decision in *Chappan* v. *Raru* (2), that suit was treated by the learned Judge as one by a member of a tarwad seeking to recover possession of properties mortgaged by his karnavan. He was allowed to do so without question, it being merely proved that the karnavan had effected another alienation not binding on the tarwad.

The second appeal is dismissed with costs.

Appeal dismissed.

(2) [1914] 37 Mad. 420—13 M.L.T. 118—15 I.C. 587.

✱ 1923 MADRAS 707

AYLING AND ODGERS, JJ.

(*Maddu*) *Venkayya*—Petitioner.

v.

Maddu Paidanna alias *Kamireddi and another*—Counter Petitioners.

Criminal Rev. Case No. 91 of 1923, D/- 12th March, 1923 from the Dt. Mag. Vizagapatam, D/-16th November 1922.

Criminal P. C., S. 488—Relationship declared not to exist by Civil Court—Order under S. 488 should not be given effect to.

Where the relationship, on which the maintenance order is based, has been declared by the final decree of a competent Civil Court not to exist, it is open to the person adversely affected thereby to ask the Magistrate to abstain from giving any further effect to his order of maintenance. 1918 M. W. N 65 Foll.

[P. 707 C. 2]

V. L. Ethiraj—for the Crown.

P. R. Srinivasa Aiyangar — for Petitioner.

Ayling J.— The petitioner in this case was directed by the Sub-Divisional Magistrate of Narasapatam under section 488 of the Criminal Procedure Code to pay maintenance at the rate of Rs. 3 a month for his illegitimate child. He subsequently brought a suit in the District Munsif's Court of Yellamanchili and succeeded in securing a final decision on appeal to the Subordinate Judge of Vizagapatam to the effect that the child was not his. On this he applied to the Sub-Divisional Magistrate drawing his attention to the decision of the Subordinate Judge and making the following prayer: " Your petitioner, therefore prays your honourable Court to abstain from giving further effect to the order dated 21st May 1918, the order awarding maintenance, in view of the decree and judgment of the Additional Subordinate Judge declaring that the second counter-petitioner was not born to the petitioner and that the petitioner is not bound to maintain her." The petition has been returned with the following endorsement. " The petitioner is free to seek whatever remedy he likes against the order of this Court which cannot be reconsidered. The order of the Sub-Divisional Magistrate is obviously based on a mis-conception. There is no question of re-considering the order of maintenance for which no provision is made in the Code, but, where the relationship on which the maintenance order is based has been declared by the final decree of a competent Civil Court not to exist, it is open to the person adversely affected thereby to ask the Magistrate to abstain from giving any further effect to his order of maintenance. This has been laid down in *Mahomed Abid Ali Kumar Kader* v. *Lulden Sahiba* (1), and it is in accordance with the view of the law taken by a Bench of this Court in *Illath Narayan Moorsad* v. *Kathil Ittichery Amma* (2) although in that case the learned Judges were dealing with a maintenance order passed after the decision of the Civil Court.

The order of the Sub-Divisional Magistrate is therefore set aside and he is directed to restore the petition to file and dispose of it in the light of the above remarks.

Petition remanded.

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(1) [1887] 14 Cal. 276.

(2) [1918] 22 M. L. T. 293—33 M. L. J. 449—6 L. W. 536—(1918) M.W.N. 65-18 Cr.L.J. 971 42 I. C. 331.

1923 MADRAS 708

COUTTS TROTTER, J.

Venkatasubramania Aiyar and another—Plaintiffs—Appellants.

v.

Syed Usuff and another—Defendants-Respondents.

C. S. No. 29 of 1921, D/-12th January, 1923.

Contract Act, S. 23—Promissory Note executed in French territory to save from prosecution for consideration payable in British territory—Criminal breach of trust—Validity.

An accused was served at Pondicherry with a process charging him with an allegation of Abus de Confiance, corresponding to Criminal Breach of trust under the Indian Penal Code. Under the French law the accused had an option to meet the demand and put an end to the prosecution, though under the English Law the offence is non-compoundable. The nephews of the accused executed a promissory note payable at Madras and consequently the proceedings against the accused were dropped.

Held: that though the offence of Criminal Breach of trust is not compoundable according to the British India Laws, the pronote was valid and enforceable, the consideration for the same not being founded on a violation of a rule of public policy or natural justice. [P. 709 C. 2 P. 711 C, 2]

C. Narasimhachari—for Appellants.

P. *Venkatramanrao and V. Radhakrishnayya*—for Respondents.

Judgment—This is a curious story and on the facts as I am about to find them gives rise to an interesting and difficult question of International Law.

After the outbreak of war, gold became exceedingly scarce in India and consequently enhanced in value. By a notification under Act XI of 1916, the Government of India made it illegal to import gold bullion or gold coins into British India and rendered gold so smuggled into the country liable to confiscation. This still further enhanced its value and offered additional temptation to smugglers. Many confiscations took place, some of which gave rise to suits tried before me.

In this case the 1st defendant Syed Usuff delivered at Pondicherry through one P. Narayana Doss Mehta of Pondicherry a quantity of American Gold Dollars, 378 in all to a man called Parameswara Iyer on the 22nd of January, 1920. They were to be taken to Madras and were to be delivered to Syed Usuff there. Parameswara Iyer was to be remunerated by some commission for services. In point of fact, the dollars were seized by the Customs Officers at Chinnababu Samudram Railway Station and were confiscated to Government. The British authorities were willing to return the gold dollars on payment of a sum of Rs. 22,000 and odd, and it appears that Parameswara Iyer arranged with a Sowcar to raise the amount of the penalty, paid it to Government and got back the dollars. I have no doubt that he did so because he reckoned that the rate of exchange was going up and that he would make a small profit on the deal; and I have little doubt that he did make a profit and the parties though they have not any exact figures, seem to agree that the profit was probably somewhere about Rs. 4,000 or 5,000 It is alleged in the plaint that before he redeemed the dollars Parameswara Iyer gave Syed Usuff, the 1st defendant, the opportunity of redeeming the dollars for his own behalf through his agency and that Syed Usuff declined to find the money and relinquished the dollars. But no proof has been given of this and I am not prepared to believe it. It was somewhat half heartedly contended for the plaintiffs that apart from this, as soon as the dollars were seized the fiduciary relation of Parameswara Iyer to Syed Usuff was *ipso facto* terminated and that Parameswara Iyer was at liberty to enter upon a transaction of redemption of the dollars without being in any way liable to account to Syed Usuff, his principal. I cannot accede to this contention. In my opinion so long as there was a possibility of redeeming the dollars with the chance of profit by so doing, Parameswara Iyer was bound to give his principal the option of redeeming them for the principal's benefit and was guilty of a breach of duty as agent if without taking that step he acquired the dollars for himself. Later on, Parameswara Iyer returned to Pondicherry where the plaintiffs who were his nephews were living and where he shared a house with them. On the 25th October, 1920 the 1st

defendant served a process at Pondicherry upon Parameswara Iyer called a Sommation a certified copy of which is before me. The effect of that document together with a petition to the Procureur de la Republique has been explained to me by Mr. M. David, an advocate practising at Pondicherry, and the document in the original is before me. I may add that there was also before me a translation made by the English Judicial Interpreter of the Pondicherry Court which is so full of elementary blunders as to make its latter part meaningless. I have made myself a translation from the French which was accepted by the parties. What it amounts to is an allegation of *Abus de Confiance* which may be taken roughly to correspond to an offence of criminal breach of trust under the Indian Penal Code, and the effect of it was that Parameswara Iyer could end the matter by meeting the demand or would be liable to criminal prosecution. The outcome of it was that after considerable discussion a promissory note for Rs. 4,000 payable at Madras was executed by the two plaintiffs, the nephews of Parameswara Iyer, in favour of Mir Hassan Ali, the 2nd defendant. The defendants' story is that Mir Hassan Ali was merely an outsider who provided the plaintiffs with cash to satisfy the demand of Syed Usuff and that the promissory note was given to him as a consideration for paying Rs. 4,000 in cash to Syed Usuff. I do not believe that and my finding is that no money in cash passed and that the proceedings were stopped in consideration of the signing of the promissory note. The promissory note was not met and this suit was instituted in this Court to set it aside, and O. S. No. 42 was instituted to enforce it by the present defendant. One suit is a corrollary of the other and the result of one determines that of the other.

On these facts as I have found them a clean point of law arises. It is clear that by the law of France that which was done was perfectly legal and did not amount to duress or coercion or undue influence. But it is said that as the *lex loci solutionis* was Madras in British India the British Law must be applied and that by that law the transaction could not stand, and a number of authorities was cited. Of these I shall refer first to the most direct, the case of *Kaufman* v. *Gerson* (1) decided by the English Court of Appeal

In that case, a wife entered into an agreement in France to pay monies to a person who had employed her husband in a fiduciary capacity and who alleged that the husband had appropriated the money entrusted to him to his own use thereby committing a criminal offence according to the Law of France. The consideration for her promise to pay was the forbearance of the principal, the plaintiff in the English action from prosecuting his agent, her husband, in France. I have been at pains to consider exactly what principle the Court of Appeal applied in refusing to enforce as they did refuse to enfore, the contract, and I think it is clear what principle the Court conceived itself to be applying from a perusal of the judgment of Collins, M. R. He cites two passages from Story's Conflict of Laws and one from Westlake on Private International Law, on which it is evident that he based his judgment. One of these passages from Story is as follows: "All such contracts, even though they might be held in the country where they are made, would be held void elsewhere, or at least ought to be, if the dictates of Christian morality or of even natural justice, are allowed to have their due force and influence in the administration of international jurisprudence" 'Such' contracts are defined as "contracts which in their own nature are founded on moral turpitude or are inconsistent with the good order and solid interests of society." Westlake's words are as follows: "Where a contract conflicts with what are deemed in England to be essential public or moral interests, it cannot be enforced here." Collins M. R. sums it up in his own words as follows: "Where an English Court is asked to enforce a contract made in a foreign country, it is entitled to enquire whether, though

(1) [1904] 1 K. B. 591—73 L. J., K. B. 320—90 L.T. 608—52 W.R. 420—20 T.L.R. 277.

the contract might be valid according to the laws of that country, it violates some moral principle which, if it is not, ought to be universally recognisse.d" It is common knowledge that the decision in *Kaufman* v. *Gerson* (1) was by no means universally accepted by the legal profession as being correct. And Prof. Dicey in his Conflict of Laws gives very cogent reasons for doubts. In substance he urges two main arguments against it. The first is that the rule of the French Courts ought not to be held by a British Court to be contrary to natural justice or public policy, and the learned author says this: "French civilization and morality is as high as our own. The presumption should always be in favour of the Justice of the French Law and after all there is no patent injustice in allowing a person to escape from criminal prosecution by making compensation to the sufferer whom he has damaged." The second objection he urges is that the decision of the Court of Appeal is irreconcilable with the judgment of the Court of Exchequer Chamber in the case of *Santos* v. *Illidge* (2) and that it is the common understanding of English lawyers that decisions of the Court of Exchequer Chamber are binding on the English Court of Appeal as constituted under the Judicature Acts. The next case to which I propose to refer is the case of *Moulis* v. *Ogen* (3). In that case the plaintiff had lent money to the defendant in order to enable him to play baccarat at a club in Algiers and the defendant had given a cheque there drawn on an English Bank to repay the sum of money so lent. The majority of the Court of Appeal held that an action brought upon the cheque would not lie as the transaction was governed by English Law and that the cheque must be deemed to be given for an illegal consideration within the English Gaming Acts. Fletcher Moulton, L.J. dissented and I think that the effect of his opinion may be summarised in this way, that he considered that the English Gaming Acts only purported to forbid gaming within the realm and could not be held to forbid British subjects to the jurisdiction of the English Courts from gaming in foreign countries where such gaming was not illegal. Once more it is common knowledge that the correctness of the decision was much canvassed in professional circles. It may be that the decision may be justified on the narrow ground that the prohibition contained in the Gaming. Acts is part of the law of procedure, merely enacting that a suit shall not be brought in an English Court on such a consideration. (See Collins, M.R. at page 753 of the case and Westlake's Private International Law, page 421, Vth Edition). There is no doubt whatever that the *lex fori* prevails as to all questions of procedure and if the provisions of the Gaming Act were rightly considered as merely part of the law of procedure, the wider objections to the case disappear and of course there disappears with them its applicability to this case. No one can suggest that the English law as to duress and coercion as affecting the validity of contracts is other than substantive law, I now turn to the case of *Santos* v. *Illidge* (2). In that case it was held that a contract for the sale of slaves to be performed in Brazil at a time when slavery was not illegal by the law of Brazil was enforcible in England. As Prof. Dicey points out, it is difficult to believe that compounding an offence is more obiviously contrary to natural justice than slave trading. Several other English cases were cited of which I need only refer to the judgment of the House of Lords in *Ertel Bieber & Co.* v. *Rio Tinto Company* (4) and the connected case. The importance of the decision is not because of its direct bearing upon this case, for no one would contest the principle that the law against trading with the enemy is so vital to the existence of the State that Courts of Law in England must declare it to be against public policy, whatever be the law of the country

(2) [1860] 8 C.B. (n. s.) 861—29 L.J., C.P. 348—6 Jur. (n. s.) 1348—3 L.T. 154—8 W.R. 705

(3) [1907] 1 K.B. 746—76 L.J., K.B. 396—96 L.T. 596—23 T.L.R. 348.

(9) [1918] A.C. 260—87 L.J., K.B. 531.

in which such contracts were made. I cite it because of its apparent endorsement of the decision of *Kaufman* v. *Gerson* (1) and its explanation of the case of *Santos* v. *Illidge* (2). *Santos* v. *Illidge*, (2) as explained by Lord Atkinson at page 299, is to be taken as turning on the construction of the English statutes prohibiting slave-trading, especially 6 & 7 Victoria Ch 98, Section 5, Lord Atkinson and Lord Parker explain the case as merely deciding that the English statutes only prohibited slave-trading in the British Empire and did not purport to bind British subjects from slave-trading outside the limits of the Empire and that the case therefore must be treated, in the words of Lord Parker, "as turning not upon any general rule of public policy but on the construction of a particular statute.

If the matter rested there, I should find myself in very great difficulty. On the one hand, there is the decision of *Kaufman* v. *Gerson* (1) apparently approved in the House of Lords and the view of the majority of the Court of Appeal in *Moulis* v *Ogen* (3). On the other, I have the dissenting judgment of Fletcher Moulton, L,J., in that case and the weighty opinion of Prof. Dicey. I do not think I can rely on *Santos* v. *Illidge* (2) partly because the House of Lords has explained it as turning on the language of a particular statute and partly because I confess to a reluctance to accept the implied doctrine that slave trading in any part of the world is not repugnant to natural justice, a proposition which I think is really involved in *Santos* v. *Illidge* (2). While the decisions of the English Courts are not strictly binding on Indian judges, I myself would regard it as intolerable presumption to take a view opposite to that taken by the English Court of Appeal and the House of Lords, though I am perfectly free to say that if I were left to my own discretion, I should feel quite unable to act on the view that the provisions of the law of France a country in many ways intellectually more developed than England were to be treated as in violation of the fundamental principles of natural justice. But I think, sitting in an Indian Court, my position is different from what it might otherwise be for two reasons. The first is that the compounding of criminal offences is so far from being regarded by the statute law of this country as being a violation of natural justice that the Code of Criminal Procedure contains a list of offences which are expressly made compoundable by money compensation. It is perfectly true that a Criminal breach of trust is not one of those offences, but I do not think that that affects the position that the Indian law does not regard the conception of evading criminal proceedings by monetary compensation as one wholly, and from its very nature, to be discountenanced. The second and determining consideration is this. I sitting as a single judge on the Original Side of this Court, am bound by the authority of any decision of a Bench of the Court and there has been cited to me the case of *Subraya Pillai* v. *Subraya Mudaliar* (5). I am unable to distinguish the facts of that case from the facts of the present one and in my opinion it concludes me from deciding this case otherwise than in favour of the defendants and the corresponding case in favour of the plaintiffs.

(5) [1856] 4 M.H.C.R. 14.

1923 MADRAS 711

SCHWABE, C. J. AND COUTTS TROTTER, J.

Parthasarathy Reddi and others—Appellants.

v.

Kandaswami Reddi and others—Resdents

O. S. A, Nos. 118, 119 and 120 of 1921. D/-12th February 1923, against the judgment and decree of Phillips, J., in C. S. No 212 of 1919.

(a) *Hindu Law—Madras Law—Daughter's son—Adoption Legal.*

An adoption of daughter's son made with the consent of the deceased husband or with the consent of the sapindas is legal. [P 712 C 1]

(b) *Evidence Act, S. 115—One cannot take advantage of the wrong of his predecessor.*

Where A was the adopted son of B whose consent, it was alleged, was corruptly given.

Held that A who claimed through B was estopped from denying the fact that his adoptive father did consent. The principle *Nemo allegans tur pitudi em suam est adiendus* is applicable in India. 32 M.L.J. 484 and 31 B. 305 Foll. [P 713 C 2]

T. K. Ramachandra, Aiyar, P. V. Ramachandra Raju S. Srinivasa Aiyar, Doraiswami Mudaliar, Natarajan, V. V Srinivasa Ayyangar and A. Narasimhachariar—for Appellants.

K. Narasimha Ayyar and V. N. Ramanatha Rao—for Respondents.

Schwabe, C.J –In this case a widow who had a son who attained the age of 18 and subsequently died unmarried adopted the appellant who was the son of her daughter. The first question that arises is whether such an adoption with the consent of her deceased husband or with the consent of the sapindas is legal. This question came before this Court a short time ago in S. A. No. 1568 of 1920 [*Tripuramba* v. *Venkataratnam* (1)] and Wallace J. and I decided that it was legal. I see no reason for departing from that judgment.

The consent of the sapinda one Kumarasami Mudaly whose consent was necessary, it is alleged in this case was obtained by a promise given by the mother of the adopted boy to pay him a sum of Rs. 200. The *onus* of establishing that was strongly on the respondents. I am not satisfied that he was bribed at all, from which it follows, in my view that the *onus* was not discharged.

Another interesting point was raised namely, whether if the promise of payment was made in connection with obtaining that consent, that fact is conclusive to prevent the adoption being good. It would be very strong evidence that the consent was obtained corruptly, but it is not clear on the authorities that the mere fact of the promise of payment standing alone would be conclusive. In this case the adoption of this particular boy was obviously reasonable. He was the grandson of the deceased through a daughter. I think it is enough to say in this case that the point does not directly arise: but I would add that I should want to be satisfied that there was something more than a promise of payment relied upon. The respondent in this case is the adopted son of Kumarasamy Mudaly, whose consent, it is alleged, was corruptly given, and the question arises whether the respondent who claims through Kumaraswamy Mudaly is estopped from denying the fact that his adoptive father did consent. The 1st point as to that is whether the mere fact that the adopted son has changed his status by entering into the new family is sufficient to bring that principle of estoppel into operation. On the view I take of the facts of this case, it is unnecessary now to express any opinion on that interesting and somewhat difficult point. But a further question of estoppel also arises. It is a principle of law adopted from the Roman Law that no one, alleging his own wrong is to be heard. *Nemo allegans tur pitudinem suam est audiendus*. That principle is applied in England and is to be found clearly stated in the case of *Doe* v. *Roberts* (2) and that the principle is applied in this country is clear from the recent decision of this Court by Wallis C. J and Coutts Trotter J. in *Kamayya* v. *Mamayya* (3) and it is also very clearly stated by Jenkins C. J. in *Sidlingappa* v. *Hirisa* (4) and it comes to this:—That where it is necessary for a party who wishes to establish a certain state of things in order to do so to set up his own wrong-doing he will not be allowed to do so. In this matter the respondent who merely takes from the late wrongdoer, Kumarasamy Mudaly, can be in no better position than Kumarasamy Mudaly himself, and applying that principle it is quite impossible for him to set up that the consent that his adoptive father gave was obtained from him by a promise of corrupt payment. In the view I take of this part of the case, it is unnecessary for me to consider the question whether the subsequent

(1) 1923 Mad 517 46 Mad. 423—44 M.L.J. 349—72 I.C. 278.

(2) [1819] 2 B & Ald. 367—106 E.R. 401—20 R.R 477.

(3) [1916] 32 M.L.J. 484—43 I.C. 352.

(4) [1907] 31 Bom. 405—9 Bom. L.R. 542.

release given by Kumarasamy of any rights he might have possessed was a release or not.

Appeal No 120 of 21 must be allowed and the suit dismissed with costs throughout.

Appeals Nos. 118 and 119 will be allowed with costs here and below.

Coutts Trotter. J.—I am of the same opinion and only add a few words because we are differing from the learned trial Judge among other things on a question of fact. That question is whether there was evidence before the learned Judge on which he ought to have come to the conclusion that the reasonable inference from the facts was that Kumarasamy was influenced by corrupt motives to give his consent as a sapinda to the adoption. Looking at the facts as found it appears to me that they cannot reasonably give rise to more than, at best, a suspicion, and having regard to the dates, namely, that the consent was in July 1909 and the alleged promise of payment was in the following October, it seems quite consistent with the facts to hold that Kumarasamy, having given his consent from perfectly proper motives, afterwards thought that he could make something out of it. Therefore I agree with my Lord that, on the facts as we know, the question of corruption in the exercise of the choice and discretion by Kumarasamy as to giving his consent as a sapinda does not arise.

There were certain points of great interest argued in this case, but I do not think that they are necessary for our decision and I do not propose to discuss them. I respectfully agree with the decision of my Lord and my brother Wallace J. to which reference has been made.

The only other thing about which I wish to say a few words is with regard to the question of estoppel. I do not think that the learned trial Judge had a fair opportunity of dealing with that question because he says in his judgment at page 24. "The question of estoppel raised by the 1st defendant which is the subject matter of issue 3 had not been pressed, and the issue must be found for the plaintiff." I take that to mean not that the learned Judge decided that question but that his attention was not fairly drawn to it so as to enable him to deal with it. That I take to be the doctrine of estoppel proper with which my Lord has dealt. But I do not see that there was even a mention made to the learned Judge of another ground of defence, which is perhaps the strongest that we have to deal with, namely that based on the maxim *Nemo allegans tur pitudinam suam est au iendus*.

That maxim belongs to civil law and is taken from the Institutes; it appears in the Common Law in England for example in the two cases to which my Lord has referred, *Doe* v. *Roberts* (2) and *Prole* v. *Wiggins* (5). The question is whether in this Court that salutary principle of law is to be applied. There is authority both in this Court in the case to which my Lord has referred and in Bombay in *Sidlingappa* v. *Hirisa* (4) for applying such a maxim, and I am entirely in concurrence with the view that we should refuse to allow the respondent in the case who can only claim through Kumarasamy to set up the case that the person through whom he claims had his judgment vitiated by the acceptance of a corrupt consideration.

I agree that these appeals be allowed with costs.

Appeals allowed.

(5) [1836] 3 Bing (n.s) 230—3 Scott. 601—2 Hadges 204—6 L.J., (n s.) C.P. 2—132 E.R. 398—43 R.R. 621.

1923 MADRAS 713

COUTTS TROTTER, J.

P. Ananthachari—Plaintiff—Appellant.

v.

Messrs. Rathnam & Sarathi and another—Defendants—Respondents.

C. S. No. 686 of 1921, D/-13th December 1922.

Principal and Agent—Agent in possession of funds for Principal Principal's direction to pay to creditor—Agents liability to the creditor arises.

Where there are funds in the hands of an agent belonging to his principal and when his

principal gives a mandate to the agent to deliver them in extinguishment of an obligation of the principal to a third party and when that mandate is communicated to the creditor, then there arises on the part of the agent an obligation on which apparently he can be sued both in law and equity—in law as on a contract and in equity as upon an implied assignment of such funds as there may be in his hands to satisfy *pro-tanto* with those funds which he had in his hands the claim of the creditor. 9 M. & W. 411 and 9 Bing. 372 Foll.

[P 716 C. 2.]

V. V. Srinivasa Aiyangar—for Appellant.

Vere Moiket—for Respondent

Judgment.—This is an interesting action which is brought by a gentleman called Ananthachari, who is the proprietor of a firm trading under the name of Messrs. P. Rungachariar & Co., and the defendants are, first a firm trading as Messrs. Ratnam & Sarathy and secondly an English Limited Company known as Messrs Alfred Mumford & Co., Ltd., who are now in liquidation and are represented by their liquidator and Official Receiver Mr Phillips. The history of this matter, which I need only deal with very briefly, is this; that on the 5th of February 1920, Messrs. P. Rungachariar & Co., signed an indent to Messrs Rathnam & Sarathy in the following terms: "We authorise you to instruct Messrs..... .....to purchase and ship the goods specified below on our risk and account and subject to the conditions over leaf," and then follows the description of the goods and the price; and the terms of payment were Draft at 60 D/S documents against payment. In fact, Messrs Rathnam & Sarathy were acting for Messrs Alfred Mumford & Co., Ltd. They had communicated with them and on the 19th February 1920, they intimated to the plaintiffs that their principals, that is Messrs. Alfred Mumford & Co., Ltd., had confirmed the same by wire subject to confirmation by mail, and on the 4th March there came an intimation of the confirmation by mail. On the 28th September 1920 there came a letter from Messrs Rathnam & Sarathy to the plaintiffs in the following terms: "We are in receipt of invoice for £. 462-10-2 towards your order 808 which we beg to enclose herewith and request you to accept the draft when presented by the Bank." Then on the 30th September the plaintiffs reiterate the allegation which they had previously made that the goods were late shipped, a dispute with the merits of which I am not now concerned; and that was followed on the 19th November by an intimation of the plaintiffs that they would allow the bill to be met with a reduction of £. 62-10-0 leaving the amount due as £ 400 together with the clearance charges. That proposal had been made apparently by Messrs Rathnam and Sarathy and it was accepted by the plaintiffs in the letter of the 19th November 1920 with the proviso that in return for this concession of waiving the contention of late shipment another contract under another indent should be cancelled. On the 22nd November 1920 Messrs Rathnam & Sarathy write to the plaintiffs enclosing apparently a letter to the National Bank of India authorising them, that is the Bank, to take £. 400 net at the current rate of exchange towards the bill together with charges and thereupon they would have a right to delivery from the Bank of the copper sheets to be delivered under the contract. That was not done and I had the explanation of the plaintiffs' witness which seems to make it quite clear that instead of that proposal a different arrangement was substituted, namely, that Messrs Rathnam & Sarathy should themselves withdraw the draft and that meanwhile the plaintiffs should remit a sum of £ 400 direct to their principals Messrs Alfred Mumford & Co., Ld., in London. That arrangement seems to have been made to gratify the desire of the plaintiffs, the postal exchange being a little more profitable to them than the Bank exchange, to avail themselves of that ard to make a few hundred rupees by remitting the money direct to London. No doubt it seemed an excellent scheme at the time but had most unfortunate results and it directly led to this litigation. On the 8th December £. 400 was remitted by postal money order by the plaintiffs to London. and on 20th December Messrs Rathnam & Sarathy

acknowledge receipt of a sum of Rs. 500 towards clearing charges and commission. Then on the 13th January 1921 Messrs. Alfred Mumford & Co., Ltd., write from London to the plaintiffs as follows: "Your favour of the 16th December is to hand and the money orders that you advised for the total sum of £ 400 arrived here to-day. As this money has still to be paid to the National Bank to release the documents, we are making the necessary arrangements. We agree that the 2½ tons of yellow metal (which I referred to) is cancelled." Then follows a cablegram which was received on the 15th January from Messrs. Alfred Mumford & Co., Ltd., to Messrs Rathnam & Sarathy, and it is in these terms: "£ 400 arrived this morning. Have you sufficient to pay the National Bank of India, Ltd., about £ 350 obtain delivery to save our remittance —Mumford." and that was followed up by a letter dated the 20th January once more from Messrs Alfred Mumford & Co, Ltd, to their agents Messrs. Rathnam & Sarathy which runs as follows: "£. 400 P. Rangachariar & Co., we got this cash and wired you to know if you had sufficient cash of ours to hand some £ 350 or so to the Bank to get the goods. This should save us paying either the Bank or you which is necessary while you have funds of ours as we understand at present. We make the balance with you as enclosed statement which please look into and let us know." That cablegram is acknowledged by Messrs. Rathnam & Sarathy on the 20th when they say that they will look into the matter and see how the accounts between them and their principals stand. Then on the 2 th January the plaintiffs complain that no arrangements had in fact been made in accordance with what had been agreed to by paying the Bank, discharging its lien and putting the plaintiffs in possession of the yellow metal Then on the 1st February a new attitude is taken up by Messrs Rathnam & Sarathy. They insist that there was another consignment of goods totally distinct from those in suit as to which the plaintiffs were indebted to them. Again the contention was apparently late shipment, and in this case the plaintiffs were notwillingto forego that objection nor so far as I know from the correspondence was any proposal made that they should. But the attitude taken by Messrs Rathnam & Sarathy was that if the bills in respect of these further consignments were met that would provide them with funds to discharge the bills held by the Bank in respect of the suit goods and that therefore they would not release the goods which are the subject matter of this contract until the later consignment of goods was paid for to put them in funds; and they communicated what they had done in that matter to their principals Messrs Alfred Mumford & Co., Ltd., by their letter of 20th February 1921. Then follows a long letter from the plaintiff dated the 17th February 1921 in which he argues his case and protests that the arrangement about the suit consignment of yellow metal stood alone and independent. that they were found to retire the bills and put the plaintiffs in a position to get the metal without making or attempting to make terms as to any other goods, the subject of distinct contracts and coming by other ships. The plaintiff wrote on the 3rd March 1921 to Messrs Alfred Mumford & Co., Ltd., as follows: We are simply surprised at your continued silence with reference to our request to you to instruct the National Bank of India, Limited. Madras to deliver us the 2½ tons of copper sheets shipped per SS. Gamaria towards the bill of which payment has been remitted to you by Postal money order months before. When remitting to you the sum of £. 400 towards the payment of the above bills we expected you to instruct the National Bank of India, Limited, Madras by cable for effecting delivery of the above said 2½ tons of copper sheets. But it is most unfortunate that we have heard nothing from you except the acknowledging of the said £. 400 and a promise to instruct the National Bank of India, Limited, Madras at the earliest opportunity to deliver us the 2½ tons of copper sheets. We herewith enclose a copy of the cable sent to you on 28-2-1921."

Then on the 10th March 1921 Messrs Alfred Mumford & Co, Ltd., write as follows: "At the time we receive' your cash we telegraphed Messrs Rathnam and Sarathy to deliver the goods to you arranging payment with the National Bank of India who held the goods. We are writing letters from this firm. As we understood it the copper had already been handed over to you. Have you paid our other draft for yellow metal?" Then on the 17th March there comes a further complaint from the plaintiffs in which I think there is nothing new, addressed again to Messrs Alfred Mumford & Co., Ltd., and on the 29th that complaint is reiterated once more. Shortly afterwards, apparently somewhere in March, towards the end of March, Messrs Alfred Mumford & Co., Ld., went into voluntary liquidation and no one knows what anyclaim upon them direct is likely to be worth.

Now in these circumstances the plaintiffs sue the two defendants in the alternative. They cannot get relief direct against both of them because the liability of the principal and agent is alternative. *Morel* v. *Westmoreland*, (1). I am told by the learned counsel for the defendant that the liquidation was in January and if it be so I do not think that it really affects anything that I have to decide in this case. As against the 1st defendant Messrs Rathnam and Sarathy, the case is put in this way. It is said that the effect of the telegram of the 15th January and the letters of the 20th January constitute a mandate to Messrs Rathnam and Sarathy to pay out of the funds in their hands moneys to ensure to the benefit of the plaintiffs because they were to be used to withdraw the bills at the National Bank and put the plaintiffs into possession of the goods which they had bought and which they had paid for. That was unquestionably communicated to the plaintiffs It is really, I think almost sufficiently, conveyed by Messrs Alfred Mumford & Co.'s letter of the 13th January 921 to the plaintiffs and I have evidence which I believe on the part of the plaintiffs that it was also conveyed to them by Messrs Rathnam and Sarathy and that the fact that that mandate was given was the basis of the future transactions between the parties. The cases of *Walker* v. *Rostron* (2) and *Crowfoot* v. *Gurney* (3), seem to me to establish clearly this proposition, that where there are funds in the hands of an agent belonging to his principal and when his principal gives a mandate to the agent to deliver them in extinguishment of an obligation of the principal to a third party and when that mandate is communicated to the creditor, then there arises on the part of the agent an obligatian on which apparently he can be sued both in law and equity-in law as on a contract and in equity as upon an implied assignment of such funds as there may be in his hands to satisfy *pro tanto* with those funds which he had in his hands the claim of the creditor. Now the trouble was that in this case it was not possible to prove that at the time when the suit was brought there were funds in his hands sufficient to meet this claim or any substantial part of it, certainly not sufficient funds to be able to withdraw the bills from the Bank and give the plaintiffs delivery of their goods; and I therefore think that any cause of action based upon a contract as against the 1st defendant was bound to fail because in a legal claim, in my opinion it, must be shown that the fund which it is sought to attack was actually in existence in the hands of the right person at the date of the writ. But with regard to the equitable remedy I do not feel that that difficulty exists. I am prepared to treat this plaint as in effect a request for the Court to direct an ascertainment of what funds belonging to the principal are in the hands of the agent as at the date of the ascertainment of rights, for I am not asked to do that except for a very subsidiary purpose because it is abundantly clear that the 2nd defendant, namely Messrs Alfred Mumford & Co., Ltd., and their liquidator have no

(1) [1904] A.C. 11—73 L.J. K.B. 93—89 L.T. 702—52 W.R. 353—20 T.L.R. 38.

(2) [1842] 9 M. and W. 411—11 L.J., Ex. 173.

(3) [1832] 9 Bing. 372—2 M. & S.C. 473—2 L.J. C.P. 21.

sort of answer to this suit whatever They took the plaintiffs' money £ 400 and have had the benefit of it on an undertaking given by them that they would utilise that money by making such arrangements with the National Bank by making up any balance of the actual bills as would enable the National Bank to give delivery to the plaintiffs and so discharge the plaintiffs' claim. That they totally failed to do. It is not for me to enquire whether it was they that failed or their Madras representatives that failed, but the fact remains that the plaintiffs have parted with their money and have got nothing for it up to date. In these circumstances I am prepared at the suggestion of the parties to hold Messrs Alfred Mumford & Co., Ltd., directly responsible to the plaintiffs for this sum of £ 400 and it has been agreed between the parties, to save the laborious enquiry that might follow as to the rate of exchange prevailing at the material times, to accept that liability as now standing at Rs 5,000 which I think is a very reasonable proposition and very reasonably accepted. I must therefore give judgment against Messrs Alfred Mumford & Co, Ltd.. for the sum of Rs. 5,000, but in accordance with the equitable doctrine which has been discussed I must further hold that there is created a charge on such funds as were found to be in the hands of Messrs Rathnam and Sarathy belonging to Messrs Alfred Mumford & Co., Ltd , and thus enable the plaintiffs to execute that charge on the funds in the possession of Messrs Rathnam & Sarathy which I am told exceeds the sum of Rs. 5,0 0 which is the amount of my judgment against Messrs Alfred Mumford & Co., Ltd.

Now I am told that the 1st defendant's Messrs Rathanam & Sarathy's difficulty in handing over the money is this. Pressure has been put upon them by the liquidator of the company forbidding them at their peril to part with this money. That case is met, in my judgment, by what was decided in *Walker* v *Rostron* (2) because in that case what Rostron did was to hold the person in the position of the claimant (here, the plaintiff), at bay in obedience to the pressure put upon him by the Assignee in Bankruptcy of the debtor, the principal, and the Court held that he was wrong and that he was bound to pay the person in favour of whom a charge had been created, he being in the position of the 1st defendant in this case in preference to discharging the claims of the Assignee in Bankruptcy. But the matter does not stop there because there is an even stronger case of *Burn* v. *Carvalho* (4). There the matter had gone so far that the Court of common law dealing with it purely as a legal claim had decided, even as far as the Exchequer Chamber, in favour of the Assignee in Bankruptcy. But when an appeal was filed in equity the Common Law Courts having expressed themselves as not dealing with the equitable claim so that it was not necessary to pass an injunction against the plaintiff against proceeding with his legal remedy, the Court of Equity held, and it was confirmed by the Lord Chancellor, that the equitable claim prevailed and that the person in the position of the plaintiff here was entitled to enforce his equitable charge to the neglect of the legal rights of those creditors in law of the principal. I am clearly of opinion that in these proceedings I am not entitled to hear the National Bank. They are not parties to this suit and they are not sought to be added. But I am further of opinion that even if they were entitled to be heard the equitable claim of the plaintiffs must inevitably prevail over any supposed legal claim either of the Bank or of the liquidator of Messrs Alfred Mumford & Co., Ltd.

There will be judgment in the way I have outlined. There will be judgment against Messrs Alfred Mumford & Co., Ltd., for Rs 5,000 for moneys had and received to the plaintiffs' use on a consideration which has failed and there will be a declaration that the moneys belonging to Messrs Alfred Mumford & Co., Ltd., in the hands of Messrs Rathnam & Sarathy are subject to an equitable charge in favour of the plaintiffs. By agreement of parties there will be no costs.

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(4) [1839] 4 Myl. and Cr. 690—7 Sim. 139—9 L.J., Ch. 65.

1923 MADRAS 718

OLDFIELD AND VENKATASUBBA RAO, JJ.

Kari Bapanna and another—Plaintiffs—Appellants.

v.

Sunkari Yerramma and others—Defendants—Respondents.

A. A O. No. 262 of 1922 and Civ. Rev. Pet. No. 541 of 1922, D/-22nd February 1923 against the order of the Addl. Sub. J., Vizagapatam in A. S. No. 361 of 1921, D/-21st February 1922.

(a) *Evidence Act,, S. 44—Principle applies to cases of gross negligence.*

Although only fraud or collusion and not gross negligence is mentioned in S. 44 the principle involved is applicable to cases of gross negligence also. 27 C. 11 and 16 I. C. 543 Ref.

(b) *Civil P. C., O. 41 R. 25—Pleading of gross negligence not distinct—Issue wide enough to cover gross negligence—Evidence produced—Finding as to gross negligence necessary—Remand proper.*

Where the plea of gross negligence was not taken in any distinct language in defendants's written statement which was very general, but on which two very general issues were framed, one of which was quite wide enough to cover the plea of gross negligence, and the parties had in mind the plea of gross negligence at the trial and the defendant was attempting to produce evidence in support of it, which was rejected, not because the matter was not agitated in the suit, but because the District Munsif did not think that that evidence was of any value,

Held: that the case of gross negligence was open and that the Munisf should have found definitely on it and therefore the Lower Appellate Courts order remanding the suit for retrial on that point must be supported.

[P. 718 C. 2]

Y. Suryanarayana—for Appellants.

P. Somasundaram—for Respondents.

Oldfield, J.—The order appealed against is one of remand. The question was whether, as the 11th defendant alleged, a previous decree was invalid, because it had been obtained owing to the negligence of her then guardian. The first objection to this order of remand is that the plea of negligence was untenable in as much as, if the eleventh defendant wished to plead that she was not bound by the previous judgment, she should have brought a regular suit to have it set aside. That does not appear to be in accordance with S. 44 of the Indian Evidence Act on the construction of that provision in *Rajib Panda* v. *Lakhan Sendh Mahapatra* (1). It is urged that S. 44 is not applicable when the previous judgment has been obtained owing to gross negligence; and it is true that only fraud or collusion and not gross negligence is mentioned in it. We do not however think that the principle involved is inapplicable to cases of gross negligence. It may be observed that such cases were referred to, as are on the same footing, with cases of fraud in *Jogeshwar Narain Singh* v. *Rai Radha Raman* (2), and we can see no reason on principle why any distinction should be made between the one class of cases and the other.

On the merits, we think that the Lower Appellate Court has stated its reasons very badly for conclusions, which are correct. The first question was whether the District Munsif was right in not coming to a conclusion on the plea of gross negligence. There is no doubt that this plea was not taken by the eleventh defendant in any distinct language in her written statemant. The written statements were exceedingly general, the injunction of the Code that allegations of fraud and the like should be made specific, if they are made at all, being entirely neglected. On these pleadings, however, two very general issues were framed, one of which, the fourth, was quite wide enough to cover the plea of gross negligence; and a most important consideration, there is no doubt that the parties had in mind, the plea of gross negligence at the trial and that the eleventh defendant was attempting to produce evidence in support of it, which was rejected, not because the matter was not agitated in the suit, but becaue that District Munsif did not think that the evidence was of any value. In these circumstances we hold that the case of gross negligence was open and that the Munsif should have found definitely on it. The lower Appellate Court's order therefore remanding the suit for retrial on that point must be supported. It had already directed the Munsif to take an additional written

(1) [1900] 27 Cal. 11—3 C.W.N. 660.
(2)]1912] 16 I. C. 543.

statement from the eleventh defendant. We supplement that direction by saying that the negligence relied on should be described in as definite a manner as possible and that a definite issue as to the gross negligence should be framed before the retrial begins.

The Lower Appellate Court's order is next, that in the retrial certain documents shall be admitted [illegible] in evidence and considered [illegible] on what grounds [illegible]. It is not clear that direction; [illegible] exactly it founded [illegible] the question [illegible] it has not gone [illegible] ts were [illegible] whether those documents by the [illegible] ejected on any legal [illegible] ith the [illegible] Munsif. We have done [illegible] to find [illegible] result that we are not [illegible] any objection valid under the Evidence Act to the admission of those documents established. They were apparently produced before the District Munsif; but he dismissed them with the remark that they were prior to the date of a certain compromise and that the father of the alleged adopted son, one Sanyasi [illegible] aidu, could not have known of [illegible] em, and elsewhere commented on [illegible] e absence of documents to show that [illegible] anyasi recognised his alleged adopted son as his son. We are told that the District Munsif was inaccurate in this and that among the documents there are some which would support his part of the case. In any event, however, the documents, as the Munsif himself says, would show that [illegible] hellammal the widow of Sanyasi after his death recognised the alleged adopted son. That in our opinion would certainly be a relevant fact and it would of course be for the trial court to estimate its importance. The District Munsif throughout has not shown that there is any provision of the Evidence Act under which he was justified in excluding these documents. He was not justified in excluding them, because they would not prove a particular part of the case when they are relevant to establish another [illegible] This being so, this portion also [illegible] e Lower Appellate Court's order [illegible] correct.

The appeal accordingly fails and is dismissed with costs of the eleventh defendant (the first respondent).

The Civil Revision Petition is dismissed.

No order as to costs.

Appeal and Petition dismissed.

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* 1923 MADRAS 719

AYLING AND ODGERS, JJ.

N. Ramamma—Complainant—Petitioner.

v.

M. Gurunathan — Accused—Respondent.

Cr. R. C. No. 333 of 1922 and Cr. R. P. No. 290 of 1922, D/-13th March 1923

Workman's Breach of Contract Act, S. 1—Enquiry under, not one under Criminal P. C.

The enquiry directed by S. 1 of the Workman's Breach of Contract Act cannot be held to be one under Chapter XX of the Criminal Procedure Code, and if a Magistrate passes an order of acquittal in accordance with S. 247 Criminal P. C., his order of acquittal is not one passed under that Chapter of the Code but merely a dismissal of the complaint, and therefore, there is nothing to prevent him from reviewing that order if he sees cause to do so, 43 M. 413 Foll. 46 C. 867 Dist. [P. 720 C.2]

S. Ranganatha Aiyar—for Petitioner.

V. L. Ethiraj — for Public Prosecutor.

Ayling, J.—The petitioner in this case has filed a complaint under S. 1 of the Workman's Breach of Contract Act against the respondent before the Stationary Sub-Magistrate, Kovur, and that officer proceeded to hear and determine the case as provided in the Act. On one of the dates of hearing, the petitioner was absent and the Magistrate thereupon passed an order purporting to acquit the respondent under S. 247 of the Criminal Procedure Code. The petitioner subsequently applied to the Magistrate to review the order of acquittal and to proceed with the trial from the stage at which the case was thrown out. The Magistrate held that he had no power under the Criminal Procedure Code to review an order of acquittal under S. 247 and accordingly dismissed the petition. Against that dismissal the present revision is preferred

In our opinion the Magistrate's view was wrong. It has been held by this Court in *Hussaina Beari* v. *King*

Emperor (1) that the Magistrate's proceedings under the Workman's Breach of Contract Act up to the stage of the passage of an order by the Magistrate for repayment or performance under S. 2 are not criminal proceedings at all, and this is also the view taken in *Emperor* v. *Dhondu* (2). If the proceedings are not criminal proceedings, it is difficult to see how the procedure can be regulated by Chapter XX of the Criminal Procedure Code or how S. 247 of the Code can be held to apply. Mr. Ethiraj, who argued the case for the Public Prosecutor, suggested, that the definition of "Summons Case" in the Code as "a case relating to an offence and not being a warrant case" would cover proceedings leading up to an offence (*i. e.*, disobedience to a Magistrate's order), which had not been committed at the time when the proceedings were initiated; but it seems to us that that would be an unwarrantable stretch of the definition. The ruling in *Hussain Beari* v. *King Emperor* (1) is to the effect that no offence is committed until the workman disobeys the Magistrate's order. In the second place, Mr. Ethiraj asks, under what provision of law the enquiry contemplated by the Act can be conducted at all, if not under the Criminal Procedure Code? We think the answer to it is contained in the closing words of S. 1 of the Act, which empowers the Magistrate to "*hear and determine the case.*" This view is in accordance with the judgment of the Calcutta High Court in *Averan Das Mochi* v. *Abdul Rahim* (3) in which the learned Judges have in fact held that the Criminal Procedure Code does not apply to the enquiry contemplated by S. 1 of the Workman's Breach of Contract Act. They say, "The learned pleader, who appears for the petitioner, urges (1) that the evidence has not been properly recorded; and (2) that the Magistrate has written no judgement. He however, has not been able to show us any section of Act XIII of 1859, or of the Criminal Procedure Code, prescribing how evidence in a case of this nature should be recorded or requiring a judgment to be written." These words imply that Chapter XX of the Criminal Procedure Code intoxes govern the case. W[illegible] men[illegible] referred to a Calcutta gro[illegible] (*Chandra Das* v. *Bhusan Da*[illegible] so w[illegible] to the present case, in able[illegible] learned Judges apparently [illegible]ned that S. 247 would apply, but the question of the applicability does not appear to have been raised in that case at all, nor was their attentio[illegible] drawn to the difficulty.

In our opinion the enquiry directed by S. 1 of the Workman's Breach o[illegible] Contract Act cannot be held to be on[illegible] under Chapter XX of the Crimina[illegible] Procedure Code, and the Magistrate's order of acqittal was in effect not passed under that Chapter of th[illegible] Code but was merely a dismissal o[illegible] the complaint. Viewed in this ligh[illegible] there is nothing to prevent him fro[illegible] reviewing that order if he sees caus[illegible] to do so We must therefore se[illegible] aside his dismissal of the petitioner[illegible] review petition dated 23rd Februar[illegible] 1922 and direct him to restore t[illegible] petition to file and dispose of [illegible] according to law.

Order set aside.

(1) [1920] 43 Mad. 443—59 I. C 45.
(2) [1909] 33 Bom. 22—6 Bom L. R. 255 - 1 Cr. L. J. 263—1 I. C 378.
(3) [1899] 27 Cal. 131—4 C. W.N.201.
(4) [1919] 46 Cal. 867-29 C.L J. 387 20 Cr L. J. 492—23 C.W.N. 959 51 I. C. 476.

Acc. No 177102
Dated 13.11.80